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WHEN: Tuesday, October 22, 2013
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
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Presidential Documents

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The President

Proclamation 9024 of September 26, 2013

National Public Lands Day, 2013

By the President of the United States of America

A Proclamation

Atop soaring mountain peaks, alongside bubbling streams, in woodlands and grasslands that stretch over rolling hills, Americans find inspiration in our great outdoors. Just as our diverse and rugged landscapes reflect our national character, the way we care for these open spaces mirrors our commitment to future generations. On National Public Lands Day, we celebrate the lands we share and gather to conserve our natural heritage.

For two decades, Americans have observed this day by lending their time to the restoration of our country's historic places and natural treasures. Across our country, volunteers beautify parks, waterways, and wilderness areas. Through these small acts—from planting trees to carving out trails, removing litter, and curbing the growth of invasive species—volunteers carry forward a long tradition of conservation and public service. Their spirit is at the heart of the America's Great Outdoors Initiative, which is making the outdoors more accessible to all Americans. Since I established this initiative, we have expanded access to recreation, restored critical landscapes, and created urban parks and water trails. We are also working with partners to let young people serve as volunteers in our parks and help returning veterans find meaningful jobs protecting and enhancing America's great outdoors.

As we come together to honor and restore America's public lands, we recognize their role in shaping our history, enriching our lives, and bolstering our economy. Today, as we mark the 20th anniversary of National Public Lands Day, let us pledge to maintain these open spaces. And let us pass forward the opportunity to experience their majesty, connect with our natural heritage, and refresh our bodies and minds.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 28, 2013, as National Public Lands Day. I encourage all Americans to participate in a day of public service for our lands.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-sixth day of September, 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. 2013–24045
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Presidential Documents

Proclamation 9025 of September 26, 2013

Gold Star Mother's and Family's Day, 2013

By the President of the United States of America

A Proclamation

In our city centers and our bustling parks, monuments stand dedicated to visionary leaders and singular moments in the life of our Republic. But in empty seats at family dinners and folded flags above the mantle, we find the constant thread of our Nation's character—the truth that America endures because it is home to an unbroken line of patriots willing to lay down their lives for the land they love. As we honor the men and women who gave their last full measure of devotion, we hold close the families left behind.

Most of us can only imagine the pain of a mother who loses a daughter, the husband who loses his partner, or the son who loses a father. Prepared to serve others at any cost, their loved ones exemplified the values of courage and selflessness that define our Armed Forces and fortify our Union. The families of the fallen embody that same character. Amid their sorrow, these homefront heroes support one another and lift up their communities. As our country seeks to understand the depth of their sacrifice, we draw strength and inspiration from their example.

On this day, we remember our commitment to the Gold Star mothers and families who carry on with pride and resolve despite unthinkable loss. We recall our sacred obligation to those who gave their lives so we could live ours. As a grateful Nation, we declare that we will never forget their sacrifice, and we renew our promise to build a future worthy of their devotion. We also recognize our countrymen and women who continue the fight, putting their lives on the line each day. Long after the battle is over, we will continue to give our military and Gold Star families the care and support they deserve—in a listening ear, a comforting shoulder, a helping hand, and a moment given to keep alive the memories of their Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen.

The Congress, by Senate Joint Resolution 115 of June 23, 1936 (49 Stat. 1985 as amended), has designated the last Sunday in September as ''Gold Star Mother's Day.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 29, 2013, as Gold Star Mother's and Family's Day. I call upon all Government officials to display the flag of the United States over Government buildings on this special day. I also encourage the American people to display the flag and hold appropriate ceremonies as a public expression of our Nation's sympathy and respect for our Gold Star Mothers and Families.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-sixth day of September, 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.

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Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AM82

Prevailing Rate Systems; Definition of Vanderburgh County, Indiana, to a Nonappropriated Fund Federal Wage System Wage Area

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule to define Vanderburgh County, IN, as an area of application county to the St. Clair, IL, nonappropriated fund (NAF) Federal Wage System (FWS) wage area. This change is necessary because there are two NAF FWS employees working in Vanderburgh County, and the county is not currently defined to a NAF wage area.

DATES: *Effective date:* This regulation is effective on October 1, 2013. *Applicability date:* This change applies on the first day of the first applicable pay period beginning on or after October 31, 2013.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, by telephone at (202) 606–2838 or by email at *pay-leave-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: On May 21, 2013, OPM issued a proposed rule (78 FR 29657) to define Vanderburgh County, IN, as an area of application county to the St. Clair, IL, NAF FWS wage area. The Federal Prevailing Rate Advisory Committee, the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, reviewed and recommended this change by consensus. The proposed rule had a 30-day comment period, during which OPM received no comments.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Elaine Kaplan,

Acting Director.

Accordingly, the U.S. Office of Personnel Management amends 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

■ 2. Appendix D to subpart B is amended by revising the wage area listing for the St. Clair, IL, NAF wage areas to read as follows:

Appendix D to Subpart B of Part 532—Nonappropriated Fund Wage and Survey Areas

* * * * *

ILLINOIS

* * * * *

St. Clair
Survey Area

Illinois:
St. Clair

Area of Application. Survey area plus:

Illinois:
Madison
Williamson
Indiana:
Vanderburgh
Missouri: (city)
St. Louis
Missouri: (counties)
Jefferson
Pulaski

* * * * *

[FR Doc. 2013–23865 Filed 9–30–13; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AM84

Prevailing Rate Systems; Redefinition of the Clayton-Cobb-Fulton, Georgia, Nonappropriated Fund Federal Wage System Wage Area

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is adopting as final the interim rule that redefined the Clayton-Cobb-Fulton, GA, nonappropriated fund (NAF) Federal Wage System (FWS) wage area by removing Clarke, Clayton, and Fulton Counties, GA, from the wage area definition. The name of the wage area will be Cobb, GA. These changes are necessary because by the end of October 2013 there will no longer be NAF employment in Clarke, Clayton, and Fulton Counties.

DATES: Effective on October 1, 2013.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, by telephone at (202) 606–2838 or by email at *pay-leave-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: On May 21 2013, OPM issued an interim rule (78 FR 29611) to redefine the Clayton-Cobb-Fulton, GA, NAF FWS wage area by removing Clarke, Clayton, and Fulton Counties, GA, from the wage area definition. The name of the wage area will be Cobb, GA. These changes are necessary because by the end of October 2013 there will no longer be NAF employment in Clarke, Clayton, and Fulton Counties. The Cobb wage area will consist of one survey county (Cobb County) and two area of application counties (Bartow and DeKalb Counties). The Federal Prevailing Rate Advisory Committee, the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, reviewed and recommended these changes by consensus.

In addition, this interim rule updates the name of the Columbus Consolidated Government in the Columbus, GA, NAF FWS wage area because Columbus is the official name of the entity resulting from the consolidation of the City of

Columbus and Muscogee County in 1971.

The interim rule had a 30-day comment period, during which OPM received no comments.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Elaine Kaplan,

Acting Director.

Accordingly, under the authority of 5 U.S.C. 5343, the interim rule published on May 21, 2013 (78 FR 29611), amending 5 CFR part 532, is adopted as final without change.

[FR Doc. 2013–23866 Filed 9–30–13; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206–AM83

Prevailing Rate Systems; Definition of Broward County, Florida, to a Nonappropriated Fund Federal Wage System Wage Area

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule to define Broward County, FL, as an area of application county to the Miami-Dade, FL, nonappropriated fund (NAF) Federal Wage System (FWS) wage area. This change is necessary because there are three NAF FWS employees working in Broward County, and the county is not currently defined to a NAF wage area.

DATES: *Effective date:* This regulation is effective on October 1, 2013. *Applicability date:* This change applies on the first day of the first applicable pay period beginning on or after October 31, 2013.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, by telephone at (202) 606–2838 or by email at *pay-leave-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: On May 21, 2013, OPM issued a proposed rule (78 FR 29658) to define Broward County, FL, as an area of application county to the Miami-Dade, FL, NAF FWS wage area. The Federal Prevailing Rate Advisory Committee, the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, reviewed and recommended this change by consensus. The proposed rule had a 30-day comment period, during which OPM received no comments.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Elaine Kaplan,

Acting Director.

Accordingly, the U.S. Office of Personnel Management amends 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

■ 2. Appendix D to subpart B is amended by revising the wage area listing for the Miami-Dade, FL, NAF wage areas to read as follows:

Appendix D to Subpart B of Part 532—Nonappropriated Fund Wage and Survey Areas

* * * * *

FLORIDA

* * * * *

Miami-Dade

Survey Area

Florida:

Miami-Dade

Area of Application. Survey area plus:

Florida:

Broward

Palm Beach

* * * * *

[FR Doc. 2013–23867 Filed 9–30–13; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0288; Directorate Identifier 2006–SW–25–AD; Amendment 39–17587; AD 2013–19–05]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron, Inc., Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Bell Helicopter Textron, Inc. (Bell), Model 214B, 214B–1, and 214ST helicopters. This AD requires creating a component history card or equivalent record for certain pylon support spindle assemblies (spindles), establishes a new retirement life for spindles installed on Model 214B and 214B–1 helicopters, reduces the retirement life for spindles installed on Model 214ST helicopters, and requires replacing any spindle that has reached its airworthiness retirement life. This AD was prompted by three in-flight failures of the spindle that resulted in forced landings. The actions of this AD are intended to prevent failure of a spindle and subsequent loss of control of the helicopter.

DATES: This AD is effective November 5, 2013.

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Martin Crane, Aviation Safety Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5056; email *7-AVS-ASW-170@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On March 13, 2008, at 73 FR 13513, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 by adding an AD that would apply to Bell Model 214B and 214B–1 helicopters with a certain spindle installed. The NPRM proposed to require creating a component history card or equivalent record for each spindle, inspecting the spindles for any corrosion, or a nick, scratch, dent, or crack, and repairing or replacing any unairworthy spindle before further flight. The actions proposed in the NPRM were intended to be interim actions until a retirement life for the affected spindles could be developed and new replacement spindles became available. The NPRM was prompted by three in-flight failures of spindles which resulted in forced landings and one serious injury.

On May 28, 2013, at 78 FR 31860, the **Federal Register** published our supplemental notice of proposed rulemaking (SNPRM), which revised some of the actions of the NPRM. The SNPRM added Bell Model 214ST to the proposed applicability, revised the proposed recording requirements, removed the proposed inspection requirements, established a new proposed retirement life for spindle part number (P/N) 214–030–606–005, reduced the proposed retirement life for spindle P/N 214–030–606–103, and added a proposed requirement to replace any spindle that has exceeded its retirement life. The Model 214ST was added after a crack was reported in a Model 214ST spindle, P/N 214–030–606–103. Bell determined it necessary to establish a retirement life for the spindles because the speed at which a crack can propagate is such that a more frequent inspection interval would not be practical. In addition, the cost of compliance information was updated in the SNPRM by correcting the estimated number of work-hours to replace both spindles, by updating the estimated labor cost per work-hour from $80 to $85, and by updating the cost of required parts to current replacement parts cost.

The proposed actions in the SNPRM were intended to prevent failure of a spindle and subsequent loss of control of the helicopter.

Comments

We gave the public the opportunity to comment on the NPRM (73 FR 13513, March 13, 2008) and the SNPRM (78 FR 31860, May 28, 2013). We received comments to the NPRM which we addressed in the SNPRM. The following presents those comments and the FAA's response to each comment.

Request

Bell stated that results from analysis and review of the pylon spindle assembly, P/N 214–030–606–005, identified the requirement to assign an airworthiness retirement life to that assembly. They also stated that alert service bulletins would detail the retirement life of the spindle. We agreed and revised the SNPRM (78 FR 31860, May 28, 2013) accordingly.

Bell commented that the NPRM (73 FR 13513, March 13, 2008) did not address conversion of torque events to retirement index number (RIN). We agreed and revised the SNPRM accordingly.

Bell also stated that the NPRM mis-identified the visual inspection requirements of using a magnifying glass on each outer radius of the spindle; that this visual inspection requirement is for the main rotor hub spindle, not the transmission spindle. They also stated that once cracks start, they progress very rapidly and visual inspection at a frequency designed to discover cracking would not be manageable. We agreed. With establishment of a maximum airworthiness life limit for the spindle and after further review, we determined that deleting the proposed visual inspections in the NPRM will not impact the overall level of safety.

FAA's Determination

We have reviewed the relevant information, considered the comments received, and determined that an unsafe condition exists and is likely to exist or develop on other products of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed in the SNPRM (78 FR 31860, May 28, 2013).

Related Service Information

We reviewed Bell ASB No. 214–08–70, Revision C, dated April 14, 2009 (214–08–70), which establishes a maximum airworthiness limit of 1,250 hours time-in-service (TIS) or a total accumulated RIN of 20,000, whichever occurs first, for any spindle, P/N 214–030–606–005, that is installed on a Model 214B or Model 214B–1 helicopter. We have also reviewed Bell ASB No. 214ST–08–86, Revision B, dated April 14, 2009, which reduces the maximum airworthiness life limit from 5,000 hours TIS to 2,500 hours TIS or a total accumulated RIN of 50,000, whichever occurs first, for any spindle, P/N 214–030–606–103, that is installed on a Model 214ST helicopter. The ASBs also specify determining the accumulated RIN by calculating a RIN factor of 1 for each lift or takeoff performed during normal operation and of 2 for each lift or takeoff performed during logging operation. When actual lift events are unknown or cannot be determined, both ASBs specify calculating RIN at 30 lift events per flight hour; ASB No. 214–08–70 further specifies calculating flight hours at a rate of 900 hours per year. Both ASBs specify replacing any spindle that has reached its maximum airworthiness limit.

Additionally, we reviewed Bell Information Letter 214ST–12–23, dated January 30, 2012, which was issued to advise owners and operators of the first actual reported crack in a Model 214ST spindle, P/N 214–030–606–103.

Differences Between This AD and the Service Information

The service information specifies, as part of determining the life of a currently installed spindle, accumulating a RIN factor of 2 for each lift or takeoff performed during a logging operation. This AD requires using a RIN factor of 2 for any external load lift or takeoff in which the helicopter achieves a vertical altitude difference of greater than 200 feet indicated altitude between the pick-up and drop-off point. We determined that other external load lift operations with the specified vertical altitude difference or greater will experience the same double torque cycle as in logging operations, and that a RIN factor of 2 needs to be used for those types of operations as well. Also, the service information for Models 214B and 214B–1 specify an initial compliance time of 150 flight hours, while we require an initial compliance time of 50 hours TIS.

Costs of Compliance

We estimate that this AD will affect 12 Model 214B/B–1 and 24 Model 214ST helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD. It will take about 1 work-hour for the record keeping requirements of this AD, and about 24 work-hours to replace both spindles. Labor costs are estimated at $85 per work-hour and the

cost of parts will be about $39,806 for both spindles for a Model 214B or 214B–1, and $40,802 for both spindles for a Model 214ST. Based on these estimates, for record keeping and the replacement of a pair of spindles, the total per helicopter cost will be $41,931 for a Model 214B or 214B–1 and $42,927 for a Model 214ST. The total cost of recordkeeping will be about $3,060.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska 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):

2013–19–05 Bell Helicopter Textron, Inc., Helicopters: Amendment 39–17587; Docket No. FAA–2008–0288; Directorate Identifier 2006–SW–25–AD.

(a) Applicability

This AD applies to Bell Helicopter Textron, Inc. (Bell), Model 214B, 214B–1, and 214ST helicopters, with pylon support spindle assembly (spindle), part number (P/N) 214–030–606–005 or –103, installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as fatigue cracking of a spindle. This condition could result in failure of the spindle and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective November 5, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Within 50 hours time-in-service (TIS):

(i) Create a component history card or equivalent record for each spindle, P/N 214–030–606–005 and 214–030–606–103, recording the spindle's P/N and serial number.

(ii) Review the helicopter records to determine the hours TIS of each spindle, if the hours TIS are not already recorded for your model helicopter. For each month for which the hours TIS is unknown, record 75 hours TIS.

(iii) Determine the total accumulated retirement index number (RIN) for each spindle. For the purpose of this AD, count 1 RIN for each takeoff and 2 RIN for each external load lift in which the helicopter achieves a vertical altitude difference of greater than 200 feet indicated altitude between the pick-up and drop-off point. For any time period for which the accumulated RIN cannot be determined while the spindle was installed on a helicopter, multiply the hours TIS by 30 to calculate the spindle's accumulated RIN.

(iv) Record the hours TIS and total accumulated RIN for each spindle on the component history card or equivalent record.

(2) Revise the Airworthiness Limitations section of the applicable maintenance manual or Instructions for Continued Airworthiness as follows:

(i) By establishing a new retirement life for the spindle, P/N 214–030–606–005, of 1,250 hours TIS or a total accumulated RIN of 20,000, whichever occurs first.

(ii) By reducing the retirement life for the spindle, P/N 214–030–606–103, from 5,000 hours TIS to 2,500 hours TIS or a total accumulated RIN of 50,000, whichever occurs first.

(3) Replace any spindle, P/N 214–030–606–005, that has been in service for 1,250 or more hours TIS, or a total accumulated RIN of 20,000 or more, whichever occurs first.

(4) Replace any spindle, P/N 214–030–606–103, that has been in service for 2,500 or more hours TIS, or a total accumulated RIN of 50,000 or more, whichever occurs first.

(5) Continue to count and record the accumulated RIN count and hours TIS for each spindle on its component history card or equivalent record.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Martin Crane, Aviation Safety Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5056; email *7-AVS-ASW-170@faa.gov*.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

Bell Alert Service Bulletin (ASB) No. 214–08–70, Revision C, dated April 14, 2009; Bell ASB No. 214ST–08–86, Revision B, dated April 14, 2009; and Bell Information Letter 214ST–12–23, dated January 30, 2012, which are not incorporated by reference, contain additional information about the subject of this AD. For service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, Texas 76101; telephone (817) 280–3391; fax (817) 280–6466; or at *http://www.bellcustomer.com/files/*. You may review a copy of this service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6330, Transmission Mount.

Issued in Fort Worth, Texas, on September 13, 2013.

Lance T. Gant,

Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–23099 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0380; Directorate Identifier 2012–SW–067–AD; Amendment 39–17588; AD 2013–19–06]

RIN 2120–AA64

Airworthiness Directives; Robinson Helicopter Company (Robinson)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Robinson Model R22, R22 Alpha, R22 Beta, and R22 Mariner helicopters with certain fuel shut-off valves installed. This AD requires replacing the fuel shut-off valve with a newer design fuel shut-off valve. This AD is prompted by three accidents that occurred because the fuel shut-off valve was inadvertently moved to the ''off'' position. These actions are intended to prevent inadvertent closing of the fuel valve, which could result in engine power loss from which a safe landing may not be possible.

DATES: This AD is effective November 5, 2013.

ADDRESSES: For service information identified in this AD, contact Robinson Helicopter Company, 2901 Airport Drive, Torrance, CA 90505; telephone (310) 539–0508; fax (310) 539–5198; or at *http://www.robinsonheli.com/servelib.htm*. You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Danny Nguyen, Aerospace Engineer, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, FAA, 3960 Paramount Blvd., Lakewood, California 90712; telephone (562) 627–5247; email *danny.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On April 25, 2013, at 78 FR 24371, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 by adding an AD that would apply to Robinson Model R22, R22 Alpha, R22 Beta, and R22 Mariner helicopters, serial number 0002 through 4271, with a fuel shut-off valve part-number (P/N) A670–1 revision A through H installed. The NPRM proposed to require, within 3 years, removing the fuel shut-off valve, P/N A670–1 revision A through H, and replacing the valve with a newly designed fuel shut-off valve. Three accidents have occurred with R22 helicopters because the lever-handle fuel valve was inadvertently moved to the ''off'' position before takeoff. Closing this valve will result in loss of power from the engine and subsequent loss of control of the helicopter. Robinson subsequently redesigned the fuel valve with a smaller actuating handle and with the valve spring loaded to the ''on'' position, to prevent inadvertent fuel shut-off. The proposed requirements were intended to prevent inadvertent closing of the fuel valve, which could result in engine power loss.

Comments

After our NPRM (78 FR 24371, April 25, 2013) was published, we received comments from one commenter.

Request

Robinson noted that the Summary and Discussion sections of the NPRM contained language stating that closing of the fuel valve could result in engine power loss and subsequent loss of control of the helicopter. Robinson commented that loss of engine power does not result in loss of control of the helicopter.

We agree, and have redefined the unsafe condition in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** Discussion sections of the preamble of this final rule to state that inadvertent closing of the fuel valve could result in engine power loss from which a safe landing may not be possible.

FAA's Determination

We have reviewed the relevant information, considered the comment received, and determined that an unsafe condition exists and is likely to exist or develop on other products of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed with the change described previously. This change is consistent with the intent of the proposals in the NPRM and will not increase the economic burden on any operator nor increase the scope of this AD.

Related Service Information

Robinson has issued R22 Service Bulletin SB–105, dated September 7, 2011 (SB–105), which specifies procedures to replace the lever handle fuel shut-off valve part number (P/N) A670–1 revision A through H with a fuel shut-off valve P/N A670–1 revision I or later.

Differences Between This AD and the Service Information

SB–105 specifies compliance within 500 flight-hours or by August 31, 2012. This AD requires compliance within 3 years.

Costs of Compliance

We estimate that this AD will affect 1,282 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD. Replacing the fuel shut-off valve requires about 2 work-hours at an average labor rate of $85 per hour, and required parts will cost about $260, for a cost per helicopter of $430, and a total cost to U.S. operators of $551,260.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska 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):

2013–19–06 Robinson Helicopter Company (Robinson): Amendment 39–17588; Docket No. FAA–2013–0380; Directorate Identifier 2012–SW–067–AD.

(a) Applicability

This AD applies to Model R22, R22 Alpha, R22 Beta, and R22 Mariner helicopters, serial number 0002 through 4271, with a fuel shut-off valve part-number (P/N) A670–1 revision A through H installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as inadvertent closing of the fuel shut-off valve, which could result in loss of fuel to the engine and loss of engine power from which a safe landing may not be possible.

(c) Effective Date

This AD becomes effective November 5, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Within 3 years, remove the fuel shut-off valve and replace with an airworthy fuel shut-off valve that has a P/N other than a P/N listed in paragraph (a) this AD.

(2) Do not install a fuel shut-off valve, P/N A670–1 revision A through H, on any helicopter.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Danny Nguyen, Aerospace Engineer, Los Angeles Aircraft Certification Office, Transport Airplane Directorate, FAA, 3960 Paramount Blvd., Lakewood, California 90712; telephone (562) 627–5247; email *danny.nguyen@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.

(g) Additional Information

Robinson R22 Service Bulletin SB–105, dated September 7, 2011, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact Robinson Helicopter Company, 2901 Airport Drive, Torrance, CA 90505; telephone (310) 539–0508; fax (310) 539–5198; or at *http://www.robinsonheli.com/servelib.htm*. You may review a copy of information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 2823: Fuel Selector/Shut-Off Valve.

Issued in Fort Worth, Texas, on September 13, 2013.

Lance T. Gant,

Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–23094 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0640; Directorate Identifier 2013–SW–016–AD; Amendment 39–17517; AD 2013–15–01]

RIN 2120–AA64

Airworthiness Directives; AgustaWestland S.p.A. (Agusta) 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 Agusta Model AB139 and AW139 helicopters. This AD requires deactivating the Full Icing Protection System (FIPS) and installing a placard next to the FIPS controller stating that flight into known icing is prohibited. This AD is prompted by a report of a fire in the aft avionics bay and the baggage compartment resulting from an Auto Transformer Rectifier Unit internal circuit overload. These actions are intended to prevent a fire, structural damage, and subsequent loss of control of the helicopter.

DATES: This AD becomes effective October 16, 2013.

We must receive comments on this AD by December 2, 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 European Aviation Safety Agency (EASA) 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 AgustaWestland, Customer Support & Services, Via Per Tornavento 15, 21019 Somma Lombardo (VA) Italy, ATTN: Giovanni Cecchelli; telephone 39–0331–711133; fax 39 0331 711180; or at *http://www.agustawestland.com/technical-bullettins.* 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: Andy Shaw, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *andy.shaw@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

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2013–0124, dated June 5, 2013, which supersedes EASA AD No. 2013–0090, dated April 11, 2013, to correct an unsafe condition for the Agusta Model AB139 and AW139 helicopters. EASA advises of arcing inside some components of the FIPS. EASA states that the subsequent investigation indicated that improper insulation of one of the main rotor electrical cables was the likely cause for this arcing. EASA also states that this condition, if not detected and corrected, could lead to other events of arcing, possibly resulting in fire and consequent damage to the helicopter and injury to occupants. EASA AD No. 2013–0124 requires a one-time inspection and insulation test of the rotor blade electrical cables, and depending on findings, applicable corrective actions. Alternatively, EASA AD No. 2013–0124 allows de-activating the FIPS. Lastly, EASA AD No. 2013–0124 requires replacing the tail rotor distributor with an improved part. EASA states that its AD is considered an interim action and further AD action may follow.

FAA's Determination

These helicopters have been approved by the aviation authority of Italy and are approved for operation in the United States. Pursuant to our bilateral agreement with Italy, 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

Agusta issued Bollettino Tecnico No. 139–324, dated April 9, 2013 (BT 139–324), which specifies inspecting the main rotor and tail rotor FIPS cables to ensure proper integrity of all wires of the cable assemblies in the area of their interface connectors. Depending on the findings, the BT also specifies applicable corrective actions.

Agusta revised BT 139–324 and issued Revision A on June 4, 2013, to clarify certain inspection procedures of the main rotor FIPS cables, remove the inspection of the tail rotor FIPS cables, and remove the insulation resistance check for tail rotor blade cables. Agusta issued Bollettino Tecnico No. 139–330, dated June 4, 2013 (BT 139–330), which specifies replacing the FIPS tail rotor distributor with an upgraded tail rotor distributor designed to increase the dielectric strength.

AD Requirements

This AD requires, before further flight, deactivating the FIPS and installing a placard next to the FIPS controller stating that flight into known icing is prohibited.

Differences Between This AD and the EASA AD

The EASA AD requires following the BT 139–324 by inspecting the rotor blade FIPS cables for damage and condition and performing an insulation test on the cable to ensure proper integrity of all wires of the cable assemblies in the area of their interface connectors. The FAA AD prohibits operation into known icing by deactivating the FIPS and installing a placard next to the FIPS controller stating that flight into known icing is prohibited. The EASA AD also requires modifying the tail rotor distributor in accordance with BT 139–330; the FAA AD does not.

Interim Action

We consider this AD to be an interim action. Once a modification to the FIPS design is evaluated, approved, and available, we might consider additional rulemaking.

Costs of Compliance

We estimate that this AD will affect 73 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD. It will take about 1 work-hour to deactivate the system and install a placard at $85 per work-hour. We estimate the total cost for the U.S. fleet to be $6,205.

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 adopting this rule because the required corrective actions must be accomplished before further flight. A system that can malfunction and cause a fire in an area that is not accessible while in flight rises to the level of an unsafe condition that the comment period should be postponed.

Since an unsafe condition exists that requires the immediate adoption of this AD, we determined that notice an opportunity for public comment before issuing this AD are impracticable and contrary to the public interest 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):

2013–15–01 AGUSTAWESTLAND S.p.A.: Amendment 39–17517; Docket No. FAA–2013–0640; Directorate Identifier 2013–SW–016–AD.

(a) Applicability

This AD applies to Model AB139 and AW139 helicopters with a Full Icing Protection System (FIPS) installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as improper insulation of an electrical cable resulting in failure of the FIPS Auto Transformer Rectifier Unit to contain the internal circuit overload. This condition could result in a fire, structural damage, and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective October 16, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Before further flight, deactivate the FIPS, and install a placard with 6 millimeter red letters on a white background next to the FIPS controller that states the following: ''FLIGHT INTO KNOWN ICING IS PROHIBITED.''

(f) Special Flight Permits

Special flight permits are prohibited.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Andy Shaw, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *andy.shaw@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) AgustaWestland Bollettino Tecnico (BT) No. 139–324, Revision A, dated June 4, 2013, and AgustaWestland BT No. 139–330, dated June 4, 2013, which are not incorporated by reference, contain additional information about the subject of this AD. For service information identified in this AD, contact AgustaWestland, Customer Support & Services, Via Per Tornavento 15, 21019 Somma Lombardo (VA) Italy, ATTN: Giovanni Cecchelli; telephone 39–0331–711133; fax 39 0331 711180; or at *http://www.agustawestland.com/technical-bullettins*. 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) AD No. 2013–0124, dated June 5, 2013. You may view the EASA AD on the Internet at *http://www.regulations.gov* in Docket No. FAA–2013–0640.

(i) Subject

Joint Aircraft Service Component (JASC) Code: 3060 Ice Protection.

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

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–23578 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0807; Directorate Identifier 2013–SW–035–AD; Amendment 39–17601; AD 2013–19–19]

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 AS332C, AS332L, AS332L1, AS332L2, and EC225LP helicopters. This AD requires replacing certain serial-numbered main gearbox (MGB) bevel gear vertical shafts because they are no longer airworthy. Also, this AD requires certain inspections of each MGB bevel gear vertical shaft (shaft) for a crack. Also, this AD requires if there is a crack, replacing the shaft with an airworthy part before further flight. This AD is prompted by two incidents of emergency ditching after warning indications of loss of MGB oil pressure. These actions are intended to detect a cracked shaft, which could result in loss of MGB oil pressure, loss of the MGB lubrication system, and subsequent loss of control of the helicopter.

DATES: This AD becomes effective October 16, 2013.

We must receive comments on this AD by December 2, 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 European Aviation Safety Agency (EASA) 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: Rao Edupuganti, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *rao.edupuganti@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Discussion

We are adopting a new AD for the specified Eurocopter helicopters with certain part-numbered shafts. This AD requires replacing certain serial-numbered shafts because they are no longer airworthy. Also, this AD requires certain inspections at specified intervals of each shaft for a crack. This AD also requires if there is a crack, replacing the shaft with an airworthy part before further flight. This AD is prompted by two incidents of emergency ditching after warning indication of loss of oil pressure. A full circumferential crack of the lower shaft occurred in the area where two sections of the shaft are welded together. As a result, the shaft stopped driving the main and backup oil pumps leading to warning indications of the loss of the MGB lubrication. The crew activated the MGB emergency lubrication system, and following a warning that indicated failure of that system, performed a controlled ditching into the sea. These actions are intended to detect a cracked shaft, which could result in loss of MGB oil pressure, loss of the MGB lubrication system, and subsequent loss of control of the helicopter.

This AD is prompted by EASA AD 2013–0138R1, dated July 15, 2013, issued by EASA, which is the Technical Agent for the Member States of the European Union. EASA AD 2013–0138R1 was issued to revise EASA AD 2013–0138–E, dated July 9, 2013, which superseded EASA Emergency AD 2012–1250–E, dated November 21, 2012, to correct an unsafe condition for the Eurocopter Model AS332C, AS332C1, AS332L, AS332L1, AS332L2, and EC225LP helicopters, all serial numbers, with certain part-numbered shafts, installed.

EASA advises of two events of the Model EC225LP helicopters. In both cases, an emergency ditching was performed after warning indication of MGB loss of oil pressure and subsequent additional red alarm on the MGB emergency lubrication system (EMLUB). EASA also advises of a full circumferential crack of the lower vertical shaft of the MGB bevel gear in the area where the two sections of the shaft are welded together. As a result, the vertical shaft ceased to drive the main and backup oil pumps leading to warning indications of the loss of the MGB main and standby oil lubrication systems. The crew activated the EMLUB system and, following a subsequent warning indicating failure of that system, performed a controlled ditching into the sea.

EASA advises that Eurocopter determined after investigating the incidents that the MGB bevel gear vertical shaft failures resulted from a combination of factors, including stress hot-spots induced by the shaft geometry, residual stresses in the shaft weld material resulting from the manufacturing process, and corrosion pitting inside the shaft on areas where gear spline wear particles accumulated.

The EASA AD allows continued operations under certain conditions if equipped with a Vibration Health Monitoring System (VHM).

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.

Interim Action

We consider this AD interim action. The design approval holder is currently developing a newly-designed shaft that will address the unsafe condition identified in this AD. Once the newly-designed shaft is developed, approved, and available, we might consider additional rulemaking.

Related Service Information

Eurocopter has issued the following service information:

- ASB No. AS332–01.00.82, Revision 3, dated July 8, 2013, for the Model AS332C, C1, L, L1, L2 civil helicopters and Model AS332B, B1, M, M1, and F1 military model helicopters. The ASB defines the new inspection

requirements to detect a crack in the shaft.

• ASB No. EC225–04A009, Revision 3, dated July 8, 2013 for Model EC225LP helicopters. The ASB defines the new inspection requirements to detect a crack in the shaft.

AD Requirements

This AD requires:

• Removing certain part-numbered and serial-numbered shafts from service, which are no longer considered airworthy.

• For certain model helicopters, before further flight and at specified intervals, eddy current inspecting the shaft for a crack in the area of the weld.

• For Model EC225LP, before further flight, either installing a placard in full view of the pilot with the following statement in red, 6 millimeter letters on a white background: ''MAXIMUM CONTINUOUS TORQUE LIMITED TO 70% DURING LEVEL FLIGHTS AT IAS EQUAL TO OR MORE THAN 60 KTS,'' and before further flight and thereafter at intervals not to exceed 11.5 hours TIS, removing the main jet and emergency spraying jet, and ultrasonic inspecting the shaft in the weld area for a crack; or

• Before further flight and thereafter at intervals not to exceed 8 hours TIS, removing the main jet and emergency spraying jet, and ultrasonic inspecting the shaft for a crack in the area of the weld.

• Each eddy current or ultrasonic inspection be done by a Level II or Level III operator certified in the ultrasonic fault detection method in the Aeronautics Sector according to the EN4179 or NAS410 standard.

• If there is a crack, before further flight, replacing the shaft with an airworthy part.

Differences Between This AD and the EASA AD

The EASA AD allows continued operations under certain conditions if equipped with a VHM. The VHM system is validated by FAA for information only, and therefore we have not adopted that portion of the EASA AD.

Costs of Compliance

We estimate that this AD will affect four helicopters of U.S. Registry.

We estimate that operators may incur the following costs to comply with this AD. We estimate labor at $85 per work hour. Minimal cost to install a placard and 3 work hours to inspect each shaft for a crack, it will cost $255 per helicopter and $1,020 for the fleet per inspection. To replace a shaft, it will take 44 work hours and $1,243,350 for required parts for a total of $1,247,090 per helicopter.

FAA's Justification and Determination of the Effective Date

Providing an opportunity for public comments before 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 before adopting this rule because the required corrective actions must be done within 10 hours TIS and at repeated intervals within short periods of time.

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):

2013–19–19 Eurocopter France: Amendment 39–17601; Docket No. FAA–2013–0807; Directorate Identifier 2013–SW–035–AD.

(a) Applicability

This AD applies to Eurocopter Model AS332C, AS332L, AS332L1, AS332L2, and EC225LP helicopters, with main gearbox (MGB) bevel gear vertical shaft (shaft), part number (P/N) 332A32–5101–00, 332A32–5101–05, 332A32–5101–10, or 332A32–5101–15, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a cracked shaft resulting in loss of MGB oil pressure. These actions are intended to prevent loss of the MGB lubrication system and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective October 16, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Before further flight, remove shaft, P/N 332A32–5101–00, 332A32–5101–05, 332A32–5101–10, or 332A32–5101–15, with S/N M330 through M340 (inclusive) and S/N M370 through M5000 (inclusive) from service, which are no longer considered airworthy.

(2) For Model AS332C, AS332L, AS332L1, and AS332L2 helicopters, before further flight and thereafter at intervals not to exceed 10 hours time-in-service (TIS), eddy current inspect the shaft for a crack in the area of the weld, which must be done by a Level II or Level III inspector certified in the eddy current fault detection method in the Aeronautics Sector according to the EN4179 or NAS410 standard.

(3) For Model EC225LP, either do paragraphs (3)(i) and (3)(ii) or do paragraph (3)(iii).

(i) Before further flight, install a placard in full view of the pilot with the following statement in red, 6 millimeter letters on a white background: ''MAXIMUM CONTINUOUS TORQUE LIMITED TO 70% DURING LEVEL FLIGHTS AT IAS EQUAL TO OR MORE THAN 60 KTS,'' and

(ii) Before further flight and thereafter at intervals not to exceed 11.5 hours TIS, remove the main jet and emergency spraying jet, and ultrasonic inspect the shaft in the weld area for a crack, which must be done by a Level II or Level III inspector certified in the eddy current fault detection method in the Aeronautics Sector according to the EN4179 or NAS410 standard, or

(iii) Before further flight, and thereafter at intervals not to exceed 8 hours TIS, remove the main jet and emergency spraying jet, and ultrasonic inspect the shaft for a crack in the area of the weld, which must be done by a Level II or Level III operator certified in the ultrasonic fault detection method in the Aeronautics Sector according to the EN4179 or NAS410 standard.

(4) If there is a crack, before further flight, replace the shaft with an airworthy part.

(f) Alternative Methods of Compliance (AMOCs)

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

(g) Additional Information

(1) Eurocopter Alert Service Bulletin (ASB) No. AS332–01.00.82 and ASB No. EC225–04A009, both Revision 3, both dated July 8, 2013, which are not incorporated by reference, contain 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) AD No. 2013–0138R1, dated July 15, 2013. You may view the EASA AD at *http://www.regulations.gov* by searching for and locating it in the Docket for this AD.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6320 Main rotor gearbox.

Issued in Fort Worth, Texas, on September 9, 2013.

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–23580 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 10, 24, 162, 163, and 178

[USCBP–2012–0017; CBP Dec. 13–16]

RIN 1515–AD88

United States-Colombia Trade Promotion Agreement

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, interim amendments to the U.S. Customs and Border Protection (CBP) regulations which were published in the **Federal Register** on September 26, 2012, as CBP Dec. 12–16, to implement the preferential tariff treatment and other customs-related provisions of the United States-Colombia Trade Promotion Agreement.

DATES: Effective October 31, 2013.

FOR FURTHER INFORMATION CONTACT: Textile Operational Aspects: Jacqueline Sprungle, Trade Policy and Programs, Office of International Trade, (202) 863–6517.

Other Operational Aspects: Katrina Chang, Trade Policy and Programs, Office of International Trade, (202) 863–6532.

Legal Aspects: Karen Greene, Regulations and Rulings, Office of International Trade, (202) 325–0041.

SUPPLEMENTARY INFORMATION:

Background

On November 22, 2006, the United States and Colombia signed the United States-Colombia Trade Promotion Agreement (''CTPA'' or ''Agreement''), and on June 28, 2007, the Parties signed a protocol amending the Agreement. On October 21, 2011, the President signed into law the United States-Colombia Trade Promotion Agreement Implementation Act (the ''Act''), Public Law 112–42, 125 Stat. 462 (19 U.S.C. 3805 note), which approved and made statutory changes to implement the CTPA.

On September 26, 2012, CBP published CBP Dec. 12–16 in the **Federal Register** (77 FR 59064) setting forth interim amendments to implement the preferential tariff treatment and other customs-related provisions of the CTPA and the Act. Please refer to those documents for further background information.

The majority of the CTPA implementing regulations set forth in CBP Dec. 12–16 and adopted as final in this document have been included within Subpart T of Part 10 of the CBP regulations (19 CFR Part 10). However, in those cases in which CTPA implementation is more appropriate in the context of an existing regulatory provision, the CTPA regulatory text has been incorporated into an existing Part within the CBP regulations. CBP Dec. 12–16 also sets forth a number of cross-references and other consequential changes to existing regulatory provisions to clarify the relationship between those existing provisions and the new CTPA implementing regulations.

Although the interim regulatory amendments were promulgated without prior public notice and comment procedures and took effect on September 26, 2012, CBP Dec. 12–16 provided for the submission of public comments which would be considered before adoption of the interim regulations as a final rule. The prescribed public comment closed on November 26, 2012. CBP received no comments on CBP Dec. 12–16.

Conclusion

After further review of the matter, and in light of the fact that no comments were submitted in response to CBP's solicitation of public comment, CBP has determined to adopt as final, with the changes described below, the interim rule published in the **Federal Register** (77 FR 59064) on September 26, 2012.

The changes in this document are set forth below:

- Amend § 10.3007(a) to clarify, as per Article 4.17.2 of the CTPA, that an importer that claims preferential tariff treatment for a good imported into the United States under § 10.3003(b), based

on either the importer's certification or its knowledge, must maintain, for a minimum of five years after the date of importation of the good, all records and documents ''necessary'' to demonstrate that the good qualifies for preferential tariff treatment under the CTPA. An importer claiming preferential tariff treatment for a good imported into the United States under § 10.3003(b) based on the certification issued by the exporter or producer must maintain, for a minimum of five years after the date of importation of the good, the certification issued by the exporter or producer.

- Amend § 10.3011(a) to clarify that a post-importation claim may be filed by paper or by the method specified for equivalent reporting via an authorized electronic data interchange system;
- Amend § 10.3013(b)(1), which incorrectly lists subheading 8704.10 twice. The first reference to that subheading should, instead, refer to subheading 8702.10, HTSUS, as per section 203(n)(2)(A) of the Act;
- Amend § 10.3016(a) to clarify the rules for determining the value of a material for purposes of calculating the regional value content of a good as well as for purposes of applying the *de minimis* rules, by removing the exception language pertaining to § 10.3024;
- Amend § 10.3016(c)(1)(i) by removing the parenthetical text pertaining to ''cost of freight,'' as section 203(d)(2)(A) of the Act does not contain that language;
- Amend § 10.3027 by redesignating existing paragraph (c) as paragraph (d) and existing paragraph (d) as paragraph (c) to better reflect the order of the actions CBP will take, depending on the findings during and upon completion of the verification, and by replacing the word ''Assistance'' with the word ''Action'' in the heading text to existing paragraph (d), to reflect section 208 of the Act; and
- Amend § 10.3034(a) by adding a clarifying sentence, as per Article 2.6.3(b) of the CTPA, which states that the term ''repairs or alterations'' does not include an operation or process that transforms an unfinished good into a finished good.

Lastly, although this does not concern a correction to the regulatory text of Subpart T, it is noted that reference in the interim rule's preamble (77 FR 59065) to ''Subchapter XXI'' of Chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) is incorrect and should, instead, read, ''Subchapter XVIII'' to Chapter 99, HTSUS.

Executive Order 12866

This document is not a regulation subject to the provisions of Executive Order 12866 of September 30, 1993 (58 FR 51735, October 1993), because it pertains to a foreign affairs function of the United States and implements an international agreement, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Regulatory Flexibility Act

CBP Dec. 12–16 was issued as an interim rule rather than a notice of proposed rulemaking because CBP had determined that the interim regulations involve a foreign affairs function of the United States pursuant to § 553(a)(1) of the Administrative Procedure Act (APA). Because no notice of proposed rulemaking was required, the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*), do not apply. Accordingly, this final rule is not subject to the regulatory analysis requirements or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The collections of information contained in these regulations have previously been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1651–0117, which covers many of the free trade agreement requirements that CBP administers, and 1651–0076, which covers general recordkeeping requirements. The collections of information in these regulations are in §§ 10.3003, 10.3004, and 10.3007. This information is required in connection with claims for preferential tariff treatment under the CTPA and the Act and will be used by CBP to determine eligibility for tariff preference under the CTPA and the Act. The likely respondents are business organizations including importers, exporters and manufacturers.

The estimated average annual burden associated with the collection of information in this final rule is 0.2 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 90 K Street NE., 10th Floor, Washington, DC 20229–1177.

Signing Authority

This document is being issued in accordance with § 0.1(a)(1) of the CBP regulations (19 CFR 0.1(a)(1)) pertaining to the authority of the Secretary of the Treasury (or his/her delegate) to approve regulations related to certain CBP revenue functions.

List of Subjects

19 CFR Part 10

Alterations, Bonds, Customs duties and inspection, Exports, Imports, Preference programs, Repairs, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 24

Accounting, Customs duties and inspection, Financial and accounting procedures, Reporting and recordkeeping requirements, Trade agreements, User fees.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Penalties, Trade agreements.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 178

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

Amendments to the CBP Regulations

Accordingly, the interim rule amending Parts 10, 24, 162, 163, and 178 of the CBP regulations (19 CFR Parts 10, 24, 162, 163, and 178), which was published at 77 FR 59064 on September 26, 2012, is adopted as a final rule with the following changes:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

■ 1. The general authority citation for part 10 continues to read, and the specific authority for new Subpart T is added, to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * *

Sections 10.3001 through 10.3034 also issued under 19 U.S.C. 1202 (General Note

34, HTSUS), 19 U.S.C. 1520(d), and Pub. L. 112–42, 125 Stat. 462 (19 U.S.C. 3805 note).

■ 2. Section 10.3007(a) is revised to read as follows:

§ 10.3007 Maintenance of records.

(a) *General.* An importer claiming preferential tariff treatment for a good imported into the United States under § 10.3003(b) based on either the importer's certification or its knowledge must maintain, for a minimum of five years after the date of importation of the good, all records and documents necessary to demonstrate that the good qualifies for preferential tariff treatment under the CTPA. An importer claiming preferential tariff treatment for a good imported into the United States under § 10.3003(b) based on the certification issued by the exporter or producer must maintain, for a minimum of five years after the date of importation of the good, the certification issued by the exporter or producer. These records are in addition to any other records that the importer is required to prepare, maintain, or make available to CBP under Part 163 of this chapter.

* * * * *

■ 3. In § 10.3011, paragraph (a) is amended by adding a sentence to the end to read as follows:

§ 10.3011 Filing procedures.

(a) * * * The post-importation claim may be filed by paper or by the method specified for equivalent reporting via an authorized electronic data interchange system.

* * * * *

§ 10.3013 [Amended]

■ 4. Section 10.3013(b)(1) is amended by removing the language, ''under 8704.10'' and adding in its place the language, ''under 8702.10''.

§ 10.3016 [Amended]

■ 5. In § 10.3016:

■ a. Paragraph (a) introductory text is amended by removing the language, ''Except as provided for in § 10.3024, for'' and adding in its place the word, ''For''; and

■ b. Paragraph (c)(1)(i) is amended by removing the language, ''(''cost of freight'' includes the costs of all types of freight, including in-land freight incurred within a Party's territory, regardless of the mode of transportation)''.

§ 10.3027 [Amended]

■ 6. In § 10.3027:

■ a. Paragraph (c) is redesignated as paragraph (d) and paragraph (d) is redesignated as paragraph (c); and

■ b. The heading for newly redesignated paragraph (c) is amended by removing the word ''Assistance'' and adding in its place the word ''Action''.

■ 7. In § 10.3034, paragraph (a) is amended by adding a sentence to the end to read as follows:

§ 10.3034 Goods re-entered after repair or alteration in Colombia.

(a) * * * The term 'repairs or alterations' does not include an operation or process that transforms an unfinished good into a finished good.

Thomas S. Winkowski,

Acting Commissioner.

Approved: September 25, 2013.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 2013–23837 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR–5238–F–02]

RIN 2502–AI84

Manufactured Housing: Revision of Notification, Correction, and Procedural Regulations

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

ACTION: Final rule.

SUMMARY: This final rule amends HUD regulations that establish procedures for manufacturers and others to address reports of problems with manufactured homes. These ''Subpart I'' regulations establish a system of protections with respect to imminent safety hazards and violations of the federal construction and safety standards, assuring a minimum of formality and delay, while protecting the rights of all parties. This final rule establishes the procedures that manufacturers, retailers, distributors, State Administrative Agencies (SAAs), and primary inspection agencies (PIAs), are required to follow to assure that notification and correction are provided with respect to manufactured homes, when required.

DATES: Effective March 31, 2014.

FOR FURTHER INFORMATION CONTACT: Henry S. Czauski, Acting Deputy Administrator, Office of Manufactured Housing Programs, Office of housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 9164, Washington, DC 20410; telephone number 202–708–6409 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll free number).

SUPPLEMENTARY INFORMATION: This final rule follows publication of a February 15, 2011, proposed rule and takes into consideration the public comments received on the proposed rule. After careful consideration of the issues raised by the commenters and further consideration of the issues by HUD, this final rule makes some changes to the February 15, 2011, proposed rule.

I. Background

The National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401–5426) (the Act) authorizes HUD to establish the Federal Manufactured Home Construction and Safety Standards (Construction and Safety Standards), codified in 24 CFR part 3280. Section 615 of the Act provides that manufacturers of manufactured homes furnish notification of any defect in any manufactured home produced by such manufacturer that fails to conform to the Construction and Safety Standards or which constitutes an imminent safety hazard to the purchaser of such manufactured home. HUD's procedural and enforcement provisions published at 24 CFR part 3282, subpart I (Subpart I), implement these requirements and have, since their promulgation in 1976, been a major component of HUD's manufactured housing regulations. These provisions establish the system for manufacturers and retailers to assure that factory-built homes sold to consumers after having been manufactured pursuant to a federal building code provide at least the protections that are built into the construction and safety standards in that building code. Because the federal building code preempts a multiplicity of state and local building codes that would otherwise apply to the construction of such homes, manufacturers, distributors, retailers, and regulators are charged with particular responsibilities designed to protect both the purchasers of these homes and the general public. The regulations in Subpart I seek to balance the interests of all persons who have a stake in the future of quality, affordable manufactured housing.

As the manufactured housing industry has evolved from manufacturing largely single-section homes to today's multiple-section homes that can be creatively and aesthetically configured and finished,

while maintaining the important affordable character of the homes, various parties have identified a need to refine the regulations in Subpart I. The Manufactured Housing Consensus Committee (MHCC), established by the Manufactured Housing Improvement Act of 2000 (Pub. L. 106–569, approved December 27, 2000), has made refinement of these regulations a priority, and HUD has worked with the MHCC to redraft Subpart I in a way that would address issues identified by regulated entities, state and federal regulators, and consumers. The MHCC has twice recommended specific revisions of Subpart I to the Secretary. In both cases, HUD concluded that the MHCC recommendations were not consistent with the statutory requirements and the Secretary's authority.[1]

The June 14, 2006, notice includes the complete text of a set of MHCC recommendations that were developed through extensive discussions in public meetings of the MHCC, in task force and subcommittees, and which was very close to being acceptable under the Act. As required by section 604(b)(3) of the Act (42 U.S.C. 5403(b)(3)), HUD first submitted its proposed rule to the MHCC for the committee's prepublication review and comments. On February 15, 2011 (76 FR 8852), HUD published its proposed rule on this set of MHCC recommendations, with a few modifications. HUD's February 15, 2011, proposed rule describes HUD's modifications of the MHCC's recommendations and provides a detailed explanation for each modification. HUD's proposed rule also includes a section, as required by section 604(b)(3) of the Act, that discusses in detail HUD's rejection of significant comments provided by the MHCC during its formal review of the HUD proposed regulation, including a written explanation of the reasons for the rejection and the MHCC's comments, and HUD's request for public comment on the MHCC's comments. Members of the public are encouraged to review HUD's February 15, 2011, proposed rule for HUD's responses to the MHCC's prepublication comments.

II. Changes and Clarifications Made in This Final Rule

This final rule follows publication of the February 15, 2011, proposed rule and takes into consideration the public comments received on the proposed rule. In response to public comment, a discussion of which is presented in the following section of this preamble, and in further consideration of issues addressed at the proposed rule stage, HUD is making the following changes, at this final rule stage, to the February 15, 2011, proposed rule:

1. *Definition of ''Defect'' (§ 3282.7).* The final rule maintains the currently codified definition of defect without change.

2. *Production Inspection Primary Inspection Agencies (IPIAs) (§ 3282.362).* In response to public comment, HUD has revised this paragraph to provide that IPIAs must review the manufacturer's service and inspection records. HUD is also relocating this paragraph to § 3282.366(b).

3. *Purpose and Scope (§ 3282.401(a)).* HUD has revised § 3282.401(a) to provide that the purpose of Subpart I is to address safety hazards and failures to conform to the construction and safety standards rather than to address violations of the standards.

4. *General provisions (§ 3282.402(b)).* HUD has removed the words ''unforeseeable'' and ''unreasonable'' from § 3282.402(b) to clarify that manufacturers are not responsible for failures due to any consumer abuse or neglect of maintenance.

5. *Manufacturers' determinations; Methods for determining class (§ 3282.404(c)(iii)).* HUD has revised § 3282.404(c)(iii) to provide that inspection of service records is an appropriate method to determine whether a defect exists in a class of manufactured homes if the defect or hazard would be ''visible to and reportable by consumers or retailers.''

6. *Manufacturers' determinations; Methods of Notification (§ 3282.405(d)).* HUD has revised § 3282.405(d) to provide that manufacturers may notify distributors, purchasers, or registered owners of manufactured homes to a defect or imminent safety hazard by any means that provides a receipt.

7. *Required manufacturer correction (§ 3282.406).* HUD is clarifying § 3282.406 to provide that a manufacturer, retailer, or installer may not be held responsible for problems created by a consumer or purchaser if it is determined through dispute resolution, or by other means, that the consumer or purchaser is responsible for the problem. HUD is also adding a cross-reference to § 3286.115 to clarify the date of installation from which the manufacturer, retailer, or installer of a manufactured home may be responsible for defects in the home that render it not fit for the use for which it was intended.

8. *Replacement or repurchase of homes after sale to purchaser (§ 3282.414).* In response to a public comment, HUD is clarifying that the Secretary or an SAA may require corrective action if the manufacturer is unable to correct or remove the hazard or defect within 60 days of an order issued under § 3282.413(c).

9. *Correction of homes before sale to purchaser (§ 3282.415).* To clarify the point at which the sale of a home to a purchaser is complete, HUD is adding a cross-reference to § 3282.252 to this section.

10. *Recordkeeping requirements.* In response to a public comment, HUD is removing proposed §§ 3282.417(f) and 3282.417(g), the requirement for retailers and distributors to maintain records of corrections taken to bring a home into compliance with the construction and safety standards and the proposed time period for the record retention, respectively. HUD notes, however, that retailers remain responsible for retaining the records required under HUD's Dispute Resolution Program.

III. Public Comments

The following section presents a summary of the significant issues raised by the public comments in response to the February 15, 2011, proposed rule, and HUD's responses to the issues. Four public comments were submitted on the proposed regulation. Commenters included a national trade association representing the manufactured housing industry, a number of agencies providing legal services for low-income individuals, a state that serves as an in-plant primary inspection agency (IPIA) and State Administrative Agency (SAA), and an independent third-party design approval and in-plant primary inspection agency (DAPIA, IPIA). The comments were generally supportive. One commenter, for example, stated that it was pleased that HUD adopted the MHCC recommendation to extend, from 20 to 30 days, the time required to make an initial determination regarding the possibility of a noncompliance, defect, serious defect, or imminent safety hazard. (See proposed § 3282.404(a)).

A group of commenters supported HUD's efforts to strengthen its Subpart I regulations, describing them as an

[1] See HUD Notices: Manufactured Housing Consensus Committee-Rejection of Consumer Complaint Handling Proposal; Correction, 68 FR 47881 (August 12, 2003), amending a denial of a proposed recommendation by the Manufactured Housing Consensus Committee to revise regulations concerning how manufacturers are required to handle reports of problems with manufactured homes, 68 FR 35850 (July 25, 2003); and Notice of Rejection of Manufactured Housing Consensus Committee recommendation of proposed regulation. Manufactured Housing Consensus Committee-Rejection of Subpart I Proposal, A Proposed Rule by the Housing and Urban Development Department, June 14, 2006. (71 FR 34464.)

effort to create a ''lemon law'' for repurchase or replacement of defective manufactured homes when a manufacturer cannot correct an imminent safety hazard or a serious defect. The group stated that the remedies provided by Subpart I would not rise to the level of protections available to Ohio consumers under Ohio's new car lemon laws, and that manufactured home purchasers would benefit greatly from the protections for manufactured housing provided by the rule. The commenters stated that even though repurchase or replacement may seldom be necessary, the availability of the remedies provided by the rule will increase accountability and give individual consumers more options when it becomes apparent that they have not received the full benefit of their bargain and have trouble getting cooperation from any of the various industry players in the supply chain.

Another commenter supported HUD's proposal to add retailers to the list of persons responsible for correction of defects in homes. According to the commenter, the integrated sales contractual system of manufacturers and specified dealers often results in employees of the retailers making the corrections for the manufacturer. The commenters stated that, by making both the manufacturer and seller equally responsible for the correction, this proposal would eliminate blame shifting, reduce the delay in correcting the problem, and better ensure that defects are corrected.

Other commenters submitted detailed comments about specific provisions in the regulations, which are reviewed and addressed sequentially, by section, below.

Comment: Definition of ''Defect'' (§ 3282.7). A commenter stated their concern that the definition of defect may expand the obligations of manufacturers to provide notice and correction to consumers for defects other than those directly related to construction of the manufactured home as required in 24 CFR part 3280. The commenter also stated that it does not make sense to use a word in its own definition.

HUD Response: HUD agrees that the definition of defect proposed in HUD's February 15, 2011, proposed rule does not add clarity to the term. As a result, HUD has decided to maintain the currently codified definition of ''defect'' without change. This definition, which has in essence been codified since 1976, provides that the term encompasses failures to comply with federal safety and construction standards that render the home or any part thereof not fit for the ordinary use for which it was intended but which do not result in an unreasonable risk of injury or death to occupants of the manufactured home.

Comment: Production Inspection Primary Inspection Agencies (§ 3282.362(c)). Two commenters stated that the proposed regulation requires PIAs to periodically review the records required under § 3282.417(e) to determine whether evidence exists that the manufacturer is ignoring or not performing under its approved quality assurance manual. The commenters stated that they continued to support the more specific recommendations of the MHCC that required that only the service records be reviewed by the PIA. They contended that the proposed regulation is overly broad, and that it seemed inappropriate to require the PIA to examine records unrelated to Subpart I problems. The commenters stated that the PIA's responsibilities under the Procedural and Enforcement regulations are clearly spelled out in § 3282.351 and include two basic functions: Approval of the plant facility and performance of inspections of the manufacturing process. The commenters stated that the comprehensive recordkeeping and review requirements required by this proposal far exceed the appropriate PIA functions under § 3282.351 and will do nothing to ensure that consumers are protected. The commenters stated the new requirement as written is vague and ambiguous, and that the change would significantly add to the PIA's responsibilities, increase costs, and diminish the primary PIA responsibility of inspecting homes and ensuring that manufacturers are conducting quality assurance.

HUD Response: HUD agrees with the commenters and has revised the final rule to limit the IPIAs review of manufacturer records to service and inspection records. HUD has relocated the language to § 3282.366, which is a more appropriate location for this requirement.

Comment: Purpose and Scope (§ 3282.401(a)). A commenter recommended that the purpose of Subpart I is not to address violations of the construction and safety standards and recommends that the paragraph be revised accordingly.

HUD Response: HUD agrees with the commenter and has revised this paragraph to provide that the purpose of Subpart I is to address safety hazards and failures to conform to the construction and safety standards rather than to address violations of the standards.

Comment: General provisions (§ 3282.402(b)). Two commenters, an association and a public agency, recommended that the words ''unforeseeable'' and ''unreasonable'' be removed from § 3282.402(b), as these words are subjective and, in a court of law, consumer abuse and neglect of maintenance are sufficient on their own to limit responsibility.

HUD Response: HUD agrees with the commenters and has deleted those terms from the final rule to clarify that manufacturers are not responsible for failure due to any consumer abuse or neglect of maintenance.

Comment: Manufacturers determination and related concurrences. Expansion of the scope of consumer protection requirements (§ 3282.404). A commenter stated that the manufacturer's responsibilities outlined in § 3282.404 improperly expand the scope of the consumer protection requirements envisioned by Subpart I. The commenter stated, for example, that a small drywall crack or loose piece of trim could require extensive investigations of designs, homes, service records, audit findings, quality control records, etc., to make a reasonable determination as to whether a problem requiring action under Subpart I exists. The commenter contended that the extensive investigations required by § 3282.404 to make an initial determination would require extremely time consuming and labor intensive data collection for problems that are not related to any underlying structural or design flaw that would trigger a Subpart I action. Although the commenter supported the narrower requirement in the proposed rule, which requires manufacturers to investigate the existence of ''likely defects'' rather than ''possible defects,'' they recommended that HUD clarify what it means by ''reasonable'' investigation in § 3282.404(a)(3).

HUD Response: This final rule clarifies that when a manufacturer makes a determination of a noncompliance for a minor problem found in one home, it only needs to make a record of its determination as required by § 3282.417. In addition, the term ''reasonable'' has been deleted in the final rule and the manufacturer's investigation requirements have been clarified by indicating that the manufacturer is to include a review of its inspection and service records, IPIA inspection records, and, as appropriate, to conduct inspections of homes in the class.

Comment: Manufacturer responsibility when no further action under Subpart I is required (§ 3282.404(a)). A commenter stated that the rule should clarify how problems

should be addressed when manufacturers make a determination that no further action is required, but a problem still exists. Under the current regulations, the manufacturer notifies the responsible party, but the proposed regulation is silent on how the problem should be addressed. The commenter also stated that when the manufacturer makes an initial determination that no further action under Subpart I is required, but a problem still exists, the manufacturer must forward information in its possession to the appropriate retailer and, if known, the installer for consideration.

HUD Response: HUD has clarified § 3282.404(a), which describes the responsibility of the manufacturer to inform the retailer and installer, respectively, when the manufacturer determines that no further action is required, but the problem continues to exist, and has added a reference to § 3282.417. The final rule also adds that the manufacturer, retailer, or installer may choose to resolve responsibility for corrections under dispute resolution under 24 CFR part 3288.

Comment: Duplicative Reporting Requirements (§ 3282.404(a)(2)). A commenter stated that this section requires the manufacturer to immediately report a serious defect or imminent safety hazard to the Secretary, the manufacturers' PIA, and to the SAA in the state of manufacture. The commenter stated that the reporting requirement duplicates the same requirements in § 3282.408, which requires the notification as a part of the manufacturer's notification and correction plan. The commenter recommended that during this first critical 30-day period, the focus should be on finding and determining the scope of the problem, and preparing a plan to fix the problem, not on additional paperwork. The commenter recommended adopting the MHCC recommendation to require this notification only once, per § 3282.408.

HUD Response: The Department does not agree with the commenter as immediate follow-up and notice is needed to rectify these problems in all manufactured homes where these serious and potentially life-threatening situations exist.

Comment: ''Readily'' Reportable (§ 3282.404(c)). A commenter supported the inclusion of service records, in addition to actual home inspections, as one method to investigate the existence of a problem with a class of homes. However, the commenter expressed that the subjective wording as to what would or would not be ''readily reportable,'' and whether or not the Secretary or a SAA would agree, was an issue. An SAA means an agency of a state that has been approved or conditionally approved to carry out the state plan for enforcement of the standards pursuant to section 623 of the Act, 42 U.S.C. 5422, and subpart G of this part. The commenter stated that it believed that HUD's intent is to not limit service records as the only source of determining whether a problem exists, but believed that speculation and guess work should not be a component of Subpart I.

HUD Response: HUD agrees with the commenter and has revised this section to provide that inspection of service records is an appropriate method to determine whether a defect exists in a class of manufactured homes if the defect or hazard would be ''visible to and reportable by consumers or retailers.''

Comment: Revise terminology for certified mail. SAA responsibilities (§ 3282.405 (d)). A commenter recommended that HUD replace ''certified mail or other more expeditious means'' and ''certified or express mail'' with ''by certified mail or other expeditious means that provide a receipt.'' The commenter contended that this would allow FedEx, UPS, DHL, and email communication, with return receipt from recipient required, and would help support paperless environments.

HUD Response: HUD agrees with the recommendation offered by the commenter and has revised § 3282.405(d) to provide that manufacturers may notify distributors, purchasers, or registered owners of manufactured homes to a defect or imminent safety hazard by any means that provides a receipt.

Comment: Required manufacturer correction (§ 3282.406). A commenter stated that § 3282.406(a)(2) provides warranty protection for one year, beginning on the date of installation of the home. According to the commenter, the intent of this provision is to provide consumers with warranty protection for issues reported during the first year after the sale of the home to the homebuyer. However, the commenter contends that, as written, the warranty period could go beyond a year. The commenter expressed concern that there would be situations where the homebuyer purchases a home and leaves it on-site without proper blocking or protection. Between the time of sale and the installation of the home, the home could suffer serious degradation. The commenter suggested that the proposed regulation be amended to take into consideration this scenario. The commenter recommended that manufacturers, installers, and retailers should not be responsible for actions taken by the purchaser, and which are outside their control.

HUD Response: HUD agrees with the commenter and is clarifying § 3286.406 to provide that a manufacturer, retailer, or installer may not be held responsible for problems created by a consumer or purchaser if dispute resolution or other means determines that the consumer or purchaser is responsible for the problem. HUD is also adding a cross-reference to § 3286.115 to clarify the date of installation from which the manufacturer, retailer or installer of a manufactured home may be responsible for defects in the home that render it not fit for the use for which it was intended.

Comment: Clarify date of installation (§ 3282.406(a)(2)). A commenter suggested that the ''date of installation'' be clarified, effectively suggesting that the ''date of installation of the home'' refers to the period following the consumers purchase of the home. The commenter stated that homes are often installed in manufactured home communities and listed for sale. The commenter stated that the consumer would thus not have adequate protection against possible defects if they purchased the house after it had been installed and the one-year period had expired.

HUD Response: HUD agrees with the commenter and is adding a cross-reference to § 3286.115 to clarify the date of installation in the final rule.

Comment: Specify that SAAs would notify the Secretary about classes of manufactured homes rather than individual homes (§ 3282.412(b)). A commenter recommended that § 3282.412(b) be amended to specify that the SAA must notify the Secretary when a serious defect or an imminent safety hazard possibly exists in more than one home or in a class of homes. The commenter questioned whether the intent of this section was to extend the scope of the language to require that the SAA notify the Secretary if individual homes have a defect or imminent safety hazard.

HUD Response: The final rule was not revised as recommended by the commenter since notification by an SAA is needed by HUD to facilitate correction of any other homes produced by the same or different manufacturers in other states that contain the same or similar types of serious defect or life-threatening problems.

Comment: Implementation of final determinations (§ 3282.414). A commenter recommended that the word ''fully'' be deleted from § 3282.414(a).

The commenter states that the word is ambiguous, open to wide interpretation, and could result in costly legal fees by consumers, manufacturers, and the Federal Government to determine what the word ''fully'' actually means.

HUD Response: HUD agrees with the commenter and is deleting the word ''fully'' and substituting ''completely correct or remove'' in the final rule.

Comment: Correction of homes before sale to purchaser (§ 3282.415). A commenter suggested that § 3282.415(a) be revised to more clearly define when the sale of a home to a purchaser is complete. The commenter recommended that the existing language in § 3282.252, ''Completion of a retail sale will be at the time the dealer completes set-up of the manufactured home,'' be added to the end of § 3282.415(a) of the proposed regulation.

HUD Response: As suggested, by the commenter, HUD is clarifying the point at which the sale of a home to a purchaser is complete by adding a cross-reference to § 3282.252.

Comment: Oversight of notification and correction activities (§ 3282.416). Two commenters stated that § 3282.416(a)(4) requires periodic review of the manufacturer's service record by its IPIA. The commenters stated that this requirement goes beyond the appropriate responsibilities and functions of the IPIA and will diminish the overriding responsibility of the IPIA to ensure that homes are being inspected and that manufacturers are conducting quality assurance.

HUD Response: HUD does not agree with commenters but has clarified the frequency of review in the final rule to require at least a monthly review of the service records by the IPIA.

Comment: Recordkeeping requirements for Determinations, Notification, and Corrections (§ 3282.417). Two commenters stated that this provision gives sufficient flexibility to the manufacturer to determine how to keep such records so as not to repeat the same information in the file associated with every manufactured home that is part of a class determination, but that § 3282.417(e) improperly adds requirements under Subpart I for keeping records for determinations, notifications, and corrections. The commenters state that the section sets forth detailed and prescriptive recordkeeping requirements for every manufactured home regardless of whether the home is part of a Subpart I action. The commenters stated that the proposal will require time consuming and costly overhaul of current recordkeeping systems and provides little or no flexibility to maintain records based on company size, production volume, quality assurance manuals, or other individual administrative practices. One commenter recommended that § 3282.417(e) be deleted from the proposed regulation. Another commenter suggested that the scope be clarified to assure that the section deals only with records related to determinations.

HUD Response: HUD does not agree with the commenters. Section 3282.417 does not expand the scope or type of information required to be maintained by the manufacturer. Additionally, this final rule continues to permit manufacturers to maintain either consolidated or separate class files. Section 3282.417(e) simply adds a requirement that the manufacturer organize its files in serial-number order to simplify retrieval.

Comment: Require recordkeeping by home rather than by class (§ 3282.417). One commenter, a regulator, stated that the proposed regulation allows the manufacturer flexibility in recordkeeping, but its experience is that it can achieve a quicker turnaround in working with manufacturers when all the information is consolidated. The commenter also stated that consolidated information facilitated a comprehensive review of the service records, documented handling of consumer complaints, and missing/incomplete Record of Purchaser cards which manufacturers are required to provide to purchasers under § 3282.211 of the regulation. The commenter recommended, therefore, the consolidation of all the records in each home file. Another commenter stated that the section places a new added burden on retailers (§ 3282.417(f)). The commenter suggested that the section be eliminated given that the current draft proposed regulation does not require a retailer to review the records. The commenter also stated that there was no time period for the record retention.

HUD Response: HUD agrees with the commenters and is removing the requirement for retailers and distributors to maintain records of corrections taken to bring a home into compliance with the construction and safety standards and the proposed time period for the record retention. HUD notes, however, that retailers remain responsible for retaining the records required under HUD's Dispute Resolution Program.

Comment: Revise the factors for appropriateness and amount of civil penalties (§ 3282.418(e)). A commenter stated that the ''ability to pay a civil penalty'' should not be a determining factor if all the other factors determine a civil penalty is appropriate. The commenter suggests that if a manufacturer could not or would not pay the civil penalty, HUD would have to find another remedy, such as a criminal penalty. The commenter recommended and agreed that the civil penalty would best be determined by HUD under its enforcement authority in § 3282.10 to ensure consistency among states and manufacturers.

HUD Response: HUD does not agree with the commenter as all of the criteria need to be considered and are retained in the final rule for determining the amount, application, and appropriateness of civil penalties.

IV. Conforming Changes

HUD is also making nonsubstantive, technical edits to 24 CFR part 3282. First, HUD is removing the term ''dealer'' and substituting the term ''retailer'' throughout part 3282. This change is intended to conform part 3282 to section 603(a)(1) of the Manufactured Housing Improvement Act of 2000 (Pub. L. 106–569) (42 U.S.C. 5402), which amended the National Manufactured Housing Construction and Safety Standards Act of 1974 by deleting the term ''dealer'' and substituting the term ''retailer.'' Second, HUD is removing references to ''Director, Manufactured Housing Standards Division,'' and substituting ''Administrator, Office of Manufactured Housing Programs, Office of Housing.'' HUD is making this change to reflect updated titles and office designations. Finally, HUD is making edits to ensure that affected sections contain accurate cross-references to the provisions implemented by this Subpart I final rule. These edits are technical in nature and make no substantive changes to requirements.

V. Findings and Certifications

Regulatory 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 is not a significant regulatory action under section 3(f) of Executive Order 12866, and it was not reviewed by OMB. This rule revises 24 CFR part 3282, Subpart I, which provides the procedures by which HUD enforces the notification and correction of defects requirements of the Manufactured Home Construction and Safety Standards Act of 1974. This rule is not significant because it reorganizes and streamlines the existing regulation and proposes to clarify rather than change or add substance to the existing regulation.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Environmental Impact

A Finding of No Significant Impact with respect to the environment for this rule was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact remains applicable to this final rule and is available for public inspection between 8 a.m. and 5 p.m., weekdays, in the Regulations Division, Room 10276, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., 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 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service, 800–877–8339 (this is a toll free number).

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

HUD is amending its current regulations in 24 CFR part 3282, subpart I, in order to make the regulations clearer and more consistent with the Act. This rule is, in large part, based on the recommendations of the MHCC and does not greatly change current requirements affecting or preempting state law. Participation by an SAA in HUD's Manufactured Housing Program is optional, and preemption of state law is provided only to the extent required by the Act.

Paperwork Reduction Act

The information collection requirements contained in this proposed regulation have been approved by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2502–0541. In accordance with the Paperwork Reduction Act, HUD 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 (RFA) (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. HUD is required by law to implement statutory requirements concerning how manufacturers and others address reports of problems with manufactured homes, in order to protect both purchasers of factory-built homes and the general public. Small entities would not be burdened by this rule because the rule would not establish requirements that differ significantly from current requirements. This rule streamlines the current regulatory process to reduce burdens on small entities. The annual number of manufactured home placements since 1999 has decreased considerably and was estimated at 58,100 in 2009. This rule does not, however, affect or alter the cost of manufacture of such homes. For instance, this rule amends current regulations to allow manufacturers to indemnify themselves through agreements or contracts with retailers, transporters, installers, distributors, or others for certain costs associated with corrective work performed. As a result, HUD does not believe that the rule would have a significant economic effect on a substantial number of small entities. Further, the rule is intended to have a beneficial impact, by reducing the recordkeeping burdens on manufacturers. For example, manufacturers would be allowed to keep records in a central file, thereby reducing recordkeeping requirements for small entities. Also under the rule, manufacturers would no longer be required to provide notification of a possible defect if only one home is involved and the manufacturer corrects the home, thus further reducing paperwork burdens on small entities. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the Manufactured Housing Program is 14.171.

List of Subjects in 24 CFR Part 3282

Administrative practice and procedure, Consumer protection, Intergovernmental relations, Investigations, Manufactured homes, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends part 3282 of title 24 of the Code of Federal Regulations, as follows:

PART 3282—MANUFACTURED HOUSING PROCEDURAL AND ENFORCEMENT REGULATIONS

■ 1. The authority citation for part 3282 continues to read as follows:

Authority: 28 U.S.C. 2461 note; 42 U.S.C. 5424; and 42 U.S.C. 3535(d).

§§ 3282.8. 3282.14, 3282.205, 3282.207, 3282.208, 3282.211, 3282.251, 3282.252, 3282.253, 3282.254, 3282.255, 3282.256, 3282.302, 3282.303, 3282.307, 3282.362, 3282.363, and 3282.552 [Amended]

■ 2. In 24 CFR part 3282, remove the words ''dealer'' and ''dealers'' and add in their place the words ''retailer'' or ''retailers,'' respectively, in the following places:

■ a. § 3282.8(e) and (j);
■ b. § 3282.14(b)(8) and (e);
■ c. § 3282.205(c);
■ d. § 3282.207(d);
■ e. § 3282.208(a);
■ f. § 3282.211(a)(1) and (a)(2)(i);
■ g. Subpart F subpart heading;
■ h. § 3282.251(a), (b), and (c);
■ i. § 3282.252(a) introductory text, (a)(2), and (b);
■ j. § 3282.253(b) and (c);
■ k. § 3282.254 section heading, (a), (b), and (c);
■ l. § 3282.255(a) and (b);
■ m. § 3282.256 section heading, (a), and (b);
■ n. § 3282.302(b)(13);
■ o. § 3282.303(a) and (b);
■ p. § 3282.307(b)(1);
■ q. § 3282.362(d)(1) and (d)(4);
■ r. § 3282.363;
■ s. § 3282.552.
■ 2. Amend § 3282.7 as follows:
■ a. Revise paragraphs (c) and (v);
■ b. Remove and reserve paragraphs (i) and (l); and
■ c. Add paragraph (dd).

The revisions and addition read as follows:

§ 3282.7 Definitions.

* * * * *

(c) *Alteration* means the replacement, addition, and modification, or removal of any equipment or installation after sale by a manufacturer to a retailer or distributor but prior to sale by a retailer to a purchaser which may affect the construction, fire safety, occupancy, plumbing, heat-producing or electrical system. It includes any modification made in the manufactured home that may affect the compliance of the home with the standards, but it does not include the repair or replacement of a component or appliance requiring plug-in to an electrical receptacle where the replaced item is of the same configuration and rating as the one being replaced. It also does not include the addition of an appliance requiring *plug-in* to an electrical receptacle, which appliance was not provided with the manufactured home by the manufacturer, if the rating of the appliance does not exceed the rating of the receptacle to which it is connected.

* * * * *

(v) *Manufactured home construction* means all activities relating to the assembly and manufacture of a manufactured home including, but not limited to, those relating to durability, quality, and safety, but does not include those activities regulated under the installation standards in this chapter.

* * * * *

(dd) *Retailer* means any person engaged in the sale, leasing, or distribution of new manufactured homes primarily to persons who in good faith purchase or lease a manufactured home for purposes other than resale.

* * * * *

■ 3. Revise § 3282.52 to read as follows:

§ 3282.52 Address of communications.

Unless otherwise specified, communications shall be addressed to the Administrator, Office of Manufactured Housing Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410.

■ 4. In § 3282.204, revise paragraph (e) to read as follows:

§ 3282.204 IPIA services.

* * * * *

(e) If during the course of production, an IPIA finds a failure to conform to a standard exists in a manufactured home under production, the manufacturer must correct the failure to conform in any manufactured home still in the factory and held by distributors or retailers and shall carry out remedial actions under § 3282.416(a) with respect to any other manufactured homes which may contain the same failure to conform.

■ 5. In § 3282.253, revise paragraph (a) to read as follows:

§ 3282.253 Removal of prohibition of sale.

(a) If a distributor or retailer has a manufactured home in its possession or a manufactured home with respect to a sales transaction has not yet been completed, and a distributor or retailer knows as a result of notification by the manufacturer or otherwise that the manufactured home contains a failure to conform or imminent safety hazard, the distributor or retailer may seek the remedies available under § 3282.415.

* * * * *

■ 6. In § 3282.302, revise the introductory text and paragraphs (b)(4), (b)(5)(i), and (b)(5)(ii) to read as follows:

§ 3282.302 State plan.

A State wishing to qualify and act as an SAA under this subpart shall make a State Plan Application under this section. The State Plan Application shall be made to the Administrator, Office of Manufactured Housing Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, and shall include:

* * * * *

(b) * * *

(4) Provide for the notification and correction procedures under subpart I of this part where the SAA is to act under that subpart by providing the required approval by the SAA of the plan for notification and correction described in §§ 3282.408, 3282.409, and 3282.410, including approval of the number of units that may be affected and the proposed repairs, and by providing for approval of corrective actions where appropriate under subpart I,

(5) * * *

(i) Remedial actions carried out by manufacturers for which the SAA approved the plan for notification and correction or for which the SAA has waived formal notification under subpart I.

(ii) A manufacturer's handling of consumer complaints and other information under subpart I as to plants located in the State.

* * * * *

■ 7. In § 3282.309, revise paragraph (a) to read as follows:

§ 3282.309 Formal and informal presentations of views held by SAAs.

(a) When an SAA is the appropriate agency to hold a Formal or Informal Presentation of Views under § 3282.412 of subpart I, the SAA shall follow the procedures set out in §§ 3282.152 and 3282.153, with the SAA acting as the Secretary otherwise would under that section. Where § 3282.152 requires publication of notice in the **Federal Register**, the SAA shall, to the maximum extent possible, provide equivalent notice throughout the State by publication in the newspaper or newspapers having statewide coverage or otherwise. The determination of whether to provide an Informal Presentation of Views under § 3282.152(f), or a Formal Presentation of Views under § 3282.152(g), is left to the SAA.

* * * * *

■ 8. In § 3282.353, revise the introductory text to read as follows:

§ 3282.353 Submission format.

States and private organizations that wish to act as primary inspection agencies shall submit to the Administrator, Office of Manufactured

Housing Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, an application that includes the following:

* * * * *

■ 9. Revise § 3282.366 to read as follows:

§ 3282.366 Notification and correction campaign responsibilities.

(a) Both IPIAs and DAPIAs are responsible for assisting the Secretary or an SAA in identifying the class of manufactured homes that may have been affected where the Secretary or an SAA makes or is contemplating making a preliminary determination of imminent safety hazard, serious defect, defect, or noncompliance under § 3282.412 with respect to manufactured homes for which the IPIA and DAPIA provided either plant inspection or design approval services.

(b) The IPIA must in each manufacturing plant review at least monthly the manufacturer's service and inspection records to verify if appropriate determinations are being made by the manufacturer under § 3282.404 and, if not, take the actions required by this section and § 3282.404.

(c) The IPIA in each manufacturing plant is also responsible for reviewing manufacturer determinations of the class of manufactured homes affected when the manufacturer is acting under subpart I. The IPIA must concur in the method used to determine the class of potentially affected manufactured homes or is to state why it finds the method to be inappropriate, inadequate, or incorrect.

■ 10. Revise Subpart I to read as follows:

Subpart I—Consumer Complaint Handling and Remedial Actions

Sec.

3282.401 Purpose and scope.
3282.402 General provisions.
3282.403 Consumer complaint and information referral.
3282.404 Manufacturers' determinations and related concurrences.
3282.405 Notification pursuant to manufacturer's determination.
3282.406 Required manufacturer correction.
3282.407 Voluntary compliance with the notification and correction requirements under the Act.
3282.408 Plan of notification required.
3282.409 Contents of plan.
3282.410 Implementation of plan.
3282.411 SAA initiation of remedial action.
3282.412 Preliminary and final administrative determinations.
3282.413 Implementation of Final Determination.
3282.414 Replacement or repurchase of homes after sale to purchaser.
3282.415 Correction of homes before sale to purchaser.
3282.416 Oversight of notification and correction activities.
3282.417 Recordkeeping requirements.
3282.418 Factors for appropriateness and amount of civil penalties.

§ 3282.401 Purpose and scope.

(a) *Purpose.* The purpose of this subpart is to establish a system of protections provided by the Act with respect to imminent safety hazards and failures to conform to the construction and safety standards with a minimum of formality and delay, while protecting the rights of all parties.

(b) *Scope.* This subpart sets out the procedures to be followed by manufacturers, retailers, and distributors, SAAs, primary inspection agencies, and the Secretary to assure that notification and correction are provided with respect to manufactured homes when required under this subpart. Notification and correction may be required with respect to manufactured homes that have been sold or otherwise released by the manufacturer to another party.

§ 3282.402 General provisions.

(a) *Purchaser's rights.* Nothing in this subpart shall limit the rights of the purchaser under any contract or applicable law.

(b) *Manufacturer's liability limited.* A manufacturer is not responsible for failures that occur in any manufactured home or component as the result of normal wear and aging, consumer abuse, or neglect of maintenance. The life of a component warranty may be one of the indicators used to establish normal wear and aging. A failure of any component may not be attributed by the manufacturer to normal wear and aging under this subpart during the term of any applicable warranty provided by the original manufacturer of the affected component.

§ 3282.403 Consumer complaint and information referral.

(a) *Retailer responsibilities.* When a retailer receives a consumer complaint or other information about a home in its possession, or that it has sold or leased, that likely indicates a noncompliance, defect, serious defect, or imminent safety hazard, the retailer must forward the complaint or information to the manufacturer of the manufactured home in question as early as possible, in accordance with § 3282.256.

(b) *SAA and HUD responsibilities.* (1) When an SAA or the Secretary receives a consumer complaint or other information that likely indicates a noncompliance, defect, serious defect, or imminent safety hazard in a manufactured home, the SAA or HUD must:

(i) Forward the complaint or information to the manufacturer of the home in question as early as possible; and

(ii) Send a copy of the complaint or other information to the SAA of the State where the manufactured home was manufactured or to the Secretary if there is no such SAA.

(2) When it appears from the complaint or other information that an imminent safety hazard or serious defect may be involved, the SAA of the State where the home was manufactured must also send a copy of the complaint or other information to the Secretary.

(c) *Manufacturer responsibilities.* Whenever the manufacturer receives information from any source that the manufacturer believes in good faith relates to a noncompliance, defect, serious defect, or imminent safety hazard in any of its manufactured homes, the manufacturer must, for each such occurrence, make the determinations required by § 3282.404.

§ 3282.404 Manufacturers' determinations and related concurrences.

(a) *Initial determination.* (1) Not later than 30 days after a manufacturer receives information that it believes in good faith may indicate a noncompliance, defect, serious defect, or imminent safety hazard, the manufacturer must make a specific initial determination that there is a noncompliance, defect, serious defect, or imminent safety hazard, or that the information requires no further action under this subpart. If a manufacturer makes a final determination of noncompliance for an individual home (see § 3282.412(b)) and a class of homes is not involved, no further action is needed by the manufacturer other than to keep a record of its determination as required by § 3282.417. If the manufacturer determines that it is not the cause of the problem, but a problem still exists, the manufacturer must forward the information in its possession to the appropriate retailer (see § 3282.254), and, if known, to the installer (see §§ 3286.115 and 3286.811) for their consideration. Alternatively, the manufacturer, retailer, or installer may choose to submit the issue for resolution under dispute resolution (see 24 CFR part 3288).

(2) When a manufacturer makes an initial determination that there is a serious defect or an imminent safety hazard, the manufacturer must immediately notify the Secretary, the

SAA in the state of manufacture, and the manufacturer's IPIA.

(3) In making the determination of noncompliance, defect, serious defect, or imminent safety hazard, or that no further action is required under this subpart, the manufacturer must review the information it received and carry out investigations, including, a review of service records, IPIA inspection records, and, as appropriate, inspections of homes in the class. The manufacturer must review the information, the known facts, and the circumstances relating to the complaint or information, including service records, approved designs, and audit findings, as applicable, to decide what investigations are reasonable.

(b) *Class determination.* (1) When the manufacturer makes an initial determination of defect, serious defect, or imminent safety hazard, the manufacturer must also make a good-faith determination of the class that includes each manufactured home in which the same defect, serious defect, or imminent safety hazard exists or likely exists. Multiple occurrences of defects may be considered the same defect if they have the same cause, are related to a specific workstation description, or are related to the same failure to follow the manufacturer's approved quality assurance manual. Good faith may be used as a defense to the imposition of a penalty, but does not relieve the manufacturer of its responsibilities for notification or correction under this subpart I. The manufacturer must make this class determination not later than 20 days after making a determination of defect, serious defect, or imminent safety hazard.

(2) Paragraph (c) of this section sets out methods for a manufacturer to use in determining the class of manufactured homes. If the manufacturer can identify the precise manufactured homes affected by the defect, serious defect, or imminent safety hazard, the class of manufactured homes may include only those manufactured homes actually affected by the same defect, serious defect, or imminent safety hazard. The manufacturer is also permitted to exclude from the class those manufactured homes for which the manufacturer has information that indicates the homes were not affected by the same cause. If it is not possible to identify the precise manufactured homes affected, the class must include every manufactured home in the group of homes that is identifiable, since the same defect, serious defect, or imminent safety hazard exists or likely exists in some homes in that group of manufactured homes.

(3) For purposes related to this section, a defect, a serious defect, or an imminent safety hazard likely exists in a manufactured home if the cause of the defect, serious defect, or imminent safety hazard is such that the same defect, serious defect, or imminent safety hazard would likely have been introduced systematically into more than one manufactured home. Indications that the defect, serious defect, or imminent safety hazard would likely have been introduced systematically may include, but are not limited to, complaints that can be traced to the same faulty design or faulty construction, problems known to exist in supplies of components or parts, information related to the performance of a particular employee or use of a particular process, and information signaling a failure to follow quality control procedures with respect to a particular aspect of the manufactured home.

(4) If the manufacturer must determine the class of homes pursuant to paragraph (b) of this section, the manufacturer must obtain from the IPIA, and the IPIA must provide, either:

(i) The IPIA's written concurrence on the methods used by the manufacturer to identify the homes that should be included in the class of homes; or

(ii) The IPIA's written statement explaining why it believes the manufacturer's methods for determining the class of homes were inappropriate or inadequate.

(c) *Methods for determining class.* (1) In making a class determination under paragraph (b) of this section, a manufacturer is responsible for carrying out reasonable investigations. In carrying out investigations, the manufacturer must review the information, the known facts, and the relevant circumstances, and generally must establish the cause of the defect, serious defect, or imminent safety hazard. Based on the results of such investigations and all information received or developed, the manufacturer must use an appropriate method or appropriate methods to determine the class of manufactured homes in which the same defect, serious defect, or imminent safety hazard exists or likely exists.

(2) Methods that may be used in determining the class of manufactured homes include, but are not limited to:

(i) Inspection of the manufactured home in question, including its design, to determine whether the defect, serious defect, or imminent safety hazard resulted from the design itself;

(ii) Physical inspection of manufactured homes of the same design or construction, as appropriate, that were produced before and after a home in question;

(iii) Inspection of the service records of a home in question and of homes of the same design or construction, as appropriate, produced before and after that home, if it is clear that the cause of the defect, serious defect, or imminent safety hazard is such that the defect, serious defect, or imminent safety hazard would be visible to and reportable by consumers or retailers;

(iv) Inspection of manufacturer quality control records to determine whether quality control procedures were followed and, if not, the time frame during which they were not;

(v) Inspection of IPIA records to determine whether the defect, serious defect, or imminent safety hazard was either detected or specifically found not to exist in some manufactured homes;

(vi) Identification of the cause as relating to a particular employee whose work, or to a process whose use, would have been common to the production of the manufacturer's homes for a period of time; and

(vii) Inspection of records relating to components supplied by other parties and known to contain or suspected of containing a defect, a serious defect, or an imminent safety hazard.

(3) When the Secretary or an SAA decides the method chosen by the manufacturer to conduct an investigation in order to make a class determination is not the most appropriate method, the Secretary or SAA must explain in writing to the manufacturer why the chosen method is not the most appropriate.

(d) *Documentation required.* The manufacturer must comply with the recordkeeping requirements in § 3282.417 as applicable to its determinations and any IPIA concurrence or statement that it does not concur.

§ 3282.405 Notification pursuant to manufacturer's determination.

(a) *General requirement.* Every manufacturer of manufactured homes must provide notification, as set out in this section, with respect to any manufactured home produced by the manufacturer in which the manufacturer determines, in good faith, that there exists or likely exists in more than one home, the same defect introduced systematically, a serious defect, or an imminent safety hazard.

(b) *Requirements by category.* (1) *Noncompliance.* A manufacturer must provide notification of a noncompliance only when ordered to do so by the

Secretary or an SAA, pursuant to §§ 3282.412 and 3282.413.

(2) *Defects.* When a manufacturer has made a class determination in accordance with § 3282.404 that a defect exists or likely exists in more than one home, the manufacturer must prepare a plan for notification in accordance with § 3282.408, and must provide notification with respect to each manufactured home in the class of manufactured homes.

(3) *Serious defects and imminent safety hazards.* When a manufacturer has made an initial determination in accordance with § 3282.404(a) that a serious defect or imminent safety hazard exists or likely exists, the manufacturer must prepare a plan for notification in accordance with § 3282.408, must provide notification with respect to all manufactured homes in which the serious defect or imminent safety hazard exists or likely exists, and must correct the home or homes in accordance with § 3282.406.

(c) *Plan for notification required.* (1) If a manufacturer determines that it is responsible for providing notification under this section, the manufacturer must prepare and receive approval on a plan for notification as set out in § 3282.408, unless the manufacturer meets alternative requirements established in § 3282.407.

(2) If the Secretary or SAA orders a manufacturer to provide notification in accordance with the procedures in §§ 3282.412 and 3282.413, the Secretary or SAA has the option of requiring a manufacturer to prepare and receive approval on a plan for notification.

(d) *Method of notification.* When a manufacturer provides notification as required under this section, notification must be:

(1) By certified mail or other more expeditious means that provides a receipt to each retailer or distributor to whom any manufactured home in the class of homes containing the defect, serious defect, or imminent safety hazard was delivered;

(2) By certified mail or other more expeditious means that provides a receipt to the first purchaser of each manufactured home in the class of manufactured homes containing the defect, serious defect, or imminent safety hazard, and, to the extent feasible, to any subsequent owner to whom any warranty provided by the manufacturer or required by federal, state, or local law on such manufactured home has been transferred, except that notification need not be sent to any person known by the manufacturer not to own the manufactured home in question if the manufacturer has a record of a subsequent owner of the manufactured home; and

(3) By certified mail or other more expeditious means that provides a receipt to each other person who is a registered owner of a manufactured home in the class of homes containing the defect, serious defect, or imminent safety hazard and whose name has been ascertained pursuant to § 3282.211 or is known to the manufacturer.

§ 3282.406 Required manufacturer correction.

(a) *Correction of noncompliances and defects.* (1) Section 3282.415 sets out requirements with respect to a manufacturer's correction of any noncompliance or defect that exists in each manufactured home that has been sold or otherwise released to a retailer but that has not yet been sold to a purchaser.

(2) In accordance with section 623 of the Act and Part 3288, ''Manufactured Home Dispute Resolution Program,'' of this chapter, the manufacturer, retailer, or installer of a manufactured home deemed responsible for correction of repairs or defects must correct, at its expense, each failure in the performance, construction, components, or material of the home that renders the home or any part of the home not fit for the ordinary use for which it was intended and that is reported during the one-year period beginning on the date of installation of the home (see § 3286.115).

(b) *Correction of serious defects and imminent safety hazards.* (1) A manufacturer required to furnish notification under § 3282.405 or § 3282.413 must correct, at its expense, any serious defect or imminent safety hazard that can be related to an error in design or assembly of the manufactured home by the manufacturer, including an error in design or assembly of any component or system incorporated into the manufactured home by the manufacturer.

(2) If, while making corrections under any of the provisions of this subpart, the manufacturer creates an imminent safety hazard or serious defect, the manufacturer shall correct the imminent safety hazard or serious defect.

(3) Each serious defect or imminent safety hazard corrected under this paragraph (b) must be brought into compliance with applicable construction and safety standards or, where those standards are not specific, with the manufacturer's approved design.

(c) *Inclusion in plan.* (1) In the plan required by § 3282.408, the manufacturer must provide for correction of those homes that are required to be corrected pursuant to paragraph (b) of this section.

(2) If the Secretary or SAA orders a manufacturer to provide correction in accordance with the procedures in § 3282.413, the Secretary or SAA has the option of requiring a manufacturer to prepare and receive approval on a plan for correction.

(d) *Corrections by owners.* A manufacturer that is required to make corrections under paragraph (b) of this section, or that elects to make corrections in accordance with § 3282.407, must reimburse any owner of an affected manufactured home who choses to make the correction before the manufacturer did so, for the reasonable cost of correction.

(e) *Correction of appliances, components, or systems.* (1) If any appliance, component, or system in a manufactured home is covered by a product warranty, the manufacturer, retailer, or installer that is responsible under this section for correcting a noncompliance, defect, serious defect, or imminent safety hazard in the appliance, component, or system may seek the required correction directly from the producer. The SAA that approves any plan of notification required pursuant to § 3282.408 or the Secretary, as applicable, may establish reasonable time limits for the manufacturer of the home and the producer of the appliance, component, or system to agree on who is to make the correction and for completing the correction.

(2) Nothing in this section shall prevent the manufacturer, retailer, or installer from seeking indemnification from the producer of the appliance, component, or system for correction work done on any appliance, component, or system.

§ 3282.407 Voluntary compliance with the notification and correction requirements under the Act.

A manufacturer that takes corrective action that complies with one of the following three alternatives to the requirement in § 3282.408 for preparing a plan will be deemed to have provided any notification required by § 3282.405:

(a) *Voluntary action—one home.* When a manufacturer has made a determination that only one manufactured home is involved, the manufacturer is not required to provide notification pursuant to § 3282.405 or to prepare or submit a plan if:

(1) The manufacturer has made a determination of defect; or

(2) The manufacturer has made a determination of serious defect or

imminent safety hazard and corrects the home within the 20-day period. The manufacturer must maintain, in the plant where the manufactured home was manufactured, a complete record of the correction. The record must describe briefly the facts of the case and any known cause of the serious defect or imminent safety hazard, state what corrective actions were taken, and be maintained in the service records in a form that will allow the Secretary or an SAA to review all such corrections.

(b) *Voluntary action—multiple homes.* Regardless of whether a plan has been submitted under § 3282.408, the manufacturer may act prior to obtaining approval of the plan. Such action is subject to review and disapproval by the SAA of the state where the home was manufactured or by the Secretary, unless the manufacturer obtains the written agreement of the SAA or the Secretary that the corrective action is adequate. If such an agreement is obtained, the correction must be accepted as adequate by all SAAs and the Secretary, if the manufacturer makes the correction as agreed to and any imminent safety hazard or serious defect is eliminated.

(c) *Waiver.* (1) A manufacturer may obtain a waiver of the notification requirements in § 3282.405 and the plan requirements in § 3282.408 either from the SAA of the state of manufacture, when all of the manufactured homes that would be covered by the plan were manufactured in that state, or from the Secretary. As of the date of a request for a waiver, the notification and plan requirements are deferred pending timely submission of any additional documentation as the SAA or the Secretary may require and final resolution of the waiver request. If a waiver request is not granted, the plan required by § 3282.408 must be submitted within 5 days after the expiration of the time frame established in § 3282.408, if the manufacturer is notified that the request was not granted.

(2) The waiver may be approved if, not later than 20 days after making the determination that notification is required, the manufacturer presents evidence that it, in good faith, believes would show to the satisfaction of the SAA or the Secretary that:

(i) The manufacturer has identified all homes that would be covered by the plan in accordance with § 3282.408;

(ii) The manufacturer will correct, at its expense, all of the identified homes, either within 60 days of being informed that the request for waiver has been granted or within another time limit approved in the waiver;

(iii) The proposed repairs are adequate to remove the defect, serious defect, or imminent safety hazard that gave rise to the determination that correction is required; and

(3) The manufacturer must correct all affected manufactured homes within 60 days of being informed that the request for waiver has been granted or within the time limit approved in the waiver, as applicable. The manufacturer must record the known cause of the problem and the correction in the service records, in an approved form that will allow the Secretary or SAA to review the cause and correction.

§ 3282.408 Plan of notification required.

(a) *Manufacturer's plan required.* Except as provided in § 3282.407, if a manufacturer determines that it is responsible for providing notification under § 3282.405, the manufacturer must prepare a plan in accordance with this section and § 3282.409. The manufacturer must, as soon as practical, but not later than 20 days after making the determination of defect, serious defect, or imminent safety hazard, submit the plan for approval to one of the following, as appropriate:

(1) The SAA of the State of manufacture, when all of the manufactured homes covered by the plan were manufactured in that State; or

(2) The Secretary, when the manufactured homes were manufactured in more than one State or there is no SAA in the State of manufacture.

(b) *Implementation of plan.* Upon approval of the plan, including any changes for cause required by the Secretary or SAA after consultation with the manufacturer, the manufacturer must carry out the approved plan within the agreed time limits.

§ 3282.409 Contents of plan.

(a) *Purpose of plan.* This section sets out the requirements that must be met by a manufacturer in preparing any plan it is required to submit under § 3282.408. The underlying requirement is that the plan show how the manufacturer will fulfill its responsibilities with respect to notification and correction.

(b) *Contents of plan.* The plan must:

(1) Identify, by serial number and other appropriate identifying criteria, all manufactured homes for which notification is to be provided, as determined pursuant to § 3282.404;

(2) Include a copy of the notice that the manufacturer proposes to use to provide the notification required by § 3282.405;

(3) Provide for correction of those manufactured homes that are required to be corrected pursuant to § 3282.406(b);

(4) Include the IPIA's written concurrence or statement on the methods used by the manufacturer to identify the homes that should be included in the class of homes, as required pursuant to § 3282.404(b); and

(5) Include a deadline for completion of all notifications and corrections.

(c) *Contents of notice.* Except as otherwise agreed by the Secretary or the SAA reviewing the plan under § 3282.408, the notice to be approved as part of the plan must include the following:

(1) An opening statement that reads: ''This notice is sent to you in accordance with the requirements of the National Manufactured Housing Construction and Safety Standards Act.''

(2) The following statement: ''[choose one, as appropriate: Manufacturer's name, or the Secretary, or the (insert State) SAA] has determined that [insert identifying criteria of manufactured home] may not comply with an applicable Federal Manufactured Home Construction or Safety Standard.''

(3) Except when the manufacturer is providing notice pursuant to an approved plan or agreement with the Secretary or an SAA under § 3282.408, each applicable statement must read as follows:

(i) ''An imminent safety hazard may exist in (identifying criteria of manufactured home).''

(ii) ''A serious defect may exist in (identifying criteria of manufactured home).''

(iii) ''A defect may exist in (identifying criteria of manufactured home).''

(4) A clear description of the defect, serious defect, or imminent safety hazard and an explanation of the risk to the occupants, which must include:

(i) The location of the defect, serious defect, or imminent safety hazard in the manufactured home;

(ii) A description of any hazards, malfunctions, deterioration, or other consequences that may reasonably be expected to result from the defect, serious defect, or imminent safety hazard;

(iii) A statement of the conditions that may cause such consequences to arise; and

(iv) Precautions, if any, that the owner can, should, or must take to reduce the chance that the consequences will arise before the manufactured home is repaired;

(5) A statement of whether there will be any warning that a dangerous

occurrence may take place and what that warning would be, and of any signs that the owner might see, hear, smell, or feel that might indicate danger or deterioration of the manufactured home as a result of the defect, serious defect, or imminent safety hazard;

(6) A statement that the manufacturer will correct the manufactured home, if the manufacturer will correct the manufactured home under this subpart or otherwise;

(7) A statement in accordance with whichever of the following is appropriate:

(i) Where the manufacturer will correct the manufactured home at no cost to the owner, the statement must indicate how and when the correction will be done, how long the correction will take, and any other information that may be helpful to the owner; or

(ii) When the manufacturer does not bear the cost of repair, the notification must include a detailed description of all parts and materials needed to make the correction; a description of all steps to be followed in making the correction, including appropriate illustrations; and an estimate of the cost of the purchaser or owner of the correction;

(8) A statement informing the owner that the owner may submit a complaint to the SAA or Secretary if the owner believes that:

(i) The notification or the remedy described therein is inadequate;

(ii) The manufacturer has failed or is unable to remedy the problem in accordance with its notification; or

(iii) The manufacturer has failed or is unable to remedy the problem within a reasonable time after the owner's first attempt to obtain remedy; and

(9) A statement that any actions taken by the manufacturer under the Act in no way limit the rights of the owner or any other person under any contract or other applicable law and that the owner may have further rights under contract or other applicable law.

§ 3282.410 Implementation of plan.

(a) *Deadline for notifications.* (1) The manufacturer must complete the notifications carried out under a plan approved by an SAA or the Secretary under § 3282.408 on or before the deadline approved by the SAA or Secretary. In approving each deadline, an SAA or the Secretary will allow a reasonable time to complete all notifications, taking into account the number of manufactured homes involved and the difficulty of completing the notifications.

(2) The manufacturer must, at the time of dispatch, furnish to the SAA or the Secretary a true or representative copy of each notice, bulletin, and other written communication sent to retailers, distributors, or owners of manufactured homes regarding any serious defect or imminent safety hazard that may exist in any homes produced by the manufacturer, or regarding any noncompliance or defect for which the SAA or Secretary requires, under § 3282.413(c), the manufacturer to submit a plan for providing notification.

(b) *Deadline for corrections.* A manufacturer that is required to correct a serious defect or imminent safety hazard pursuant to § 3282.406(b) must complete implementation of the plan required by § 3282.408 on or before the deadline approved by the SAA or the Secretary. The deadline must be no later than 60 days after approval of the plan. In approving the deadline, the SAA or the Secretary will allow a reasonable amount of time to complete the plan, taking into account the seriousness of the problem, the number of manufactured homes involved, the immediacy of any risk, and the difficulty of completing the action. The seriousness and immediacy of any risk posed by the serious defect or imminent safety hazard will be given greater weight than other considerations.

(c) *Extensions.* An SAA that approved a plan or the Secretary may grant an extension of the deadlines included in a plan, if the manufacturer requests such an extension in writing and shows good cause for the extension, if the SAA or the Secretary decides that the extension is justified and not contrary to the public interest. When the Secretary grants an extension for completion of any corrections, the Secretary will notify the manufacturer and must publish notice of such extension in the **Federal Register**. When an SAA grants an extension for completion of any corrections, the SAA must notify the Secretary and the manufacturer.

(d) *Recordkeeping.* The manufacturer must provide the report and maintain the records that are required by § 3282.417 for all notification and correction actions.

§ 3282.411 SAA initiation of remedial action.

(a) *SAA review of information.* Whenever an SAA has information indicating the possible existence of a noncompliance, defect, serious defect, or imminent safety hazard in a manufactured home, the SAA may initiate administrative review of the need for notification and correction. An SAA initiates administrative review by either:

(1) Referring the matter to another SAA in accordance with paragraph (b) of this section or to the Secretary; or

(2) Taking action itself, in accordance with § 3282.412, when it appears that all of the homes affected by the noncompliance, defect, serious defect, or imminent safety hazard were manufactured in the SAA's State.

(b) *SAA referral of matter.* If at any time it appears that the affected manufactured homes were manufactured in more than one State, an SAA that decides to initiate such administrative review must refer the matter to the Secretary for possible action pursuant to § 3282.412. If it appears that all of the affected manufactured homes were manufactured in another State, an SAA that decides to initiate administrative review must refer the matter to the SAA in the State of manufacture or to the Secretary, for possible action pursuant to § 3282.412.

§ 3282.412 Preliminary and final administrative determinations.

(a) *Grounds for issuance of preliminary determination.* The Secretary or, in accordance with § 3282.411, an SAA in the State of manufacture, may issue a Notice of Preliminary Determination when:

(1) The manufacturer has not provided to the Secretary or SAA the necessary information to make a determination that:

(i) A noncompliance, defect, serious defect, or imminent safety hazard possibly exists; or

(ii) A manufacturer had information that likely indicates a noncompliance, defect, serious defect, or imminent safety hazard for which the manufacturer failed to make the determinations required under § 3282.404;

(2) The Secretary or SAA has information that indicates a noncompliance, defect, serious defect, or imminent safety hazard possibly exists, and, in the case of the SAA, the SAA believes that:

(i) The affected manufactured home has been sold or otherwise released by a manufacturer to a retailer or distributor, but there is no completed sale of the home to a purchaser;

(ii) Based on the same factors that are established for a manufacturer's class determination in § 3282.404(b), the information indicates a class of homes in which a noncompliance or defect possibly exists; or

(iii) The information indicates one or more homes in which a serious defect or an imminent safety hazard possibly exists;

(3) The Secretary or SAA is reviewing a plan under § 3282.408 and the Secretary or SAA disagree with the manufacturer on proposed changes to the plan;

(4) The Secretary or SAA believes that the manufacturer has failed to fulfill the requirements of a waiver granted under § 3282.407(c); or

(5) There is information that a manufacturer failed to make the determinations required under § 3282.404.

(b) *Additional requirements—SAA issuance.* (1) An SAA that receives information that indicates a serious defect or an imminent safety hazard possibly exists in a home manufactured in that SAA's State must notify the Secretary about that information.

(2) An SAA that issues a preliminary determination must provide a copy of the preliminary determination to the Secretary at the time of its issuance. Failure to comply with this requirement does not affect the validity of the preliminary determination.

(c) *Additional requirements—Secretary issuance.* The Secretary will notify the SAA of each State where the affected homes were manufactured, and, to the extent reasonable, the SAA of each State where the homes are located, of the issuance of a preliminary determination. Failure to comply with this requirement does not affect the validity of the preliminary determination.

(d) *Notice of Preliminary Determination.* (1) The Notice of Preliminary Determination must be sent by certified mail or express delivery and must:

(i) Include the factual basis for the determination;

(ii) Include the criteria used to identify any class of homes in which the noncompliance, defect, serious defect, or imminent safety hazard possibly exists;

(iii) If applicable, indicate that the manufacturer may be required to make corrections on a home or in a class of homes; and

(iv) If the preliminary determination is that the manufacturer failed to make an initial determination required under § 3282.404(a), include an allegation that the manufacturer failed to act in good faith.

(2) The Notice of Preliminary Determination must inform the manufacturer that the preliminary determination will become final unless the manufacturer requests a hearing or presentation of views under subpart D of this part.

(e) *Presentation of views.* (1) If a manufacturer elects to exercise its right to a hearing or presentation of views, the Secretary or the SAA, as applicable, must receive the manufacturer's request for a hearing or presentation of views:

(i) Within 15 days of delivery of the Notice of Preliminary Determination of serious defect, defect, or noncompliance; or

(ii) Within 5 days of delivery of the Notice of Preliminary Determination of imminent safety hazard.

(2) A Formal or an Informal Presentation of Views will be held in accordance with § 3282.152 promptly upon receipt of a manufacturer's request under paragraph (c) of this section.

(f) *Issuance of Final Determination.* (1) The SAA or the Secretary, as appropriate, may make a Final Determination that is based on the allegations in the preliminary determination and adverse to the manufacturer if:

(i) The manufacturer fails to respond to the Notice of Preliminary Determination within the time period established in paragraph (c)(2) of this section; or

(ii) The SAA or the Secretary decides that the views and evidence presented by the manufacturer or others are insufficient to rebut the preliminary determination.

(2) At the time that the SAA or Secretary makes a Final Determination that an imminent safety hazard, serious defect, defect, or noncompliance exists, the SAA or Secretary, as appropriate, must issue an order in accordance with § 3282.413.

§ 3282.413 Implementation of Final Determination.

(a) *Issuance of orders.* (1) The SAA or the Secretary, as appropriate, must issue an order directing the manufacturer to furnish notification if:

(i) The SAA makes a Final Determination that a defect or noncompliance exists in a class of homes;

(ii) The Secretary makes a Final Determination that an imminent safety hazard, serious defect, defect, or noncompliance exists; or

(iii) The SAA makes a Final Determination that an imminent safety hazard or a serious defect exists in any home, and the SAA has received the Secretary's concurrence on the issuance of the Final Determination and order.

(2) The SAA or the Secretary, as appropriate, must issue an order directing the manufacturer to make corrections in any affected manufactured home if:

(i) The SAA or the Secretary makes a Final Determination that a defect or noncompliance exists in a manufactured home that has been sold or otherwise released by a manufacturer to a retailer or distributor but for which the sale to a purchaser has not been completed;

(ii) The Secretary makes a Final Determination that an imminent safety hazard or serious defect exists; or

(iii) The SAA makes a Final Determination that an imminent safety hazard or serious defect exists in any home, and the SAA has received the Secretary's concurrence on the issuance of the Final Determination and order.

(3) Only the Secretary may issue an order directing a manufacturer to repurchase or replace any manufactured home already sold to a purchaser, unless the Secretary authorizes an SAA to issue such an order.

(4) An SAA that has a concurrence or authorization from the Secretary on any order issued under this section must have the Secretary's concurrence on any subsequent changes to the order. An SAA that has issued a Preliminary Determination must have the Secretary's concurrence on any waiver of notification or any settlement when the concerns addressed in the Preliminary Determination involve a serious defect or an imminent safety hazard.

(5) If an SAA or the Secretary makes a Final Determination that the manufacturer failed to make, in good faith, an initial determination required under § 3282.404(a):

(i) The SAA may impose any penalties or take any action applicable under State law and may refer the matter to the Secretary for appropriate action; and

(ii) The Secretary may take any action permitted by law.

(b) *Decision to order replacement or repurchase.* The SAA or the Secretary will order correction of any manufactured home covered by an order issued in accordance with paragraph (a)(2) of this section, unless any requirements and factors applicable under § 3282.414 and § 3282.415 indicate that the SAA or the Secretary should order replacement or repurchase of the home.

(c) *Time for compliance with order.* (1) The SAA or the Secretary may require the manufacturer to submit a plan for providing any notification and any correction, replacement, or repurchase remedy that results from an order under this section. The manufacturer's plan must include the method and date by which notification and any corrective action will be provided.

(2) The manufacturer must provide any such notification and correction, replacement, or repurchase remedy as early as practicable, but not later than:

(i) Thirty days after issuance of the order, in the case of a Final Determination of imminent safety hazard or when the SAA or Secretary has ordered replacement or repurchase of a home pursuant to § 3282.414; or

(ii) Sixty days after issuance of the order, in the case of a Final Determination of serious defect, defect, or noncompliance.

(3) Subject to the requirements of paragraph (a)(3) of this section, the SAA that issued the order or the Secretary may grant an extension of the deadline for compliance with an order if:

(i) The manufacturer requests such an extension in writing and shows good cause for the extension; and

(ii) The SAA or the Secretary is satisfied that the extension is justified in the public interest.

(4) When the SAA grants an extension, it must notify the manufacturer and forward to the Secretary a draft of a notice of the extension for the Secretary to publish in the **Federal Register**. When the Secretary grants an extension, the Secretary must notify the manufacturer and publish notice of such extension in the **Federal Register**.

(d) *Appeal of SAA determination.* Within 10 days of a manufacturer receiving notice that an SAA has made a Final Determination that an imminent safety hazard, a serious defect, a defect, or noncompliance exists or that the manufacturer failed to make the determinations required under § 3282.404, the manufacturer may appeal the Final Determination to the Secretary under § 3282.309.

(e) *Settlement offers.* A manufacturer may propose in writing, at any time, an offer of settlement and shall submit it for consideration by the Secretary or the SAA that issued the Notice of Preliminary Determination. The Secretary or the SAA has the option of providing the manufacturer making the offer with an opportunity to make an oral presentation in support of such offer. If the manufacturer is notified that an offer of settlement is rejected, the offer is deemed to have been withdrawn and will not constitute a part of the record in the proceeding. Final acceptance by the Secretary or an SAA of any offer of settlement automatically terminates any proceedings related to the matter involved in the settlement.

(f) *Waiver of notification.* (1) At any time after the Secretary or an SAA has issued a Notice of Preliminary Determination, the manufacturer may ask the Secretary or SAA to waive any formal notification requirements. When requesting a waiver, the manufacturer must certify that:

(i) The manufacturer has made a class determination in accordance with § 3282.404(b);

(ii) The manufacturer will correct, at the manufacturer's expense, all affected manufactured homes in the class within a time period specified by the Secretary or SAA, but not later than 60 days after the manufacturer is notified of the acceptance of the request for waiver or the issuance of any Final Determination, whichever is later; and

(iii) The proposed repairs are adequate to correct the noncompliance, defect, serious defect, or imminent safety hazard that gave rise to the issuance of the Notice of Preliminary Determination.

(2) If the Secretary or SAA grants a waiver, the manufacturer must reimburse any owner of an affected manufactured home who chose to make the correction before the manufacturer did so, for the reasonable cost of correction.

(g) *Recordkeeping.* The manufacturer must provide the report and maintain the records that are required by § 3282.417 for all notification and correction actions.

§ 3282.414 Replacement or repurchase of homes after sale to purchaser.

(a) *Order to replace or repurchase.* Whenever a manufacturer cannot correct or remove an imminent safety hazard or a serious defect in a manufactured home, for which there is a completed sale to a purchaser, within 60 days of the issuance of an order under § 3282.413 or any extension of the 60-day deadline that has been granted by the Secretary in accordance with § 3282.413(c)(3), the Secretary or, if authorized in writing by the Secretary in accordance with § 3282.413(a)(3), the SAA may require that the manufacturer:

(1) Replace the manufactured home with a home that:

(i) Is substantially equal in size, equipment, and quality; and

(ii) Either is new or is in the same condition that the defective manufactured home would have been in at the time of discovery of the imminent safety hazard or serious defect had the imminent safety hazard or serious defect not existed; or

(2) Take possession of the manufactured home, if the Secretary or the SAA so orders, and refund the purchase price in full, except that the amount of the purchase price may be reduced by a reasonable amount for depreciation if the home has been in the possession of the owner for more than one year and the amount of depreciation is based on:

(i) Actual use of the home; and

(ii) An appraisal system approved by the Secretary or the SAA that does not take into account damage or deterioration resulting from the imminent safety hazard or serious defect.

(b) *Factors affecting order.* In determining whether to order replacement or refund by the manufacturer, the Secretary or the SAA will consider:

(1) The threat of injury or death to manufactured home occupants;

(2) Any costs and inconvenience to manufactured-home owners that will result from the lack of adequate repair within the specified period;

(3) The expense to the manufacturer;

(4) Any obligations imposed on the manufacturer under contract, or other applicable law of which the Secretary or the SAA has knowledge; and

(5) Any other relevant factors that may be brought to the attention of the Secretary or the SAA.

(c) *Owner's election of remedy.* When under contract or other applicable law the owner has the right of election between replacement and refund, the manufacturer must inform the owner of such right of election and must inform the Secretary of the election, if any, made by the owner.

(d) *Recordkeeping.* The manufacturer must provide the report that is required by § 3282.417 when a manufactured home has been replaced or repurchased under this section.

§ 3282.415 Correction of homes before sale to purchaser.

(a) *Sale or lease prohibited.* Manufacturers, retailers, and distributors must not sell, lease, or offer for sale or lease any manufactured home that they have reason to know, in the exercise of due care, contains a noncompliance, defect, serious defect, or imminent safety hazard. The sale of a home to a purchaser is complete when all contractual obligations of the manufacturer, retailer, and distributor to the purchaser and conditions specified in § 3282.252 have been met.

(b) *Retailer/distributor notification to manufacturer.* When a retailer, acting as a reasonable retailer, or a distributor, acting as a reasonable distributor, believes that a manufactured home that has been sold to the retailer or distributor, but for which there is no completed sale to a purchaser, likely contains a noncompliance, defect, serious defect, or imminent safety hazard, the retailer or distributor must notify the manufacturer of the home in a timely manner.

(c) *Manufacturer's remedial responsibilities.* Upon a Final

Determination pursuant to § 3282.412(f) by the Secretary or an SAA, a determination by a court of appropriate jurisdiction, or a manufacturer's own determination that a manufactured home that has been sold to a retailer but for which there is no completed sale to a purchaser contains a noncompliance, defect, serious defect, or imminent safety hazard, the manufacturer must do one of the following:

(1) Immediately repurchase such manufactured home from the retailer or distributor at the price paid by the retailer or distributor, plus pay all transportation charges involved, if any, and a reasonable reimbursement of not less than one percent per month of such price paid, prorated from the date the manufacturer receives notice by certified mail of the noncompliance, defect, serious defect, or imminent safety hazard; or

(2) At its expense, immediately furnish to the retailer or distributor all required parts or equipment for installation in the home by the retailer or distributor, and the manufacturer must reimburse the retailer or distributor for the reasonable value of the retailer's or distributor's work, plus a reasonable reimbursement of not less than one percent per month of the manufacturer's or distributor's selling price, prorated from the date the manufacturer receives notice by certified mail to the date the noncompliance, defect, serious defect, or imminent safety hazard is corrected, so long as the retailer or distributor proceeds with reasonable diligence with the required work; or

(3) Carry out all needed corrections to the home.

(d) *Establishing costs.* The value of reasonable reimbursements as specified in paragraph (c) of this section will be fixed by either:

(1) Mutual agreement of the manufacturer and retailer or distributor; or

(2) A court in an action brought under section 613(b) of the Act (42 U.S.C. 5412(b)).

(e) *Records required.* The manufacturer and the retailer or distributor must maintain records of their actions taken under this section in accordance with § 3282.417.

(f) *Exception for leased homes.* This section does not apply to any manufactured home purchased by a retailer or distributor that has been leased by such retailer or distributor to a tenant for purposes other than resale. Other remedies that may be available to a retailer or distributor under subpart I of this part continue to be applicable.

(g) *Indemnification.* A manufacturer may indemnify itself through agreements or contracts with retailers, distributors, transporters, installers, or others for the costs of repurchase, parts, equipment, and corrective work incurred by the manufacturer pursuant to paragraph (c).

§ 3282.416 Oversight of notification and correction activities.

(a) *IPIA responsibilities.* The IPIA in each manufacturing plant must:

(1) Assure that notifications required under this subpart I are sent to all owners, purchasers, retailers, and distributors of whom the manufacturer has knowledge;

(2) Audit the certificates required by § 3282.417 to assure that the manufacturer has made required corrections;

(3) Whenever a manufacturer is required to determine a class of homes pursuant to § 3282.404(b), provide either:

(i) The IPIA's written concurrence on the methods used by the manufacturer to identify the homes that should be included in the class of homes; or

(ii) The IPIA's written statement explaining why it believes the manufacturer's methods for determining the class of homes were inappropriate or inadequate; and

(4) Conduct, at least monthly, a review the manufacturer's service records of determinations under § 3282.404 and take appropriate action in accordance with §§ 3282.362(c) and 3282.364.

(b) *SAA and Secretary's responsibilities.* (1) SAA oversight of manufacturer compliance with this subpart will be done primarily by periodically checking the records that manufacturers are required to keep under § 3282.417.

(2) The SAA or Secretary to which the report required by § 3282.417(a) is sent is responsible for assuring, through oversight, that remedial actions have been carried out as described in the report. The SAA of the State in which an affected manufactured home is located may inspect that home to determine whether any correction required under this subpart I is carried out in accordance with the approved plan or, if there is no plan, with the construction and safety standards or other approval obtained by the manufacturer.

§ 3282.417 Recordkeeping requirements.

(a) *Manufacturer report on notifications and corrections.* Within 30 days after the deadline for completing any notifications, corrections, replacement, or repurchase required pursuant to this subpart, the manufacturer must provide a complete report of the action taken to, as appropriate, the Secretary or the SAA that approved the plan under § 3282.408, granted a waiver, or issued the order under § 3282.413. If any other SAA or the Secretary forwarded the relevant consumer complaint or other information to the manufacturer in accordance with § 3282.403, the manufacturer must send a copy of the report to that SAA or the Secretary, as applicable.

(b) *Records of manufacturer's determinations.* (1) A manufacturer must record each initial and class determination required under § 3282.404, in a manner approved by the Secretary or an SAA and that identifies who made each determination, what each determination was, and all bases for each determination. Such information must be available for review by the IPIA.

(2) The manufacturer records must include:

(i) The information it received that likely indicated a noncompliance, defect, serious defect, or imminent safety hazard;

(ii) All of the manufacturer's determinations and each basis for those determinations;

(iii) The methods used by the manufacturer to establish any class, including, when applicable, the cause of the defect, serious defect, or imminent safety hazard; and

(iv) Any IPIA concurrence or statement that it does not concur with the manufacturer's class determination, in accordance with § 3282.404(b).

(3) When the records that a manufacturer is required to keep in accordance with this paragraph (b) involve a class of manufactured homes that have the same noncompliance, defect, serious defect, or imminent safety hazard, the manufacturer has the option of meeting the requirements of this paragraph by establishing a class determination file, instead of including the same information in the file required by paragraph (e) of this section for each affected home. Such class determination file must contain the records of each class determination, notification, and correction, as applicable. For each class determination, the manufacturer must record once in each class determination file the information common to the class, and must identify by serial number all of the homes that the class comprises and that are subject to notification and correction, as applicable.

(c) *Manufacturer records of notifications.* When a manufacturer is required to provide notification under this subpart, the manufacturer must maintain a record of each type of notice sent and a complete list of the persons notified and their addresses. The manufacturer must maintain these records in a manner approved by the Secretary or an SAA to identify each notification campaign.

(d) *Manufacturer records of corrections.* When a manufacturer is required to provide or provides correction under this subpart, the manufacturer must maintain a record of one of the following, as appropriate, for each manufactured home involved:

(1) If the correction is made, a certification by the manufacturer that the repair was made to conform to the federal construction and safety standards in effect at the time the home was manufactured and that each identified imminent safety hazard or serious defect has been corrected; or

(2) If the owner refuses to allow the manufacturer to repair the home, a certification by the manufacturer that:

(i) The owner has been informed of the problem that may exist in the home;

(ii) The owner has been provided with a description of any hazards, malfunctions, deterioration, or other consequences that may reasonably be expected to result from the defect, serious defect, or imminent safety hazard; and

(iii) An attempt has been made to repair the problems, but the owner has refused the repair.

(e) *Maintenance of manufacturer's records.* (1) Except as provided in paragraph (b)(3) of this section, for each manufactured home produced by a manufacturer, the manufacturer must maintain in a printed or electronic format all of the information required by paragraphs (b), (c), and (d) of this section, and must consolidate the information in a readily accessible file or in a readily accessible combination of a printed file and an electronic file. For each home, the manufacturer also must include in such file a copy of the homes data plate; all information related to manufacture, handling, and assembly of the home; any checklist or similar documentation used by the manufacturer in the transport of the home; the name and address of the retailer; the original or a copy of each purchaser's registration record received by the manufacturer; all correspondence with the retailer and homeowner that is related to the home; any information received by the manufacturer regarding setup of the home; all work orders for servicing the home; and the information that the manufacturer is required to keep pursuant to § 3282.211. The manufacturer must organize all such files in order of the serial numbers of the homes produced.

(2) The manufacturer must maintain each of these manufactured-home records at the plant where the home was produced. If that plant is no longer in existence, the manufacturer must keep the records at its nearest production plant in the same State, or, if such a plant does not exist, at the manufacturer's corporate headquarters.

§ 3282.418 Factors for appropriateness and amount of civil penalties.

In determining whether to seek a civil penalty for a violation of the requirements of this subpart, and the amount of such penalty to be recommended, the Secretary will consider the provisions of the Act and the following factors:

(a) The gravity of the violation;

(b) The degree of the violator's culpability, including whether the violator had acted in good faith in trying to comply with the requirements;

(c) The injury to the public;

(d) Any injury to owners or occupants of manufactured homes

(e) The ability to pay the penalty;

(f) Any benefits received by the violator;

(g) The extent of potential benefits to other persons;

(h) Any history of prior violations;

(i) Deterrence of future violations; and

(j) Such other factors as justice may require.

■ 11. In 3282.554, revise paragraph (b) to read as follows:

§ 3282.554 SAA reports.

* * * * *

(b) The description of the SAA's oversight activities and findings regarding consumer complaints, notification, and correction actions during the preceding month. The IPIA report for the preceding month described in § 3282.553, as well as any orders issued pursuant to 3282.413 and manufacturer reports under § 3282.417(a), which were received during the preceding month, are to be attached to each such SAA report as an Appendix thereto.

Dated: September 18, 2013.

Carol J. Galante,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2013–23775 Filed 9–30–13; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

30 CFR Part 250

[Docket ID: BSEE–2013–0007; 134E1700D2 EEAA103000 ET1EX0000.PEA000]

RIN 1014–AA12

Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Adjustment of Service Fees

AGENCY: Bureau of Safety and Environmental Enforcement (BSEE), Interior.

ACTION: Final rule.

SUMMARY: This final rule amends the BSEE oil and gas resources regulations to update some fees that cover BSEE's cost of processing and filing certain documents relating to its oil and gas resources program.

DATES: This final rule becomes effective on October 1, 2013.

FOR FURTHER INFORMATION CONTACT: Angela Mazzullo, Office of the Deputy Director, 202–208–5122 or Amy C. White, Chief, Regulations and Standards Branch, 703–787–1665.

SUPPLEMENTARY INFORMATION:

I. BSEE

The BSEE promotes safety, protects the environment, and conserves offshore oil and gas resources through vigorous regulatory oversight and enforcement. The BSEE was established on October 1, 2011, as part of a major restructuring of the Department of the Interior's (DOI) offshore regulatory programs. The Secretary of the Interior (Secretary) announced the new division of responsibilities of the former Minerals Management Service (MMS) into three new bureaus within DOI in Secretarial Order No. 3299, issued on May 19, 2010. The BSEE, one of the three new bureaus, assumed responsibility for ''safety and environmental enforcement functions including, but not limited to, the authority to permit activities, inspect, investigate, summon witnesses and produce evidence[;] levy penalties; cancel or suspend activities; and oversee safety, response and removal preparedness'' (76 FR 64432).

II. BSEE Statutory and Regulatory Authority

The BSEE derives its authority from the Outer Continental Shelf Lands Act (OCSLA)(43 U.S.C. 1331–1356(a). Congress enacted OCSLA in 1953, establishing Federal control over the Outer Continental Shelf (OCS) and

authorizing the Secretary to regulate oil and gas exploration, development, and production operations on the OCS. The Secretary has authorized BSEE to perform these functions (30 CFR 250.101).

The BSEE regulatory program is comprehensive and provides regulatory oversight over a wide range of facilities and activities including drilling, completion, workover production, pipeline, and decommissioning operations. To carry out its responsibilities, BSEE develops and enforces regulations to enhance safety and environmental protection for offshore exploration and development of oil and natural gas on the OCS and to reflect advancements in technology and new information. The BSEE also conducts onsite inspections to assure compliance with regulations, lease terms, and approved plans and operates an oil spill response program. Detailed information concerning BSEE's regulations and guidance to the offshore industry may be found on BSEE's Web site at *http://www.bsee.gov/Regulations-and-Guidance/index.aspx.*

III. Background

The BSEE has authority to recover the full cost of services that confer special benefits under the Independent Offices Appropriation Act (31 U.S.C. 9701), the Omnibus Appropriations Bill (Pub. L. 104–133, 110 Stat. 1321, April 26, 1996), and the Office of Management and Budget (OMB) Circular A–25. Under DOI's implementing policy, BSEE is required to charge the full cost for services that provide special benefits or privileges to an identifiable non-Federal recipient above and beyond those which accrue to the public at large. At 30 CFR 250.125(a), the regulations provide that BSEE will periodically adjust fees for inflation according to changes in the Implicit Price Deflator for Gross Domestic Product (IPD–GDP), which is published quarterly by the U.S. Department of Commerce, Bureau of Economic Analysis (BEA).

The DOI finds that good cause exists under the Administrative Procedure Act (5 U.S.C. 553(b)(B)) to implement this final rule without prior public notice and comment for these inflation adjustments. The BSEE provided the public with an opportunity to comment on this procedure during the public comment period when it promulgated 30 CFR 250.125(a), and this new rule simply implements the procedure set forth in that regulation. The calculation of these adjustments is based on the change in the BEA IPD–GDP. The amount of the adjustment is not within BSEE's discretion. Accordingly, public notice and comment procedures are unnecessary.

The DOI also finds that good cause exists under 5 U.S.C. 553(d)(3) to implement this final rule with an effective date sooner than 30 days after publication. An effective date of October 1, 2013 allows BSEE to align implementation of the final rule with the beginning of the fiscal year. This final rule will not affect the operations of the parties to which it applies. These parties will only need to increase the dollar amount of the cost recovery fee payments that are prospectively submitted to BSEE. Accordingly, waiting 30 days after publication to make this final rule effective is unnecessary.

IV. Discussion of Final Rule

In this final rule, BSEE is adjusting cost recovery service fees to account for inflation in accordance with 30 CFR 250.125(a). These cost recovery service fees were last updated on August 25, 2008, when the MMS published a final rule on Electronic Payment of Fees for Outer Continental Shelf Activities in the **Federal Register** (73 FR 49943). The 2008 update included fee adjustment through the year 2007. This final rule is based on the change in the IPD–GDP from 2007 through 2012, thus reflecting the rate of inflation over 5 years.

The inflation rate between any 2 years is calculated as the percentage difference between the measure of the level of prices for a designated year (*e.g.,* 2012) and some previous year (*e.g.,* 2007) of all new, domestically produced, final goods and services in the economy for the designated year (*e.g.,* 2012), as contained in the BEA Table 1.1.9, IPD–GDP available at *http://www.bea.gov/iTable/index_nipa.cfm.* The BEA Table 1.1.9 IPD–GDP shows a percentage difference between the measure of the level of prices between 2012 and 2007 of 7.87 percent. The 2013 cost recovery service fees are calculated by increasing the 2008 cost recovery service fee value by 7.87 percent. The calculated value is rounded to the nearest dollar to establish the 2013 cost recovery service fee.

While BEA may revise the inflation rate in the future, BSEE will retain this published cost recovery service fee schedule until BSEE publishes an updated cost recovery service fee schedule in the **Federal Register**.

The following table lists the cost recovery service fees that are affected by this rulemaking. The BSEE is also making a few minor revisions to the numbering of the cost recovery service fees and the 30 CFR citations in the cost recovery service fee table in 30 CFR 250.125(a).

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Service—processing of the following:	30 CFR citation	2008 Fee Amount (Current)	2013 Fee Amount
(1) Suspension of Operations/ Suspension of Production (SOO/SOP) Request	§ 250.171(e).	$1,968	$2,123
(2) Deepwater Operations Plan	§ 250.292(p).	$3,336	$3,599
(3) Application for Permit to Drill (APD; Form BSEE-0123)	§ 250.410(d); § 250.513(b); § 250.1617(a).	$1,959 for initial applications only; no fee for revisions	$2,113 for initial applications only; no fee for revisions
(4) Application for Permit to Modify (APM; Form BSEE-0124)	§ 250.465(b); § 250.513(b); § 250.613(b); § 250.1618(a); § 250.1704(g).	$116	$125
(5) New Facility Production Safety System Application for facility with more than 125 components	§ 250.802(e).	$5,030 A component is a piece of equipment or ancillary system that is protected by one or more of the safety devices required by API RP 14C (as incorporated by reference in § 250.198); $13,238 additional fee will be charged if BSEE deems it necessary to visit a facility offshore, and $6,884 to visit a facility in a shipyard.	$5,426 A component is a piece of equipment or ancillary system that is protected by one or more of the safety devices required by API RP 14C (as incorporated by reference in § 250.198); $14,280 additional fee will be charged if BSEE deems it necessary to visit a facility offshore, and $7,426 to visit a facility in a shipyard.
(6) New Facility Production Safety System Application for facility with 25-125 components	§ 250.802(e)	$1,218 Additional fee of $8,313 will be charged if BSEE deems it necessary to visit a facility offshore, and $4,766 to visit a facility in a shipyard.	$1,314 Additional fee of $8,967 will be charged if BSEE deems it necessary to visit a facility offshore, and $5,141 to visit a facility in a shipyard.
(7) New Facility Production Safety System Application for facility with fewer than 25 components	§ 250.802(e).	$604	$652
(8) Production Safety System Application—Modification with more than 125 components reviewed	§ 250.802(e).	$561	$605

Service—processing of the following:	30 CFR citation	2008 Fee Amount (Current)	2013 Fee Amount
(9) Production Safety System Application—Modification with 25-125 components reviewed	§ 250.802(e).	$201	$217
(10) Production Safety System Application—Modification with fewer than 25 components reviewed	§ 250.802(e).	$85	$92
(11) Platform Application—Installation—Under the Platform Verification Program	§ 250.905(l).	$21,075	$22,734
(12) Platform Application—Installation—Fixed Structure Under the Platform Approval Program	§ 250.905(l).	$3,018	$3,256
(13) Platform Application—Installation—Caisson/Well Protector	§ 250.905(l).	$1,536	$1,657
(14) Platform Application—Modification/Repair	§ 250.905(l).	$3,601	$3,884
(15) New Pipeline Application (Lease Term)	§ 250.1000(b).	$3,283	$3,541
(16) Pipeline Application—Modification (Lease Term)	§ 250.1000(b).	$1,906	$2,056
(17) Pipeline Application—Modification (ROW)	§ 250.1000(b).	$3,865	$4,169
(18) Pipeline Repair Notification	§ 250.1008(e).	$360	$388
(19) Pipeline Right-of-Way (ROW) Grant Application	§ 250.1015(a).	$2,569	$2,771
(20) Pipeline Conversion of Lease Term to ROW	§ 250.1015(a).	$219	$236
(21) Pipeline ROW Assignment	§ 250.1018(b).	$186	$201

Service—processing of the following:	30 CFR citation	2008 Fee Amount (Current)	2013 Fee Amount
(22) 500 Feet From Lease/Unit Line Production Request	§ 250.1156(a).	$3,608	$3,892
(23) Gas Cap Production Request	§ 250.1157.	$4,592	$4,953
(24) Downhole Commingling Request	§ 250.1158(a).	$5,357	$5,779
(25) Complex Surface Commingling and Measurement Application	§ 250.1202(a); § 250.1203(b); § 250.1204(a).	$3,760	$4,056
(26) Simple Surface Commingling and Measurement Application	§ 250.1202(a); § 250.1203(b); § 250.1204(a).	$1,271	$1,371
(27) Voluntary Unitization Proposal or Unit Expansion	§ 250.1303(d).	$11,698	$12,619
(28) Unitization Revision	§ 250.1303(d).	$831	$896
(29) Application to Remove a Platform or Other Facility	§ 250.1727.	$4,342	$4,684
(30) Application to Decommission a Pipeline (Lease Term)	§ 250.1751(a) or § 250.1752(a).	$1,059	$1,142
(31) Application to Decommission a Pipeline (ROW)	§ 250.1751(a) or § 250.1752(a).	$2,012	$2,170

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Procedural Matters

Regulatory Planning and Review (Executive Order 12866)

The OMB has not designated this rule as significant under Executive Order (E.O.) 12866.

(1) These amendments are administrative and procedural. This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. A cost-benefit and economic analysis is not required.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues.

Regulatory Flexibility Act

The DOI certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The changes in the rule will affect lessees and pipeline right-of-way holders in the OCS. This includes about 130 Federal oil and gas lessees and 115 holders of pipeline rights-of-way. Small lessees that operate under this rule fall under the Small Business Administration's North American Industry Classification System (NAICS) codes 211111, Crude Petroleum and Natural Gas Extraction, and 213111, Drilling Oil and Gas Wells. For these NAICS code classifications, a small company is one with fewer than 500 employees. Based on these criteria, an estimated 69 percent of these companies are considered small.

This final rule, therefore, will affect a substantial number of small entities, but BSEE has concluded that it will not have a significant economic effect on those entities. The cost recovery service fees increase less than 8 percent as a result of this final rule. The highest adjustment, in dollar terms, is for Platform Application—Installation—Under the Platform Verification Program, which will be increased by $1,659. This dollar amount is insignificant as compared to the considerable operational costs and liability risks associated with activities on the OCS.

Your comments are important. The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency

enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the actions of BSEE, call 1–888–734–3247. You may comment to the Small Business Administration without fear of retaliation. Allegations of discrimination/retaliation filed with the Small Business Administration will be investigated for appropriate action.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*). This rule:

a. Will not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The requirements will apply to all entities operating on the OCS.

Unfunded Mandates Reform Act of 1995

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

Takings Implication Assessment (E.O. 12630)

According to E.O. 12630, the rule does not have significant takings implications. The rulemaking is not a governmental action capable of interfering with constitutionally protected property rights. A Takings Implication Assessment is not required.

Federalism (E.O. 13132)

Under the criteria in E.O. 13132, this rulemaking does not have federalism implications. This rule will not substantially and directly affect the relationship between the Federal and State governments. To the extent that State and local governments have a role in OCS activities, this rule will not affect that role. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (E.O. 13175)

Under the criteria in E.O. 13175, we evaluated this rule and determined that it has no substantial effects on federally recognized Indian tribes.

Paperwork Reduction Act (PRA) of 1995

This rule does not contain new information collection requirements and a submission under the PRA is not required. Therefore, an information collection request is not being submitted to OMB for review and approval under the PRA (44 U.S.C. 3501 *et seq.*).

National Environmental Policy Act of 1969 (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. The BSEE has analyzed this rule under the criteria of NEPA and DOI's regulations implementing NEPA. This rule meets the criteria set forth at 43 CFR 46.210(i) for a Departmental Categorical Exclusion in that this rule is ''. . . of an administrative, financial, legal, technical, or procedural nature . . .'' Further, BSEE has analyzed this rule to determine if it meets any of the extraordinary circumstances that would require an environmental assessment or an environmental impact statement as set forth in 43 CFR 46.215 and concluded that this rule does not meet any of the criteria for extraordinary circumstances.

Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L.106–554, app. C § 515, 114 Stat. 2763, 2763A–153–154).

Effects on the Nation's Energy Supply (E.O. 13211)

This rulemaking is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

List of Subjects in 30 CFR Part 250

Administrative practice and procedure, Continental shelf, Oil and gas exploration, Pipelines, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, and Sulphur.

Dated: September 23, 2013.

Tommy P. Beaudreau,

Acting Assistant Secretary—Land and Minerals Management.

For the reasons stated in the preamble, the Bureau of Safety and Environmental Enforcement (BSEE) amends 30 CFR part 250 as follows:

PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 1. Authority citation for part 250 continues to read as follows:

Authority: 30 U.S.C. 1751; 31 U.S.C. 9701, 43 U.S.C. 1334.

■ 2. Revise the table in § 250.125(a) to read as follows:

§ 250.125 Service fees.

(a) * * *

BILLING CODE 4310–VH–P

Service—processing of the following:	Fee Amount	30 CFR citation
(1) Suspension of Operations/Suspension of Production (SOO/SOP) Request	$2,123	§ 250.171(e).
(2) Deepwater Operations Plan	$3,599	§ 250.292(p).
(3) Application for Permit to Drill (APD; Form BSEE-0123)	$2,113 for initial applications only; no fee for revisions.	§ 250.410(d); § 250.513(b); § 250.1617(a).
(4) Application for Permit to Modify (APM; Form BSEE-0124)	$125	§ 250.465(b); § 250.513(b); § 250.613(b); § 250.1618(a); § 250.1704(g).
(5) New Facility Production Safety System Application for facility with more than 125 components	$5,426 A component is a piece of equipment or ancillary system that is protected by one or more of the safety devices required by API RP 14C (as incorporated by reference in § 250.198); $14,280 additional fee will be charged if BSEE deems it necessary to visit a facility offshore, and $7,426 to visit a facility in a shipyard.	§ 250.802(e).
(6) New Facility Production Safety System Application for facility with 25-125 components	$1,314 Additional fee of $8,967 will be charged if BSEE deems it necessary to visit a facility offshore, and $5,141 to visit a facility in a shipyard.	§ 250.802(e).
(7) New Facility Production Safety System Application for facility with fewer than 25 components	$652	§ 250.802(e).
(8) Production Safety System Application—Modification with more than 125 components reviewed	$605	§ 250.802(e).
(9) Production Safety System Application—Modification with 25-125 components reviewed	$217	§ 250.802(e).
(10) Production Safety System Application—Modification with fewer than 25 components reviewed	$92	§ 250.802(e).
(11) Platform Application—Installation—Under the Platform Verification Program	$22,734	§ 250.905(l).

(12) Platform Application—Installation—Fixed Structure Under the Platform Approval Program	$3,256	§ 250.905(l).
(13) Platform Application—Installation—Caisson/Well Protector	$1,657	§ 250.905(l)
(14) Platform Application—Modification/Repair	$3,884	§ 250.905(l).
(15) New Pipeline Application (Lease Term)	$3,541	§ 250.1000(b).
(16) Pipeline Application—Modification (Lease Term)	$2,056	§ 250.1000(b).
(17) Pipeline Application—Modification (ROW)	$4,169	§ 250.1000(b).
(18) Pipeline Repair Notification	$388	§ 250.1008(e).
(19) Pipeline Right-of-Way (ROW) Grant Application	$2,771	§ 250.1015(a).
(20) Pipeline Conversion of Lease Term to ROW	$236	§ 250.1015(a).
(21) Pipeline ROW Assignment	$201	§ 250.1018(b).
(22) 500 Feet From Lease/Unit Line Production Request	$3,892	§ 250.1156(a).
(23) Gas Cap Production Request	$4,953	§ 250.1157.
(24) Downhole Commingling Request	$5,779	§ 250.1158(a).
(25) Complex Surface Commingling and Measurement Application	$4,056	§ 250.1202(a); § 250.1203(b); § 250.1204(a).
(26) Simple Surface Commingling and Measurement Application	$1,371	§ 250.1202(a); § 250.1203(b); § 250.1204(a).
(27) Voluntary Unitization Proposal or Unit Expansion	$12,619	§ 250.1303(d).
(28) Unitization Revision	$896	§ 250.1303(d).
(29) Application to Remove a Platform or Other Facility	$4,684	§ 250.1727.
(30) Application to Decommission a Pipeline (Lease Term)	$1,142	§ 250.1751(a) or § 250.1752(a).
(31) Application to Decommission a Pipeline (ROW)	$2,170	§ 250.1751(a) or § 250.1752(a).

* * * * *

[FR Doc. 2013–23874 Filed 9–30–13; 8:45 am]

BILLING CODE 4310–VH–C

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[USCG–2013–0760]

RIN 1625–AA11

Regulated Navigation Area; Reporting Requirements for Barges Loaded With Certain Dangerous Cargoes, Inland Rivers, Eighth Coast Guard District; Extension of Stay (Suspension)

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Commander, Eighth Coast Guard District is extending the previously published stay (suspension) of reporting requirements under the Regulated Navigation Area (RNA) established by 33 CFR 165.830 for barges loaded with certain dangerous cargoes (CDC barges) in the inland rivers of the Eighth Coast Guard District. This extension is necessary because the Coast Guard continues to analyze future reporting needs and evaluate possible changes in CDC reporting requirements. This extension of the suspension of the CDC reporting requirements in no way relieves towing vessel operators and fleeting area managers responsible for CDC barges in the RNA from their dangerous cargo or vessel arrival and movement reporting obligations currently in effect under other regulations or placed into effect under appropriate Coast Guard authority.

DATES: Effective midnight September 30, 2013, 33 CFR 165.830(d), (f), (g), and (h) are stayed until midnight December 31, 2015.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2013–0760. 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 about this temporary rule, call or email LT Jason Doherty, Coast Guard; telephone 504–671–2266, email: *Jason.C.Doherty@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

CDC Certain Dangerous Cargo
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)(3)(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 would be impracticable, unnecessary, and contrary to the public interest.

The contract for the CDC barge reporting system at the Inland River Vessel Movement Center (IRVMC) expired in January 2011. Due to the expiration of this contract, the Coast Guard is not able to receive and process reports. Therefore in late December 2010, the Coast Guard decided to suspend the IRVMC reporting requirements for a two-year period. This suspension was published in the **Federal Register** at 76 FR 1360 (January 10, 2011), and was due to expire on January 15, 2013. On January 2, 2013, the Coast Guard extended this suspension until midnight, September 30, 2013 (78 FR 25).

At this time, there is no plan to renew the contract for the CDC barge reporting system, and the Coast Guard is still considering whether to enter into a new contract and lift the suspension, modify the reporting requirements in the RNA, or repeal the RNA completely. Additionally, the Coast Guard has proposed a rule that would require vessels in this area to install and carry Automatic Identification Systems (AIS). See Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System notice of proposed rulemaking (73 FR 76295, December 16, 2008). These requirements, if imposed, may provide a suitable alternative to the stayed reporting requirements of 33 CFR 165.830. Therefore, an additional extension of the stay is necessary while the Coast Guard continues to evaluate these options.

We believe prior notice and comment is unnecessary because we expect the affected public will have no objection to the extension of the temporary suspension of regulatory requirements. This suspension has been in place since January 2011, and the Coast Guard has received no public comment or objection regarding the suspension. Prior notice and comment is also contrary to the public interest because there is no public purpose served by continuing to require reports when there is no mechanism for receiving or processing those reports.

Under 5 U.S.C. 553(d)(1), a substantive rule that relieves a restriction may be made effective less than 30 days after publication. This temporary final rule, suspending the reporting requirements and thereby relieving the regulatory restriction on towing vessel operators and fleeting area managers provided by 33 CFR 165.830, takes effect at midnight on September 30, 2013, less than 30 days after publication.

B. Basis and Purpose

The legal basis for this rulemaking is the Coast Guard's authority to establish regulated navigation areas, under 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1. An RNA is a water area within a defined boundary for which regulations for vessels navigating within the area have been established, to control vessel traffic in a place determined to have hazardous conditions. See 33 CFR 165.10; Commandant Instruction Manual M16704.3A, 1–6.

The purpose of this temporary final rule is to extend the previously published suspension of the reporting requirements for CDC barges imposed by the RNA created in 33 CFR 165.830. This temporary rule relieves the towing vessel operators and fleeting area managers responsible for CDC barges from the reporting requirements for an additional 2-year period.

C. Discussion of the Final Rule

During the extended period for the suspension of reporting requirements, towing vessel operators and fleeting area managers responsible for CDC barges will be relieved of their obligation to

report their CDCs under 33 CFR 165.830(d), (f), (g), and (h). This suspension in no way relieves towing vessel operators and fleeting area managers responsible for CDC barges from their dangerous cargo or vessel arrival and movement reporting obligations currently in effect under other regulations or placed into effect under appropriate Coast Guard authority. This stay is extended until December 31, 2015.

D. Regulatory Analyses

We developed this temporary final rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 14 of these statutes or executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that Order. This rule is temporary and limited in nature by extending the previously published suspension of CDC barge reporting requirements for an additional 2-year period, creating no undue delay to vessel traffic in the regulated area.

2. 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 will affect the following entities, some which may be small entities: Owners or operators of CDC barges intending to transit the Inland Rivers in the Eighth Coast Guard District during this two-year period. This rule will not have a significant economic impact on those entities or a substantial number of any small entities because this rule suspends reporting requirements for two years.

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 calls for no 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 State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it 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 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 which do not

individually or cumulatively have a significant effect on the human environment. This rule involves a 2-year extension of a previously published suspension of reporting requirements established for CDC barges transiting the inland rivers of the Eighth Coast Guard District. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. Under figure 2–1, paragraph (34)(g), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

§ 165.830 [Amended]

■ 2. Amend 33 CFR 165.830 by staying paragraphs (d), (f), (g), and (h) from midnight September 30, 2013 to midnight December 31, 2015.

Dated: September 17, 2013.

Kevin S. Cook,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 2013–23858 Filed 9–30–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0196]

RIN 1625–AA00

Safety Zone; Old Mormon Slough, Stockton, CA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a safety zone at: McCormick & Baxter superfund site, Old Mormon Slough, Stockton, CA. This safety zone supports ongoing efforts by the Environmental Protection Agency (EPA) to decontaminate soil, groundwater, and sediment in Old Mormon Slough and the surrounding basin. This safety zone restricts vessels from entering Old Mormon Slough and disturbing the existing sediment cap needed for site decontamination. This safety zone reduces human health and environmental risks associated with clean up efforts at McCormick & Baxter superfund site.

DATES: This rule is effective October 31, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0196]. 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 Junior Grade Blake Morris, Waterways Management Division, U.S. Coast Guard; telephone 510–437–3801, email *Blake.J.Morris@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:

A. Regulatory History and Information

On July 17, 2013, we published a Notice of Proposed Rulemaking (NPRM) entitled Safety Zones: Old Mormon Slough, Stockton, CA, in the **Federal Register** (76 FR 17102). We received no comments on the NPRM, or a request for public meeting. A public meeting was not held.

B. Basis and Purpose

The Coast Guard is conducting this rulemaking under the authority of 33 U.S.C. 1231.

The purpose of this rule is to establish a safety zone in Old Mormon Slough to further the efforts of the EPA to rehabilitate soil, sediment, and ground water from contaminates of the McCormick & Baxter Creosoting Company. The McCormick & Baxter Creosoting Co. site is a 29-acre former wood-preserving facility located in an industrial area near the Port of Stockton. Old Mormon Slough, which is connected to the Stockton Deepwater Channel, borders the site on the north. Except for an 8-acre portion of the site owned by Southern Pacific Railroad Company, McCormick & Baxter owns the entire property. From 1942 to 1990, McCormick & Baxter treated utility poles and railroad ties with creosote, pentachlorophenol (PCP), and compounds of arsenic, chromium and copper. Wood treating chemicals were stored in tanks, and oily waste generated by the wood-treatment process was stored in unlined ponds and concrete tanks on the site. The site came to the attention of state agencies in 1977 when a fish kill in New Mormon Slough and the Stockton Deepwater Channel was attributed to a release of PCP-contaminated storm water runoff from the McCormick & Baxter facility. In 1978, McCormick & Baxter constructed a perimeter dike to prevent storm water runoff from the site and installed two storm water collection ponds. The unlined oily waste ponds were closed in 1981. Sampling has shown that soils throughout the site and groundwater in the shallow aquifer beneath the site are contaminated with PCP, various constituents of creosote, dioxin (a contaminant in industrial-grade PCP) and metals. Soil contamination extends to greater than 40 feet below ground surface (BGS) in the central processing area of the site. Site investigations indicate that the shallow aquifer (0–200 ft BGS) is connected with the deeper aquifer, which is a drinking water source. However, no drinking water supplies are currently threatened by site-related contamination. Approximately 105,000 people live and work within 4 miles of the site. Sediment in Old Mormon Slough adjacent to the site is also contaminated, primarily with polycyclic aromatic hydrocarbons (PAHs) and dioxin. Site-related contaminants have been detected in fish caught in the vicinity of the site. People fish in the Stockton Channel and in Old Mormon Slough, although the McCormick & Baxter site is fenced and posted with warning signs.

Previous testing conducted by the EPA found soils and groundwater were contaminated with PCP, dioxin, PAHs, which are constituents of creosote, arsenic, chromium, and copper. In addition, non-aqueous phase liquids (NAPLs) are widespread beneath the site. Sediment in Old Mormon Slough adjacent to the site is also contaminated, primarily with PAHs and dioxin. Individuals who accidentally ingest or

come in direct contact with contaminated soil, sediment or groundwater could be at risk. Drinking water from the deep aquifer has not been affected by any contaminants from the McCormick & Baxter site. Oily seeps from the former oily waste ponds into Old Mormon Slough occurred in the past, although the seeps are now controlled. Site-related contaminants have been found in locally-caught fish, which may be consumed by nearby fishermen and their families. Sediment contamination also poses an environmental threat to aquatic organisms in the vicinity of the site.

The EPA is actively making efforts to control human exposure to contaminates via direct contact or ingestion in Old Mormon Slough as well as protect the decontamination process. The installation of storm water collection ponds and perimeter dike, site security improvements, chemical and sludge disposal, demolition and disposal of processing equipment and site structures, construction of a sheet piling wall along Old Mormon Slough, excavation and backfilling at the oily waste pond area, installation of a cap over the most heavily contaminated central portion of the site, and installation of a sand cap in Old Mormon Slough have reduced threats to public health and the environment from these areas of the site.

C. Discussion of Comments, Changes and the Final Rule

The Coast Guard received no comments or request for a public meeting after publishing the NPRM for this rule. Therefore, no changes have been made to the regulatory text of this rule.

The Coast Guard is amending 33 CFR part 165 to establish a safety zone in Old Mormon Slough to help effect the rehabilitation process at the McCormick & Baxter superfund site. This amendment is necessary to prevent pleasure craft from disturbing the sediment cap in Old Mormon Slough. The EPA had previously established a log boom at the waterway entrance. However, tidal influences and heavy weather, at times, caused the log boom to shift and allow vessels unrestricted access. It is imperative for proper rehabilitation that control measures beyond physical are implemented to restrict waterside interaction and allow contaminates to dissipate.

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. We expect the economic impact of this rule does not rise to the level of necessitating a full Regulatory Evaluation.

2. Impact on Small Entities

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

(1) This rule would affect the following entities, some of which may be small entities: The owners or operators of vessels engaged in recreational activities intending to transit, anchor or fish in the Old Mormon Slough.

(2) This safety zone would not have a significant economic impact on a substantial number of small entities because it is limited to a narrowly tailored geographic area. There has been no indication that small entities currently have a significant interest in this site.

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 calls for no 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 have 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 expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and

Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded 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 protection of the sediment cap and ongoing efforts by the EPA to reduce human health risks. This rule is categorically excluded under section 2.B.2, figure 2–1, paragraph (34)(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Navigation (water) and Waterways.

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

PART 165—SAFETY ZONES

■ 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. Add § 165.1201 to read as follows:

§ 165.1201 Safety Zone; Old Mormon Slough, Stockton California.

(a) *General.* This safety zone is established to protect environmental rehabilitation efforts and prevent vessels from disturbing the sediment cap at Old Mormon Slough.

(b) *Regulation.* All vessels and personnel not associated with the EPA are prohibited from entering into and transiting Old Mormon Slough. Old Mormon Slough is defined as all waters Eastward from the connection of coordinates 37°57′02.13″ North, 121°18′49.55″ West and 37°57′01.11″ North, 121°18′46.75″ West (NAD 83).

(c) Each person in a safety zone who has notice of a lawful order or direction shall obey the order or direction of the Captain of the Port (COTP) or District Commander issued to carry out the purposes of this subpart.

(d) The Coast Guard may be assisted in enforcing this rule by other Federal, state, or local agencies.

Dated: September 10, 2013.

K.L. Schultz,

Rear Admiral, U.S. Coast Guard, Commander, Eleventh Coast Guard District.

[FR Doc. 2013–23859 Filed 9–30–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2013–0623]

RIN 1625–AA00

Safety Zone; Fireworks Display, Willamette River, Oregon City, OR

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone in Oregon City, OR. This safety zone is necessary to help ensure the safety of the maritime public during a fireworks display and will do so by prohibiting unauthorized persons and vessels from entering the safety zones unless authorized by the Sector Columbia River Captain of the Port or his designated representatives.

DATES: This rule is effective on October 5, 2013 from 8:00 p.m. to 8:30 p.m.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0623]. 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 LTJG Ian McPhillips, Waterways Management Division, Marine Safety Unit Portland, Coast Guard; telephone 503–240–9319, email *msupdxwwm@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

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

A. 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, the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule. Waiting for a 30 day notice period to run would be impracticable and contrary to the public interest. The Coast Guard did not receive the necessary information in time for this regulation to undertake both an NPRM and a 30 day delayed effective date. Additionally, waiting for a 30 day notice period to run would be impracticable as delayed promulgation may result in injury or damage to persons and vessels from the hazards associated with fireworks displays.

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** due to the late notification of this event and that the event will have occurred before comments could have been taken.

B. Basis and Purpose

Coast Guard Captains of the Port are granted authority to establish safety and security zones in 33 CFR 1.05–1(f) for safety and environmental purposes as described in 33 CFR part 165.

Fireworks displays create hazardous conditions for the maritime public because of the large number of vessels that congregate near the displays, as well as the noise, falling debris, and explosions that occur during the event. This safety zone is necessary in order to reduce vessel traffic congestion in the proximity of fireworks discharge sites to prevent vessel traffic within the fallout zone of the fireworks.

C. Discussion of the Temporary Final Rule

This rule establishes one safety zone in the Sector Columbia River Captain of the Port Zone.

The safety zone would be established to encompass all waters of the Willamette River south of the I–205 Bridge and north of the Oregon City Bridge, Oregon City, OR. The safety zone will encompass approximately 1,000 feet of river length. This event will be held on Saturday, October 5, 2013 from 8:00 p.m. to 8:30 p.m.

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. The Coast Guard has made this determination based on the fact that the safety zone created by this rule will not significantly affect the maritime public because vessels may still coordinate their transit with the Coast Guard in the vicinity of the safety zone.

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.

(1) This rule may affect the following entities, some of which may be small entities: The owners and operators of vessels intending to operate in the area covered by the safety zone. This safety zone will not have a significant economic impact on a substantial number of small entities because the area can still be used to transit with permission of the Captain of the Port. The rule will not have a significant economic impact on a substantial number of small entities because the safety zone will only be in effect late in the evening when vessel traffic is low. Before the effective period, we will publish advisories in the Local Notice to Mariners available to users of the river. Maritime traffic will be able to schedule their transits around the safety zone.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain 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 expenditure, we do not 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 creation of one safety zone during fireworks displays to protect maritime public. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, 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(g), 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–259 to read as follows:

§ 165.T13–259 Safety Zone; Clackamas County Tourism Fireworks Display, Oregon City, OR.

(a) *Safety zones.* The following area is a designated safety zone:

(1) *Location.* All waters of the Willamette River, Oregon City, OR, between the I–205 Bridge and the Oregon City Bridge.

(2) *Enforcement period.* This event will be held on October 5, 2013 from 8:00 p.m. to 8:30 p.m.

(b) *Regulations.* In accordance with the general regulations in 33 CFR Part 165, subpart C, no person may enter or remain in the safety zone created in this section or bring, cause to be brought, or allow to remain in the safety zone created in this section any vehicle, vessel, or object unless authorized by the Captain of the Port or his designated representative. The Captain of the Port may be assisted by other Federal, State, or local agencies with the enforcement of the safety zone.

Dated: September 10, 2013.

S.C. MacKenzie,

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

[FR Doc. 2013–23860 Filed 9–30–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0868]

RIN 1625–AA00

Safety Zone; Motion Picture Stunt Work and Filming; Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing five temporary safety zones on waterways near Chicago, IL. These safety zones are intended to restrict vessels from portions of Chicago waterways due to the filming of a motion picture. These temporary safety zones are necessary to protect the surrounding public and vessels from the hazards associated with the stunt work, pyrotechnics, low-flying helicopter, and other hazards involved in the filming of a motion picture.

DATES: This rule is effective from 6 a.m. on October 1 through 12 a.m. on October 31, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2013–0868. 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
FR Federal Register
NPRM Notice of Proposed Rulemaking
TFR Temporary Final Rule

A. Regulatory History and Information

On August 20, 2013, the Coast Guard published a TFR (USCG–2013–0676) entitled Safety Zone; Motion Picture Production; Chicago, IL in the **Federal Register** (78 FR 20241). Because this motion picture production—with associated hazards—is expected to continue into October, the Coast Guard is issuing this TFR to keep five safety zones, in the same locations as previously established, in place during the month of October 2013.

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 and contrary to the public interest. The movie production company informed the Coast Guard of delays in filming and changes of schedule that pushed filming into October, leaving the Coast Guard without the time to complete an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be both impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect spectators and vessels from the hazards associated with the filming of a motion picture, 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.

From October 1 through October 31, 2013 the Coast Guard anticipates that a motion picture corporation will film scenes for a motion picture on portions of the Chicago River, Calumet Harbor, and Chicago Sanitary and Ship Canal. In early to mid October the Coast Guard anticipates filming and stunt work on the Chicago Sanitary and Ship Canal in the vicinity of the South Damen Avenue Bridge. This shooting sequence is expected to involve pyrotechnics. Filming is also expected to continue in the vicinity of the north breakwall within Calumet Harbor, as well as the Chicago River System.

The Captain of the Port, Lake Michigan, has determined that this filming event—with associated stunt work, pyrotechnics, and low-flying helicopters—will pose a significant risk to public safety and property. Such hazards include the collision of stunt, film, and spectator vessels in a congested area. Other hazards include falling wreckage, as well as injuries associated with debris propelled by helicopter rotor-wash.

The Coast Guard anticipates that the safety zones created by this temporary rule will not be enforced every day between October 1 and October 31, 2013. Because of the possibility of bad weather on one or more of the filming days, and considering the unpredictability involved in filming a motion picture, this rule was written with a wider range of dates and times to give the Coast Guard flexibility to accommodate changes in the film schedule between October 1 and October 31, 2013.

C. Discussion of the Final Rule

With the aforementioned hazards in mind, the Captain of the Port, Lake Michigan, has determined that five temporary safety zones are necessary to ensure the safety of persons and vessels during the filming of a motion picture on the Chicago River, Chicago Sanitary and Ship Canal, and Calumet Harbor. This rule is effective from 6 a.m. on October 1 until 12 a.m. on October 31, 2013. This rule will be enforced from 6 a.m. to 12 a.m. on intermittent dates between October 1 through October 31, 2013.

During this date range, these safety zones will be enforced during the time of filming and associated stunt work, between 6 a.m. and 12 a.m. The Coast Guard will issue a Broadcast Notice to Mariners to provide the public with advanced notice of those days that these safety zones will be enforced. The Coast Guard on-scene Captain of the Port Representative will provide actual notice on-scene.

Five safety zones will be established as follows:

—All waters of Lake Michigan, Calumet Harbor west of an imaginary line connecting 41°44′29.4″ N, 087°31′33.9″ W and 41°44′21″ N, 087°31′47.12″ W (NAD 83).

—All waters of the South Branch of the Chicago River from position 41°52′19.03″ N, 087°38′08.7″ W, then approximately 1380 yards south to position 41°51′36.5″ N, 087°38′04.7″ W (NAD 83).

—All waters of the Chicago River from an imaginary line connecting positions 41°53′11.6″ N, 087°38′20.5″ W and 41°53′14.0″ N, 087°38′17.2″ W, then east to the North Orleans Street Bridge in position 41°53′15.84″ N, 087°38′09.16″ W, then south along the south branch of the river to the vicinity of the West Van Buren Street Bridge in position 41°52′36.4″ N, 087°38′15.8″ W (NAD 83).

—All waters of the Chicago River from the West Lake Street Bridge in position 41°53′8.6″ N, 087°38′15.9″ W, then north to an imaginary line connecting positions 41°53′11.6″ N, 087°38′20.5″ W and 41°53′14.0″ N, 087°38′17.2″ W, then east along the main branch of the river to a position of 41°53′19″ N, 087°36′33″ W (NAD 83) in the vicinity of the North Lake Shore Drive Bridge.

—All waters of the Chicago Sanitary and Ship Canal within a 1000 foot radius of a position at 41°50′28.5″ N, 087°40′22.7″ W (NAD 83) in the vicinity of the South Damen Avenue bridge.

Entry into, transiting, or anchoring within the safety zones 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 (DHS).

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 zones created by this rule will be small and enforced for a limited time on a limited number of days in October of 2013. Under certain conditions, moreover, vessels may still transit through the safety zones 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 the Chicago River, Calumet Harbor, or Chicago Sanitary and Ship Canal during the times in which the safety zones are enforced in October, 2013.

These safety zones 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 these zones, 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 safety zones 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**. We seek any comments or information that may lead to the

discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, 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.T09–0868 to read as follows:

§ 165.T09–0868 Safety Zone; Motion Picture Stunt Work and Filming; Chicago, IL.

(a) *Safety Zones.* The following are designated as safety zones:

(1) All waters of Lake Michigan, Calumet Harbor, west of an imaginary line connecting 41°44′29.4″ N, 087°31′33.9″ W and 41°44′21″ N, 087°31′47.12″ W (NAD 83).

(2) All waters of the South Branch of the Chicago River from position 41°52′19.03″ N, 087°38′08.7″ W, then approximately 1380 yards south to position 41°51′36.5″ N, 087°38′04.7″ W (NAD 83).

(3) All waters of the Chicago River from an imaginary line connecting positions 41°53′11.6″ N, 087°38′20.5″ W and 41°53′14.0″ N, 087°38′17.2″ W, then east to the North Orleans Street Bridge in position 41°53′15.84″ N, 087°38′09.16″ W, then south along the south branch of the river to the vicinity of the West Van Buren Street Bridge in position 41°52′36.4″ N, 087°38′15.8″ W (NAD 83).

(4) All waters of the Chicago River from the West Lake Street Bridge in position 41°53′8.6″ N, 087°38′15.9″ W, then north to an imaginary line connecting positions 41°53′11.6″ N, 087°38′20.5″ W and 41°53′14.0″ N, 087°38′17.2″ W, then east along the main branch of the river to a position of 41°53′19″ N, 087°36′33″ W (NAD 83) in the vicinity of the North Lake Shore Drive Bridge.

(5) All waters of the Chicago Sanitary and Ship Canal within a 1,000 foot radius of a position at 41°50′28.5″ N, 087°40′22.7″ W (NAD 83) in the vicinity of the South Damen Avenue bridge.

(b) *Effective and Enforcement Period.* These zones are effective from 6 a.m. on October 1 until 12 a.m. on October 31, 2013. This rule will be enforced from 6 a.m. to 12 a.m. on intermittent dates between October 1 through October 31, 2013.

(c) *Regulations.*

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

(2) These safety zones are 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 zones 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 zones must comply with all directions given to them by the Captain of the Port, Lake Michigan, or his on-scene representative.

Dated: September 24, 2013.

M.W. Sibley,

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

[FR Doc. 2013–23861 Filed 9–30–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0955; FRL–9901–40–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia; Removal of Obsolete Regulations and Updates to Citations to State Regulations Due to Recodification; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; correction.

SUMMARY: This document contains a correction to the direct final rule, which was published on Thursday, June 6, 2013. The regulations related to removal of over fifty rules in the Code of Federal Regulations (CFR) for Delaware, the District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia because they are unnecessary or obsolete. Errors in the amendatory instruction are identified and corrected in this action.

DATES: Effective October 1, 2013.

FOR FURTHER INFORMATION CONTACT: Harold A. Frankford, (215) 814–2108, or by email at *frankford.harold@epa.gov.*

SUPPLEMENTARY INFORMATION:

Background

In a direct final rule published on June 6, 2013 (78 FR 33977), Amendatory Instruction Number 33 for § 52.2063 was incorrectly stated. This document corrects this amendatory instruction and set-out text to read as follows:

Need for Correction

As published, the final regulations contain an error in the amendatory instruction and set-out text:

List of Subjects in 40 CFR part 52

Air pollution control, Carbon monoxide, Environmental Protection Agency, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Accordingly, 40 CFR part 52 is corrected by making the following correcting amendment:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

§ 52.2063 Original identification of plan section.

■ 2. Section 52.2063 is revised to read as follows:''

(a) This section identifies the original ''Air Implementation Plan for the Commonwealth of Pennsylvania'' and all revisions submitted by Pennsylvania that were federally approved prior to February 10, 2005. The information in this section is available in the 40 CFR, part 52, Volume 2 of 2 (§§ 52.1019 to the end of part 52) editions revised as of July 1, 2005 through July 1, 2011, and the 40 CFR, part 52, Volume 3 of 3 (§§ 52.2020 to the end of part 52) edition revised as of July 1, 2012.

(b) [Reserved]

Dated: September 12, 2013.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2013–23792 Filed 9–30–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 350, 381, 383, 384, 385, 386, 387, and 392

RIN 2126–AB60

Amendments To Implement Certain Provisions of the Moving Ahead for Progress in the 21st Century Act (MAP–21)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) adopts, as final, certain regulations required by the Moving Ahead for Progress in the 21st Century surface transportation reauthorization legislation. The majority of these statutory changes went into effect on October 1, 2012, while others will go into effect on October 1, 2013. It is necessary to make conforming changes to ensure that FMCSA's regulations are current and consistent with the applicable statutes. Adoption of the rules is a nondiscretionary ministerial action that can be taken without issuing a notice of proposed rulemaking and receiving public comment, in accordance with the good cause exception available to Federal agencies under the Administrative Procedure Act (APA).

DATES: *Effective Date:* This final rule is effective Tuesday, October 1, 2013. Petitions for Reconsideration must be received by the Agency no later than December 2, 2013.

FOR FURTHER INFORMATION CONTACT: Genevieve Sapir, Office of Chief Counsel, Regulatory Affairs Division (MC–CCR), Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; by telephone at (202) 366–7056, or by electronic mail at *genevieve.sapir@dot.gov.* If you have questions regarding the docket, call Ms. Barbara Hairston, Docket Operations, telephone 202–366–3024.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose and Summary of the Major Provisions

This rule makes nondiscretionary ministerial changes to FMCSA regulations that are required by MAP–21.

Benefits and Costs

The rule provisions considered both individually and in the aggregate do not rise to the level of economic significance. The only costs associated with this rule arise out of 49 U.S.C. 32918(a), which requires brokers and freight forwarders to provide evidence of minimum financial security in the amount of $75,000. The annual overall cost of this new requirement is approximately $15.9 million.

Legal Basis for the Rulemaking

This rule is based on the MAP–21 Act (Pub. L. 112–141, 126 Stat. 405, July 6, 2012). Certain provisions of MAP–21 made mandatory, non-discretionary changes to FMCSA programs. The majority of these statutory changes went into effect on October 1, 2012, while others will go into effect on October 1, 2013. It is necessary to make conforming changes to ensure that FMCSA's regulations are current and consistent with the applicable statutes.

The provisions implemented in this final rule in Title 49, United States Code (U.S.C.) are from the following sections of MAP–21:

1. Section 32102 Safety Fitness of New Operators
2. Section 32108 Increased Penalties for Operating Without Registration
3. Section 32110 Revocation of Registration and Other Penalties for Failure To Respond to Subpoena
4. Section 32111 Fleetwide Out of Service Order for Operating Without Required Registration
5. Section 32203 State Reporting of Foreign Commercial Driver Convictions
6. Section 32204 Authority To Disqualify Foreign Commercial Drivers
7. Section 32205 Revocation of Foreign Motor Carrier Operating Authority for Failure To Pay Civil Penalties
8. Section 32307 Employer Responsibilities
9. Section 32501 Inspection Demand and Display of Credentials
10. Section 32503 Penalties for Violation of Operation Out of Service Orders
11. Section 32505 Increased Penalties for Evasion of Regulations
12. Section 32506 Violations Relating to Commercial Motor Vehicle Safety Regulation and Operators
13. Section 32507 Emergency Disqualification for Imminent Hazard
14. Section 32601 Motor Carrier Safety Assistance Program
15. Section 32913 Waivers, Exemptions, and Pilot Programs
16. Section 32918 Financial Security of Brokers and Freight Forwarders
17. Section 33010 Civil Penalties

FMCSA is authorized to implement these statutory provisions by delegation from the Secretary of Transportation in 49 CFR 1.87.

Generally, agencies may promulgate final rules only after issuing a notice of proposed rulemaking and providing an opportunity for public comment under procedures required by the APA, as provided in 5 U.S.C. 553(b) and (c). The APA, in 5 U.S.C. 553(b)(3)(B), provides an exception from these requirements when notice and public comment procedures are ''impracticable, unnecessary, or contrary to the public interest.'' FMCSA finds that notice and comment is unnecessary prior to adoption of each provision in this final rule because the changes to regulations are statutorily mandated by Congress, and the Agency is performing a nondiscretionary, ministerial act. Therefore, the Agency may adopt this rule without issuing a notice of proposed rulemaking and receiving public comment, in accordance with the APA. For these same reasons, the rule will be effective on October 1, 2013, the day many of these statutory changes go into effect.

MAP–21 Provisions Implemented by the Final Rule

The Federal Motor Carrier Safety Regulations amended by this final rule encompass diverse subject areas. Those amendments are explained below.

Section 32102—Safety Fitness of New Operators

Previously, 49 U.S.C. 31144 required new entrant motor carriers to undergo a safety review within 18 months of beginning operations. Section 32102 of MAP–21 changed that time period to 12 months for property carriers and 120 days for passenger carriers. This final rule amends 49 CFR 385.3 and 49 CFR part 385, Appendix A(I)(a), to change references from an 18-month safety review to 12-month and 120-day safety reviews.

Section 32108—Increased Penalties for Operating Without Registration

Previously, 49 U.S.C. 14901(a) set the civil penalty for violating the Agency's reporting, recordkeeping, and registration requirements at $500, except for violations of passenger carrier registration requirements, which were set at $2,000.[1] MAP–21 Section 32108

[1] The penalties referenced in this rule refer to statutorily enacted amounts. In 2007, the Agency amended 49 CFR part 386, Appendix B to increase

increased the penalties to $1,000 for violating the reporting and recordkeeping requirements, $10,000 for non-passenger carrier registration violations, and $25,000 for passenger carrier registration violations. It also changed the penalty for transporting hazardous wastes without the appropriate registration from a maximum of $20,000 [2] to a minimum of $20,000 and maximum of $40,000. This final rule amends 49 CFR part 386, Appendix B (g)–(3) and (6), to reflect these new penalties.

Section 32110—Revocation of Registration and Other Penalties for Failure To Respond to Subpoena

Previously, 49 U.S.C. 525 provided for a fine of between $100 and $5,000 for motor carriers that failed to obey a subpoena or an Agency order to appear or testify issued under 49 U.S.C. chapter 5. Section 32110 of MAP–21 amended the penalties in that section by raising the fine to between $1,000 and $10,000. This final rule implements those amendments by adding new Section II. to 49 CFR part 386 Appendix A.

Section 32111—Fleetwide Out of Service Order for Operating Without Required Registration

Previously, 49 U.S.C. 13902(e)(1) provided that if a *motor vehicle* was used to provide transportation without or beyond the scope of registration, that *motor vehicle* could be put out of service (emphasis added). Section 32111 changed § 13902(e)(1) to authorize FMCSA to place a *motor carrier* out of service for operating vehicles without or beyond the scope of registration. This final rule amends 49 CFR § 392.9a(b) to reflect this change.

Section 32203—State Reporting of Foreign Commercial Driver Convictions

Section 32203(a) of MAP–21 amended 49 U.S.C. 31301 by adding a definition of ''foreign commercial driver.'' This final rule amends 49 CFR 383.5 to add this definition.

Section 32203(b) of MAP–21 amended 49 U.S.C. 31311(a) by adding a requirement that States report foreign commercial drivers' convictions related to the operation of both CMVs and non-CMVs to FMCSA's Federal Convictions and Withdrawal Database. Section 32203(b) also added the requirement that States report unlicensed or non-CDL foreign drivers' convictions related to the operation of a CMV to the Federal Convictions and Withdrawal Database. This final rule amends 49 CFR 384.209 to add these requirements.

Section 32204—Authority To Disqualify Foreign Commercial Drivers

Previously enacted 49 U.S.C. 31310 sets forth the criteria for disqualifying CMV operators. Section 32204 of MAP–21 amended that section by stating explicitly that the disqualification criteria also apply to foreign commercial drivers. This rule amends 49 CFR 383.51 to reflect this change.

Section 32205—Revocation of Foreign Motor Carrier Operating Authority for Failure To Pay Civil Penalties

Section 32205 of MAP–21 amended 49 U.S.C. 13905(d)(2) to state explicitly that the Agency's authority to suspend, amend, and revoke motor carrier operating authority registration applies to foreign motor carriers. This final rule amends 49 CFR 386.84 to reflect this change. The final rule also makes a technical correction to § 386.84. That section contains a reference to 49 CFR part 386 Appendix A (h) that was not updated after that paragraph was re-numbered. The correction references 49 CFR part 386 Appendix A (i).

Section 32307—Employer Responsibilities

Previously, 49 U.S.C. 31304 prohibited employers from allowing employees to operate CMVs when the employer *knew* that the employee had lost the right to operate a CMV or was disqualified, or when the employee's driver's license was suspended, revoked, or canceled (emphasis added). Section 32307 of MAP–21 amended that section to prohibit employers from allowing employees to drive when the employer *knows or should reasonably know* that those circumstances exist. This final rule amends 49 CFR 383.37 to reflect this change.

Section 32501—Inspection Demand and Display of Credentials

Section 32501 of MAP–21 amended 49 U.S.C. 504(c) to include employees of States that receive Motor Carrier Safety Assistance Program (MCSAP) grants as among those authorized to conduct inspections of certain equipment and records upon display of proper credentials. In addition, Section 32501 amended 49 U.S.C. 504(c) by specifying that the credentials of authorized individuals may be presented either in person or in writing. This final rule amends 49 CFR part 386 Appendix B (h) and 49 CFR Chapter III, Subchapter B, Appendix B, paragraph 2. to reflect these changes.

Section 32503—Penalties for Violation of Operation Out of Service Orders

Section 32503 of MAP–21 amended 5 U.S.C. 521 to add a $25,000 penalty for motor carriers operating CMVs in violation of an out-of-service order issued following a determination that the carrier is unfit or an imminent hazard. This final rule amends 49 CFR part 386 Appendices A (IV)(g.) and B (f) and to reflect this change.

Section 32505—Increased Penalties for Evasion of Regulations

Previously, 49 U.S.C. 524 provided the following penalties for knowing and willful violations of 49 U.S.C. chapter 5: $200–$500 for a first violation and $250–$2,000 for a subsequent violation. Section 32505 of MAP–21 amended this provision by removing the knowing and willful requirement; expanding the scope of applicable violations to include 49 U.S.C. chapter 51, subchapter III of chapter 311 (except §§ 31138 and 31139), §§ 31302, 31303, 31304, 31305(b), 31310(g)(1)(A), and 31502, and any regulation issued under those provisions; and increasing the penalty for a first violation to $2,000–$5,000 and subsequent violations to $2,500–$7,000. This final rule adds new paragraph (i) to 49 CFR part 386, Appendix B, to implement these amendments.

Section 32506—Violations Relating to CMV Safety Regulation and Operators

Previously, 49 U.S.C. 521(b)(2)(D) directed the Agency to take into account the following factors when assessing a civil penalty: The nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, *ability to pay,* effect on ability to continue to do business, and such other matters as justice and public safety may require (emphasis added). Section 32506 of MAP–21 amended 49 U.S.C. 521(b)(2)(D) by removing ''ability to pay'' from this list. This final rule amends 49 CFR 386.81, 387.17, and 387.41 to reflect this change.

Section 32507—Emergency Disqualification for Imminent Hazard

Previously, 49 U.S.C. 31310(f) provided for the emergency disqualification of an individual from operating a CMV, if continued operation would constitute an imminent hazard, as defined at 49 U.S.C. 5102. Section 32507 of MAP–21 amended § 31310(f) by changing the meaning of ''imminent

the civil penalties to adjust for inflation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–131, title III, chapter 10, Sec. 31001, par. (s), 110 Stat. 1321–373). 72 FR 55100 (Sept. 28, 2007). The Agency adjusted these penalty amounts to $650 and $2200.

[2] The Agency previously adjusted this amount to $22,000. *See* note 1, above.

hazard'' to include the definition at 49 U.S.C. 521. This final rule amends the definition of ''imminent hazard'' at 49 CFR 383.5 to reflect this change.

Section 32601—Motor Carrier Safety Assistance Program

Section 32601(a)(3) of MAP–21 amended 49 U.S.C. 31102(b) by identifying local government agencies as MCSAP partners and establishing four program goals. This final rule amends 49 CFR 350.103 to incorporate these new elements.

Section 32601(a)(4) amended the requirements, codified at 49 U.S.C. 31102(b), for State participation in the MCSAP grant program. This final rule amends 49 CFR 350.201 (n) and (s) and adds new § 350.201(z) and § 350.211(22) to reflect these changes.

Section 32601(a)(5) amended requirements, codified at 49 U.S.C. 31102(b), for the States' maintenance of effort and average level of expenditure under the MCSAP grant plans. This final rule amends 49 CFR 350.201(f), 350.211, and 350.301(a) and (c) to reflect these changes.

Section 32913—Waivers, Exemptions and Pilot Programs

Section 32913(b) amended the requirements, codified at 49 U.S.C. 31315(b), for a person to request an exemption from certain Agency requirements. The amendment requires the person's licensing State to inform roadside enforcement personnel of the exemption, after having received notice from FMCSA. New 49 CFR 350.201(z), discussed above, also implements this change.

Previously, 49 U.S.C. 31315(c)(1) required FMCSA to publish notice of all pilot programs in the **Federal Register**. Section 32913(c) retained the requirement that the Agency publish notices of pilot programs, but removed the requirement that they be published in the **Federal Register.** This final rule amends 49 CFR 381.500(d) to reflect that change.

Section 32918—Financial Security of Brokers and Freight Forwarders

Previously, 49 U.S.C. 13906 required brokers to maintain a bond to ensure that the transportation contracted for was actually provided, but left the amount of the bond to the Agency's discretion. Section 32918 of MAP–21 amended that section to set a minimum of $75,000 and extended the bond requirement to freight forwarders as well. This final rule amends 49 CFR 387.307(a) and 387.405 and adds new § 387.403(c) to implement this change.

Section 33010—Civil Penalties

Previously, 49 U.S.C. 5123 provided for penalties of between $250 and $50,000 for violations of regulations related to the transportation of hazardous materials. For violations that resulted in ''death, serious illness, or severe injury to any person or substantial destruction of property,'' it provided for penalties of up to $100,000.[3] MAP–21 amended § 5123 to provide for penalties of up to $75,000 for violations of regulations related to the transportation of hazardous materials and $175,000 in the event of death, serious illness, severe injury or substantial destruction of property. This final rule amends 49 CFR Appendix B (f)(2) to implement these changes.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review and DOT Regulatory Policies and Procedures as Supplemented by E.O. 13563)

FMCSA has determined this final rule is not a significant regulatory action within the meaning of Executive Order (E.O.) 12866, as supplemented by E.O. 13563 (76 FR 3821, January 21, 2011), and is also not significant within the meaning of DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). As explained above, this final rule is strictly ministerial in that it incorporates nondiscretionary statutory requirements and includes administrative revisions, technical corrections and civil penalty increases to a number of statutory provisions. The majority of these statutory changes went into effect on October 1, 2012, while others will go into effect on October 1, 2013. These changes are necessary to make FMCSA's regulations consistent with MAP–21 and will not exceed the $100 million annual threshold. Any costs associated with this action are attributable to the non-discretionary statutory provisions. This final rule is not expected to generate substantial congressional or public interest. Therefore, a full regulatory impact analysis has not been conducted nor has there been a review by the Office of Management and Budget (OMB).

Although a full regulatory evaluation is unnecessary because of the low economic impact of this rulemaking, FMCSA analyzed the cost impact of the MAP–21 provisions implemented by this final rule. The provision in 49 U.S.C. 32918(a) requires all brokers and freight forwarders registered with FMCSA to provide a minimum financial security of $75,000 (surety bond or trust fund). Previously, the financial security requirement was $10,000 for general property brokers and $25,000 for household goods brokers. Freight forwarders did not have a comparable surety bond requirement. *See* 49 CFR part 387, subparts C and D.

FMCSA has identified 2,212[4] registered interstate freight forwarders that will be subject to the new MAP–21 requirement. In addition, the Agency has 21,565[5] registered interstate property brokers, of which 776[6] are household goods brokers.[7] The cost components associated with this rule are a $75,000 minimum surety bond/trust fund consisting of the following: (1) One percent to secure the surety bond or trust fund;[8] (2) $10 BMC–84/85 filing fee; and (3) 10 minutes by an insurance clerk with a median $25.39[9] hourly wage to complete the BMC 84/85 form(s). The overall cost of the new

[3] The Agency previously adjusted this amount to $105,000. *See* note 1, above.

[4] FMCSA's Licensing and Insurance (L&I) and Motor Carrier Management Information System (MCMIS) database snapshot as February 22, 2013.

[5] Commercial Motor Vehicle (CMV) Facts Sheet March 2013. Available at *http://www.fmcsa.dot.gov/documents/facts-research/CMV-Facts.pdf.*

[6] Ibid., footnote 1.

[7] These numbers reflect the number of brokers currently subject to FMCSA registration requirements. As a result of MAP–21 § 32915, which is not the subject of this rule, some motor carriers might choose to obtain broker registration in addition to motor carrier registration. At this time, the Agency does not have information on how many motor carriers this will affect; some might choose to obtain broker registration, while others might choose to revise their business practices to avoid obtaining broker registration. OMB approval of the BMC–84 and BMC–85 forms expires in January 2014. As a part of the renewal process, FMCSA will consider whether MAP–21 has affected the total number of responding brokers.

[8] For the purpose of this analysis we will use 1% of the increased bond value ($65,000 = $650 for general property brokers, $50,000 = $500 for household goods, and $75,000 = $750 for freight forwarders). The cost is based on a percentage of the bond amount, which will vary by the applicant's personal credit and experience in the industry (Brokers of Household Goods Transportation by Motor Vehicle final rule Regulatory Evaluation, published November 29, 2010—75 FR 72987), and volume of business. The typical surety bond usually costs between 1 and 3 percent of the bond's face value, dependent on credit score. The bond's cost will be higher and/or a down payment may be required if the principal's financial history report contains negative marks, as the surety will now take a greater risk when guaranteeing the principal's work. Available at *http://www.jwsuretybonds.com/surety-bonds/commercial-bonds/freight_brokerbond.htm, www.suretybonds.com,* Transportation Intermediaries Association (TIA) available at *http://www.tianet.org/AM/Template.cfm?Section=About_TIA.*

[9] U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Wages Statistics, April 2013. Available at *http://www.bls.gov/oes/current/oes439041.htm.* Insurance and Policy Clerks have a median $16.93 hourly wage, plus a 50 percent markup for fringe benefits = $25.39.

requirement is $1.69 million [10] in the first year for freight forwarders and $14.21 million [11] for brokers with an overall cost of approximately $15.9 million.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FMCSA is not required to prepare a final regulatory flexibility analysis under 5 U.S.C. 604(a) for this final rule because the agency has not issued a notice of proposed rulemaking prior to this action. FMCSA has determined that it has good cause to adopt the rule without notice and comment.

Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this rule so that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the FMCSA point of contact, Ms. Genevieve Sapir, listed in the **FOR FURTHER INFORMATION CONTACT** section of this rule.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the SBA's 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 FMCSA, call 1–888–REG–FAIR (1–888–734–3247). DOT has a policy ensuring the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

[10] The freight forwarder (FF) calculation includes the following: (2,212 FF × $750 annual premium cost) = $1.66 million + (2,212 FF × $10 filing fee) = $22,120 + (2,212 FF × 10/60 minutes to fill out form × $25.39 wage) = $9,360.

[11] The property broker calculation includes the following: (20,789 × $650 general property broker annual premium cost) = $13.51 million + (776 household good brokers × $500 annual premium cost) = $388,000 + (21,565 brokers × $10 filing fee) = $215,650 + (21,565 brokers × 10/60 minutes to fill out form × $25.39 wage) = $91,255.

Unfunded Mandates Reform Act of 1995

This final rule will not impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532 *et seq.*), that will result in the expenditure by a State, local, or tribal governments, in the aggregate, or by the private sector of $143.1 million (which is the value of $100 million in 2010 after adjusting for inflation) or more in any one year.

E.O. 13132 (Federalism)

A rulemaking has implications for Federalism under Section 1(a) of E.O. 13132 if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on State or local governments. FMCSA analyzed this action in accordance with Executive Order 13132. This final rule does not preempt or modify any provision of State law, impose substantial direct unreimbursed compliance costs on any State, or diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have Federalism implications warranting the application of Executive Order 13132.

E.O. 12988 (Civil Justice Reform)

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988 to minimize litigation, eliminate ambiguity, and reduce burden.

E.O. 13045 (Protection of Children)

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, Apr. 23, 1997), requires agencies issuing ''economically significant'' rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation's environmental health and safety effects on children. The Agency determined this final rule is not economically significant. Therefore, no analysis of the impacts on children is required. In any event, the Agency does not anticipate that this regulatory action could in any respect present an environmental or safety risk that could disproportionately affect children.

E.O. 12630 (Taking of Private Property)

FMCSA reviewed this final rule in accordance with E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it will not effect a taking of private property or otherwise have takings implications.

Privacy Impact Assessment

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108–447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note), requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that will affect the privacy of individuals. This rule does not require the collection of personally identifiable information (PII).

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency which receives records contained in a system of records from a Federal agency for use in a matching program.

E.O. 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), Federal agencies must obtain approval from the OMB for each collection of information they conduct, sponsor, or require through regulations. For the currently approved OMB control number 2126–0017, Financial Responsibility, Trucking, and Freight Forwarding, this rule will produce a slight increase of 146 annual burden hours due to the increase of annual responses [Form BMC–84—2,750 annual responses x 10 minutes/60 minutes = 458 hours – previous 405 hours = 53 hours; Form BMC–85—4,380 annual responses x 10 minutes/60 minutes = 730 hours – previous 637 hours = 93 hours]. There is no collection requirement or change in annual burden hours for the currently approved OMB control number 2126–0016, Licensing Applications for Motor Carrier Operating Authority.

The Agency estimates that the changes to the Forms BMC–84 and BMC–85 result in a small modification in the number of respondents that will have no impact on the currently approved 10 minutes it takes a respondent to complete the form.

National Environmental Policy Act and Clean Air Act

FMCSA analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) and FMCSA's *NEPA Implementing Procedures and Policy for Considering Environmental Impacts,* Order 5610.1

(FMCSA Order), March 1, 2004 (69 FR 9680). FMCSA's Order states that ''[w]here FMCSA has no discretion to withhold or condition an action if the action is taken in accordance with specific statutory criteria and FMCSA lacks control and responsibility over the effects of an action, that action is not subject to this Order.'' *Id.* at chapter 1(D). Because Congress specifies the Agency's precise action here, thus leaving the Agency no discretion over such action, and since the Agency lacks jurisdiction and therefore control and responsibility over the effects of these action, this rulemaking falls under chapter 1(D). Therefore, no further analysis is considered.

In addition to the NEPA requirements to examine impacts on air quality, the Clean Air Act (CAA) as amended (42 U.S.C. 7401, *et seq.*) also requires FMCSA to analyze the potential impact of its actions on air quality and to ensure that FMCSA actions conform to State and local air quality implementation plans. This non-discretionary action is expected to fall within the CAA *de minimis* standards and are not subject to the Environmental Protection Agency's General Conformity Rule (40 CFR parts 51 and 93).

Additionally, FMCSA evaluated the effects of this final rule in accordance with Executive Order 12898 and determined that there are no environmental justice issues associated with its provisions nor any collective environmental impacts resulting from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on minority or low-income populations. This final rule is exempt from analysis under the National Environmental Policy Act. This final rule simply makes ministerial, mandatory changes and would not result in high and adverse environmental impacts.

E.O. 13211 (Energy Supply, Distribution, or Use)

FMCSA analyzed this action under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA determined that it is not a ''significant energy action'' under that E.O. because it is not economically significant and is not likely to have an adverse effect on the supply, distribution, or use of energy.

E.O. 13175 (Indian Tribal Governments)

This final rule does not have tribal implications under E.O. 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.

National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This final rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

List of Subjects

49 CFR Part 350

Grant programs—transportation, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 381

Motor carriers.

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 385

Administrative practice and procedure, Highway safety, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

49 CFR Part 387

Buses, Freight, Freight forwarders, Hazardous materials transportation, Highway safety, Insurance, Intergovernmental relations, Motor carriers, Motor vehicle safety, Moving of household goods, Penalties, Reporting and recordkeeping requirements, Surety bonds.

49 CFR Part 392

Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

For the reasons stated in the preamble, the FMCSA amends 49 CFR chapter III, as set forth below:

PART 350—COMMERCIAL MOTOR CARRIER SAFETY ASSISTANCE PROGRAM

■ 1. The authority citation for part 350 continues to read as follows:

Authority: 49 U.S.C. 13902, 31101–31104, 31108, 31136, 31140–31141, 31161, 31310–31311, 31502; and 49 CFR 1.87.

■ 2. Revise § 350.103 to read as follows:

§ 350.103 What is the purpose of this part?

The purpose of this part is to ensure the Federal Motor Carrier Safety Administration (FMCSA), States, local government agencies and other political jurisdictions work in partnership to establish programs to improve motor carrier, CMV, and driver safety to support a safe and efficient transportation system by—

(a) Making targeted investments to promote safe CMV transportation, including transportation of passengers and hazardous materials;

(b) Investing in activities likely to generate maximum reductions in the number and severity of CMV crashes and fatalities resulting from such crashes;

(c) Adopting and enforcing effective motor carrier, CMV, and driver safety regulations and practices consistent with Federal requirements; and

(d) Assessing and improving State wide performance by setting program goals and meeting performance standards, measures and benchmarks.

■ 3. In § 350.201, revise paragraphs (f), (n), and (s) and add a new paragraph (z) to read as follows:

§ 350.201 What conditions must a State meet to qualify for Basic Program Funds?

* * * * *

(f) Maintain the aggregate expenditure of funds by the State lead agency responsible for implementing the CVSP, exclusive of Federal funds and State matching amounts, for CMV safety programs eligible for funding under this

part, at a level at least equal to the average level of that expenditure for fiscal years 2004 and 2005. Upon the request of a State, the Secretary may allow the State to exclude State expenditures for Government-sponsored demonstration or pilot projects. Upon the request of a State, the Secretary may waive or modify the requirements of this subsection for one fiscal year, if the Secretary determines that a waiver is equitable due to exceptional or uncontrollable circumstances, such as a natural disaster or a serious decline in the financial resources of the MCSAP agency.

* * * * *

(n) Ensure participation in appropriate FMCSA systems and other information systems by all appropriate jurisdictions receiving funding under this section.

* * * * *

(s) Establish and dedicate sufficient resources to a program to ensure that accurate, complete, and timely motor carrier safety data are collected and reported, and ensure the State's participation in a national motor carrier safety data correction system prescribed by FMCSA.

* * * * *

(z) Ensure transmittal to roadside inspectors the notice of each Federal exemption the State receives from FMCSA pursuant to 49 CFR part 381 subpart C, including the name of the person granted the exemption and any terms and conditions that apply to the exemption.

■ 4. In § 350.211, revise paragraphs 8., 11., and add paragraph 22. to read as follows:

§ 350.211 What is the format of the certification required by § 350.209?

* * * * *

8. The State must maintain the average aggregate expenditure of the State lead agency responsible for implementing the CVSP, exclusive of Federal assistance and State matching funds, for CMV safety programs eligible for funding under the Basic program at a level at least equal to the average level of that expenditure for fiscal years 2004 and 2005. These expenditures must cover at least the following four program areas, as applicable:

a. Motor carrier safety programs in accordance with 49 CFR 350.109.

b. Size and weight enforcement programs in accordance with 49 CFR 350.309(c)(1).

c. Drug interdiction enforcement programs in accordance with 49 CFR 350.309(c)(2).

d. Traffic safety programs in accordance with 49 CFR 350.309(d).

* * * * *

11. The State will establish a program to provide FMCSA with accurate, complete, and timely reporting of motor carrier safety information that includes documenting the effects of the State's CMV safety programs; participate in a national motor carrier safety data correction program (DataQs); participate in appropriate FMCSA systems; and ensure information is exchanged in a timely manner with other States.

* * * * *

22. The State will transmit to its roadside inspectors the notice of each Federal exemption granted pursuant to 49 U.S.C. 31315(b) as provided to the State by FMCSA, including the name of the person granted the exemption and any terms and conditions that apply to the exemption.

* * * * *

■ 5. In § 350.301, revise paragraphs (a) and (c) to read as follows:

§ 350.301 What level of effort must a State maintain to qualify for MCSAP funding?

(a) The State must maintain the average aggregate expenditure of the State and its political subdivisions, exclusive of Federal funds and State matching funds, for CMV safety programs eligible for funding under this part at a level at least equal to the average level of expenditure for fiscal years 2004 and 2005.

* * * * *

(c) The State must include costs associated with activities performed during the base period by the lead agency responsible for implementing the CVSP that receives funds under this part. It must include only those activities which meet the current requirements for funding eligibility under the grant program.

PART 381—WAIVERS, EXEMPTIONS, AND PILOT PROGRAMS

■ 6. The authority citation for part 381 continues to read as follows:

Authority: 49 U.S.C. 31136(e) and 31315; and 49 CFR 1.87.

■ 7. In § 381.500, revise paragraph (d) to read as follows:

§ 381.500 What are the general requirements the agency must satisfy in conducting a pilot program?

* * * * *

(d) The FMCSA will publish a detailed description of each pilot program, including the exemptions to be considered, and provide notice and an opportunity for public comment before the effective date of the pilot program.

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 8. The authority citation for part 383 continues to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 et seq., and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 272, 397; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1726; and 49 CFR 1.86.

■ 9. In § 383.5, add a new definition of ''foreign commercial driver'' to appear in alphabetical order and revise the definition of ''imminent hazard'' to read as follows:

§ 383.5 Definitions.

* * * * *

Foreign commercial driver means an individual licensed to operate a commercial motor vehicle by an authority outside the United States, or a citizen of a foreign country who operates a commercial motor vehicle in the United States.

* * * * *

Imminent hazard means the existence of any condition of vehicle, employee, or commercial motor vehicle operations that substantially increases the likelihood of serious injury or death if not discontinued immediately; or a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury or endangerment.

* * * * *

■ 10. Revise the introductory paragraph of § 383.37 to read as follows:

§ 383.37 Employer responsibilities.

No employer may allow, require, permit, or authorize a driver to operate a CMV in the United States if he or she knows or should reasonably know that any of the following circumstances exist:

* * * * *

■ 11. In § 383.51, add paragraph (a)(7) to read as follows:

§ 383.51 Disqualification of drivers.

(a) * * *

(7) A foreign commercial driver is subject to disqualification under this subpart.

* * * * *

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 12. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301, *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–59, 113 Stat. 1753, 1767; and 49 CFR 1.87.

■ 13. Revise § 384.209 to read as follows:

§ 384.209 Notification of traffic violations.

(a) *Required notification with respect to CLP or CDL holders.* (1) Whenever a person who holds a CLP or CDL from another State is convicted of a violation of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight or vehicle defect violations), in any type of vehicle, the licensing entity of the State in which the conviction occurs must notify the licensing entity in the State where the driver is licensed of this conviction within the time period established in paragraph (c) of this section.

(2) Whenever a person who holds a foreign commercial driver's license is convicted of a violation of any State or local law relating to motor vehicle traffic control (other than parking, vehicle weight or vehicle defect violations), in any type of vehicle, the licensing entity of the State in which the conviction occurs must report that conviction to the Federal Convictions and Withdrawal Database.

(b) *Required notification with respect to non-CDL holders.* (1) Whenever a person who does not hold a CDL, but who is licensed to drive by another State, is convicted of a violation in a CMV of any State or local law relating to motor vehicle traffic control (other than a parking violation), the licensing entity of the State in which the conviction occurs must notify the licensing entity in the State where the driver is licensed of this conviction within the time period established in paragraph (c) of this section.

(2) Whenever a person who is unlicensed or holds a foreign non-commercial driver's license is convicted of a violation in a CMV of any State or local law relating to motor vehicle traffic control (other than a parking violation), the licensing entity of the State in which the conviction occurs must report that conviction to the Federal Convictions and Withdrawal Database.

* * * * *

PART 385—SAFETY FITNESS PROCEDURES

■ 14. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 13901–13905, 31133, 31135, 31136, 31137(a), 31144, 31148, and 31502; Sec. 113(a), Pub. L. 103–311; Sec. 408, Pub. L. 104–88; Sec. 350 of Pub. L. 107–87; and 49 CFR 1.87.

■ 15. In § 385.3, revise the definition of ''new entrant registration'' to read as follows:

§ 385.3 Definitions and acronyms.

* * * * *

New entrant registration is the registration (US DOT number) granted a new entrant before it can begin interstate operations in an 18-month monitoring period. A safety audit must be performed on a new entrant's operations within 12 months after receipt of its US DOT number for motor carriers of property and 120 days for motor carriers of passengers, and it must be found to have adequate basic safety management controls to continue operating in interstate commerce at the end of the 18-month period.

* * * * *

■ 16. In Appendix A to part 385, revise paragraph (I)(a) to read as follows:

Appendix A to Part 385—Explanation of Safety Audit Evaluation Criteria

I. General

(a) Section 210 of the Motor Carrier Safety Improvement Act (49 U.S.C. 31144) directed the Secretary to establish a procedure whereby each owner and each operator granted new authority must undergo a safety review within 12 months after receipt of its US DOT number for motor carriers of property and 120 days for motor carriers of passengers. The Secretary was also required to establish the elements of this safety review, including basic safety management controls. The Secretary, in turn, delegated this to the FMCSA.

* * * * *

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER, INTERMODAL EQUIPMENT PROVIDER, BROKER, FREIGHT FORWARDER, AND HAZARDOUS MATERIALS PROCEEDINGS

■ 17. The authority citation for part 386 continues to read as follows:

Authority: 49 U.S.C. 113, chapters 5, 51, 59, 131–141, 145–149, 311, 313, and 315; Sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); Sec. 217, Pub. L. 105–159, 113 Stat. 1748, 1767; Sec. 206, Pub. L. 106–159, 113 Stat. 1763; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.81 and 1.87.

§ 386.81 [Amended]

■ 18. In § 386.81, amend paragraph (a) by removing the phrase ''ability to pay,''.

■ 19. In § 386.84, revise paragraphs (a), (b)(1), (c), and the introductory text to (d) to read as follows:

§ 386.84 Sanction for failure to pay civil penalties or abide by payment plan; suspension or revocation of registration.

(a)(1) *General rule.* The registration of a broker, freight forwarder, for-hire motor carrier, foreign motor carrier or foreign motor private carrier that fails to pay a civil penalty in full within 90 days after the date specified for payment by the FMCSA's final agency order, will be suspended starting on the next (i.e., the 91st) day. The suspension continues until the FMCSA has received full payment of the penalty.

(2) *Civil penalties paid in installments.* The FMCSA Service Center may allow a respondent broker, freight forwarder, for-hire motor carrier, foreign motor carrier or foreign motor private carrier to pay a civil penalty in installments. If the respondent fails to make an installment payment on schedule, the payment plan is void and the entire debt is payable immediately. The registration of a respondent that fails to pay the remainder of its civil penalty in full within 90 days after the date of the missed installment payment is suspended on the next (i.e., the 91st) day. The suspension continues until the FMCSA has received full payment of the entire penalty.

(3) *Appeals to Federal Court.* If the respondent broker, freight forwarder, for-hire motor carrier, foreign motor carrier or foreign motor private carrier appeals the final agency order to a Federal Circuit Court of Appeals, the terms and payment due date of the final agency order are not stayed unless the Court so directs.

(b) *Show Cause Proceeding.* (1) The FMCSA will notify a broker, freight forwarder, for-hire motor carrier, foreign motor carrier or foreign motor private carrier in writing if it has not received payment within 45 days after the date specified for payment by the final agency order or the date of a missed installment payment. The notice will include a warning that failure to pay the entire penalty within 90 days after payment was due will result in the suspension of the respondent's registration.

* * * * *

(c) The registration of a broker, freight forwarder, for-hire motor carrier, foreign motor carrier or foreign motor private carrier that continues to operate in

interstate commerce in violation of this section after its registration has been suspended may be revoked after an additional notice and opportunity for a proceeding in accordance with 49 U.S.C. 13905(c). Additional sanctions may be imposed under paragraph IV(i) of Appendix A to part 386.

(d) This section does not apply to any person who is unable to pay a civil penalty because the person is a debtor in a case under chapter 11, title 11, United States Code. Brokers, freight forwarders, for-hire motor carriers, foreign motor carriers or foreign motor private carriers in bankruptcy proceedings under chapter 11 must provide the following information in their response to the FMCSA:

* * * * *

■ 20. In Appendix A to part 386, add paragraph II. and revise paragraph IV.g. to read as follows:

Appendix A to Part 386—Penalty Schedule; Violations of Notices and Orders

* * * * *

II. Subpoena

Violation—Failure to respond to Agency subpoena to appear and testify or produce records.

Penalty—minimum of $1,000 but not more than $10,000 per violation.

* * * * *

IV. Out-of-Service Order

* * * * *

g. Violation—Operating in violation of an order issued under § 386.72(b) to cease all or part of the employer's commercial motor vehicle operations or to cease all or part of an intermodal equipment provider's operations, i.e., failure to cease operations as ordered.

Penalty—Up to $25,000 per day the operation continues after the effective date and time of the order to cease.

* * * * *

■ 21. In Appendix B to Part 386, revise paragraphs (f); (g)(1) through (3) and (6); and (h) and add new paragraph (i) to read as follows:

Appendix B to Part 386—Penalty Schedule; Violations and Monetary Penalties

* * * * *

(f) *Operating after being declared unfit by assignment of a final ''unsatisfactory'' safety rating.* (1) A motor carrier operating a commercial motor vehicle in interstate commerce (except owners or operators of commercial motor vehicles designed or used to transport hazardous materials for which placarding of a motor vehicle is required under regulations prescribed under 49 U.S.C. chapter 51) is subject, after being placed out of service because of receiving a final ''unsatisfactory'' safety rating, to a civil penalty of not more than $25,000 (49 CFR 385.13). Each day the transportation continues in violation of a final ''unsatisfactory'' safety rating constitutes a separate offense.

(2) A motor carrier operating a commercial motor vehicle designed or used to transport hazardous materials for which placarding of a motor vehicle is required under regulations prescribed under 49 U.S.C. chapter 51 is subject, after being placed out of service because of receiving a final ''unsatisfactory'' safety rating, to a civil penalty of not more than $75,000 for each offense. If the violation results in death, serious illness, or severe injury to any person or in substantial destruction of property, the civil penalty may be increased to not more than $175,000 for each offense. Each day the transportation continues in violation of a final ''unsatisfactory'' safety rating constitutes a separate offense.

* * * * *

(g) * * *

(1) A person who fails to make a report, to specifically, completely, and truthfully answer a question, or to make, prepare, or preserve a record in the form and manner prescribed is liable for a minimum penalty of $1,000 per violation.

(2) A person who operates as a carrier or broker for the transportation of property in violation of the registration requirements of 49 U.S.C. 13901 is liable for a minimum penalty of $10,000 per violation.

(3) A person who operates as a motor carrier of passengers in violation of the registration requirements of 49 U.S.C. 13901 is liable for a minimum penalty of $25,000 per violation.

* * * * *

(6) A person who operates as a motor carrier or broker for the transportation of hazardous wastes in violation of the registration provisions of 49 U.S.C. 13901 is liable for a minimum penalty of $20,000 and a maximum penalty of $40,000 per violation.

* * * * *

(h) *Copying of records and access to equipment, lands, and buildings.* A person subject to 49 U.S.C. chapter 51 or a motor carrier, broker, freight forwarder, or owner or operator of a commercial motor vehicle subject to part B of subtitle VI of title 49 U.S.C. who fails to allow promptly, upon demand in person or in writing, the Federal Motor Carrier Safety Administration, an employee designated by the Federal Motor Carrier Safety Administration, or an employee of a MCSAP grant recipient to inspect and copy any record or inspect and examine equipment, lands, buildings, and other property, in accordance with 49 U.S.C. 504(c), 5121(c), and 14122(b), is subject to a civil penalty of not more than $1,000 for each offense. Each day of a continuing violation constitutes a separate offense, except that the total of all civil penalties against any violator for all offenses related to a single violation shall not exceed $10,000.

(i) A person, or an officer, employee, or agent of that person, that by any means tries to evade regulation of motor carriers under Title 49, United States Code chapter 5, chapter 51, subchapter III of chapter 311 (except sections 31138 and 31139) or section 31302, 31303, 31304, 31305(b), 31310(g)(1)(A), or 31502, or a regulation issued under any of those provisions, shall be fined at least $2,000 but not more than $5,000 for the first violation and at least $2,500 but not more than $7,500 for a subsequent violation.

PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS

■ 22. The authority citation for part 387 continues to read as follows:

Authority: 49 U.S.C. 13101, 13301, 13906, 14701, 31138, 31139, and 31144; and 49 CFR 1.87.

§ 387.17 [Amended]

■ 23. Amend § 387.17 by removing the phrase ''ability to pay,''.

§ 387.41 [Amended]

■ 24. Amend § 387.41 by removing the phrase ''ability to pay,''.

■ 25. In § 387.307, revise paragraph (a) to read as follows:

§ 387.307 Broker surety bond or trust fund.

(a) *Security.* A broker must have a surety bond or trust fund in effect for $75,000. The FMCSA will not issue a broker license until a surety bond or trust fund for the full limits of liability prescribed herein is in effect. The broker license shall remain valid or effective only as long as a surety bond or trust fund remains in effect and shall ensure the financial responsibility of the broker.

* * * * *

■ 26. In § 387.403, add paragraph (c) to read as follows:

§ 387.403 General requirements.

* * * * *

(c) *Surety bond or trust fund.* A freight forwarder must have a surety bond or trust fund in effect. The FMCSA will not issue a freight forwarder license until a surety bond or trust fund for the full limit of liability prescribed in § 387.405 is in effect. The freight forwarder license shall remain valid or effective only as long as a surety bond or trust fund remains in effect and shall ensure the financial responsibility of the freight forwarder. The requirements applicable to property broker surety bonds and trust funds in § 387.307 shall apply to the surety bond or trust fund required by this paragraph.

■ 27. Revise § 387.405 to read as follows:

§ 387.405 Limits of liability.

The minimum amounts for cargo and public liability security are identical to

those prescribed for motor carriers at 49 CFR 387.303. The minimum amount for the surety bond or trust fund is identical to that prescribed for brokers at 49 CFR 387.307.

PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES

■ 28. The authority citation for part 392 continues to read as follows:

Authority: 49 U.S.C. 504, 13902, 31136, 31151, 31502; and 49 CFR 1.87.

■ 29. In § 392.9a, revise paragraph (b) to read as follows:

§ 392.9a Operating authority.

* * * * *

(b) *Penalties.* Every motor carrier providing transportation requiring operating authority shall be ordered out of service if it is determined that the motor carrier is operating a vehicle in violation of paragraph (a) of this section. In addition, the motor carrier may be subject to penalties in accordance with 49 U.S.C. 14901.

* * * * *

SUBCHAPTER B—FEDERAL MOTOR CARRIER SAFETY REGULATIONS

■ 30. In Appendix B to Subchapter B of Chapter III, revise paragraph 2. to read as follows:

Appendix B to Subchapter B of Chapter III—Special Agent

* * * * *

2. *Compliance.* Motor carriers and other persons subject to these Acts shall submit their accounts, books, records, memoranda, correspondence, and other documents for inspection and copying, and they shall submit their lands, buildings, and equipment for examination and inspection, to any special agent of the Administration upon demand and display of an Administration credential, either in person or in writing, identifying him/her as a special agent.

* * * * *

Issued under the authority of delegation in 49 CFR 1.87: September 19, 2013.

Anne S. Ferro,

Administrator.

[FR Doc. 2013–23517 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–EX–P

Proposed Rules

Federal Register
Vol. 78, No. 190
Tuesday, October 1, 2013

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0592; Airspace Docket No. 13–ASW–13]

Proposed Amendment of Class E Airspace; Georgetown, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Georgetown, TX. Decommissioning of the Georgetown radio beacon (RBN) at Georgetown Municipal Airport has made reconfiguration necessary for standard instrument approach procedures and for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before November 15, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2013–0592/Airspace Docket No. 13–ASW–13, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: 817–321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2013–0592/Airspace Docket No. 13–ASW–13.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, at 202–267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by modifying Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Georgetown Municipal Airport, Georgetown, TX. Airspace reconfiguration to within a 6.5-mile radius of the airport, with segments extending from the 6.5-mile radius to 9.7 miles northwest and 10.3 miles north of the airport, is necessary due to the decommissioning of the Georgetown RBN and the cancellation of the NDB approach. Controlled airspace is necessary for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9X, dated August 7, 2013 and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with

prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Georgetown Municipal Airport, Georgetown, TX.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, and effective September 15, 2013, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Georgetown, TX [Amended]

Georgetown Municipal Airport, TX
(Lat. 30°40′44″ N., long. 97°40′46″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Georgetown Municipal Airport, and within 2.2 miles each side of the 301° bearing from the airport extending from the 6.5-mile radius to 9.7 miles northwest of the airport, and within 2 miles each side of the 003° bearing from the airport extending from the 6.5-mile radius to 10.3 miles north of the airport.

Issued in Fort Worth, TX, on September 23, 2013.

David P. Medina,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2013–23949 Filed 9–30–13; 8:45 am]

BILLING CODE 4901–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0590; Airspace Docket No. 13–AGL–20]

Proposed Amendment of Class E Airspace; Lawrenceville, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Lawrenceville, IL. Decommissioning of the Mount Carmel nondirectional radio beacon (NDB) at Mount Carmel Municipal Airport has made reconfiguration necessary for standard instrument approach procedures and for the safety and management of Instrument Flight Rules (IFR) operations at the airport. Geographic coordinates would also be updated.

DATES: 0901 UTC. Comments must be received on or before November 15, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2013–0590/Airspace Docket No. 13–AGL–20, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: 817–321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2013–0590/Airspace Docket No. 13–AGL–20.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking 202–267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by modifying Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Lawrenceville, IL. Airspace reconfiguration to within a 6.5-mile radius of Mount Carmel Municipal Airport, with a segment extending from the 6.5-mile radius to 7.4 miles south of the airport, is necessary due to the decommissioning of the Mount Carmel NDB and the cancellation of the NDB approach. Controlled airspace is necessary for the safety and management of IFR operations at the

airport. Geographic coordinates of Mount Carmel Municipal Airport would also be updated to coincide with the FAA's aeronautical database.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9X, dated August 7, 2013 and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Mount Carmel Municipal Airport, Lawrenceville, IL.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, and effective September 15, 2013, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AGL IL E5 Lawrenceville, IL [Amended]

Lawrenceville—Vincennes International Airport, IL
(Lat. 38°45′51″ N., long. 87°36′20″ W.)
Mount Carmel Municipal Airport, IL
(Lat. 38°36′24″ N., long. 87°43′36″ W.)
Lawrenceville VOR/DME
(Lat. 38°46′12″ N., long. 87°36′14″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Lawrenceville-Vincennes International Airport, and within 4.8 miles either side of the Lawrenceville VOR/DME 018° radial, extending from the 7-mile radius to 7 miles northeast of the VOR/DME; and within a 6.5-mile radius of Mount Carmel Municipal Airport, and within 2.7 miles either side of the 196° bearing from Mount Carmel Municipal Airport, extending from the 6.5-mile radius to 7.4 miles south of the airport.

Issued in Fort Worth, TX, on September 23, 2013.

David P. Medina,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2013–23948 Filed 9–30–13; 8:45 am]

BILLING CODE 4901–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0594; Airspace Docket No. 13–ASW–14]

Proposed Amendment of Class E Airspace; Burnet, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Burnet, TX. Decommissioning of the Burnet nondirectional radio beacon (NDB) at Burnet Municipal Airport—Kate Craddock Field has made reconfiguration necessary for standard instrument approach procedures and for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before November 15, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2013–0594/Airspace Docket No. 13–ASW–14, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following

statement is made: ''Comments to Docket No. FAA–2013–0594/Airspace Docket No. 13–ASW–14.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by modifying Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Burnet Municipal Airport—Kate Craddock Field, Burnet, TX. Airspace reconfiguration to within a 6.7-mile radius of the airport, with segments extending from the 6.7-mile radius to 10.2 miles north and 10.3 miles south of the airport, is necessary due to the decommissioning of the Burnet NDB and the cancellation of the NDB approach. Controlled airspace is necessary for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9X, dated August 7, 2013 and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would amend controlled airspace at Burnet Municipal Airport—Kate Craddock Field, Burnet, TX.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, and effective September 15, 2013, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Burnet, TX [Amended]

Burnet Municipal Airport—Kate Craddock Field, TX
(Lat. 30°44′20″ N., long. 98°14′19″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Burnet Municipal Airport—Kate Craddock Field, and within 2 miles each side of the 016° bearing from the airport extending from the 6.7-mile radius to 10.2 miles north of the airport, and within 2 miles each side of the 196° bearing from the airport extending from the 6.7-mile radius to 10.3 miles south of the airport.

Issued in Fort Worth, TX, on September 23, 2013.

David P. Medina,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2013–23943 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2013–0729; Airspace Docket No. 13–AEA–14]

Proposed Modification and Establishment of Restricted Areas; Aberdeen Proving Ground, MD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish a new restricted area, designated R–4001C, within the existing restricted areas R–4001A and R–4001B, at the U.S. Army's Aberdeen Proving Ground in Maryland. The purpose of the proposed R–4001C is to contain two moored balloons, called Aerostats that would be airborne continuously at approximately 10,000 feet MSL. This action would segregate nonparticipating aircraft from a hazard to navigation in the Aberdeen Proving Ground airspace.

DATES: Comments must be received on or before November 15, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of

Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2013–0729 and Airspace Docket No. 13–AEA–14, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2013–0729 and Airspace Docket No. 13–AEA–14) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2013–0729 and Airspace Docket No. 13–AEA–14.'' The postcard will be date/time stamped and returned to the commenter.

Comments on environmental and land use aspects to should be directed to: U.S. Army Corps of Engineers, Baltimore District, 10 South Howard Street, Baltimore, MD 21201.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*.

You may review the public docket containing the proposal, any comments received and any final disposition in person at the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

The U.S. Army requested that the FAA establish a new restricted area, designated R–4001C, within restricted areas R–4001A and R–4001B at Aberdeen Proving Ground, MD, to contain two moored balloons called Aerostats. The Aerostat is a 243-foot long balloon that resembles a blimp in appearance. The balloons would be moored to the ground by cables and would operate at 9,950 feet MSL. The Aerostats would be airborne 24 hours per day, seven days per week, except for periods when maintenance is required or the winds exceed 60 knots. Lighting of the mooring cables is not practical due to technical design issues; therefore, this activity is deemed to be a hazard to navigation and must be contained within restricted airspace.

Aberdeen Restricted Airspace Structure

Restricted airspace at Aberdeen Proving Ground consists of two areas: R–4001A and R–4001B. R–4001A, the larger of the two, has variable altitudes based on the time of day. R–4001A extends from the surface to unlimited altitude from 0700 to 2400 local time. It extends from the surface up to 10,000 feet MSL from 0000 to 0700 local time. However, higher altitudes may be used between 0000 and 0700 local time when a Notice to Airmen (NOTAM) is issued 24 hours in advance. R–4001B abuts the southwest end of R–4001A. R–4001B extends from the surface to 10,000 feet MSL. It also may be used to higher altitudes by NOTAM issued 24 hours in advance. The time of designation for R–4001B is ''Intermittent as activated by NOTAM 24 hours in advance.'' Both R–4001A and R–4001B are ''joint-use'' restricted areas. This means that the restricted areas may be released, in whole or in part, to the FAA controlling agency when the airspace is not needed by the using agency.

The Proposal

The FAA is proposing an amendment to 14 CFR part 73 to establish a new restricted area, designated R–4001C, within the confines of restricted areas R–4001A and R–4001B, Aberdeen Proving Ground, MD. R–4001C would consist of a rectangular area approximately 4.5 NM by 2 NM extending from the surface to 10,000 feet MSL. The time of designation for R–4001C would be ''continuous.'' Because the balloons would be airborne 24 hours per day (except for periods as noted above), R–4001C would not be a joint-use restricted area. R–4001A and R–4001B would continue to be joint-use areas as described above.

R–4001C would be established totally within existing restricted airspace. To accommodate this, the internal dividing line between R–4001A and R–4001B would be realigned to southwest by less than one nautical mile. This would expand R–4001A slightly into R–4001B so that the proposed R–4001C would be kept inside the modified R–4001A boundary. These changes would be fully contained within the present overall outer boundary and vertical limits of R–4001A and R–4001B. In addition, an editorial change would be made to the using agency name for R–4001A and R–4001B for standardization.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify restricted airspace to support Department of Defense requirements, at Aberdeen Proving Grounds, MD.

Environmental Review

This proposal will be subjected to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.40 [Amended]

■ 2. § 73.40 is amended as follows:

* * * * *

1. R–4001A Aberdeen, MD [Amended]

By removing the current boundaries and using agency and inserting the following:

Boundaries. Beginning at lat. 39°30′30″ N., long. 076°09′59″ W.; to lat. 39°29′00″ N., long. 076°07′59″ W.; to lat. 39°29′30″ N., long. 076°04′59″ W.; to lat. 39°27′00″ N., long. 076°00′29″ W.; to lat. 39°19′47″ N., long. 076°11′33″ W.; to lat. 39°17′30″ N., long. 076°12′58″ W.; to lat. 39°16′24″ N., long. 076°16′17″ W.; to lat. 39°17′13″ N., long. 076°18′48″ W.; to lat. 39°18′42″ N., long. 076°18′48″ W.; to lat. 39°20′03″ N., long. 076°20′30″ W.; to lat. 39°19′56″ N., long. 076°21′02″ W.; to lat. 39°20′39″ N., long. 076°21′59″ W.; to lat. 39°22′00″ N., long. 076°21′59″ W.; to lat. 39°23′28″ N., long. 076°20′39″ W.; to lat. 39°26′10″ N., long. 076°14′49″ W.; to lat. 39°27′00″ N., long. 076°12′29″ W.; to the point of beginning, excluding R–4001C.

Using agency. U.S. Army, Commander, Aberdeen Proving Ground, MD.

2. R–4001B Aberdeen, MD [Amended]

By removing the current boundaries and using agency and inserting the following:

Boundaries. Beginning at lat. 39°17′30″ N., long. 076°12′58″ W.; to lat. 39°12′10″ N., long. 076°16′29″ W.; to lat. 39°12′45″ N., long. 076°22′29″ W.; to lat. 39°17′30″ N., long. 076°19′44″ W.; to lat. 39°18′30″ N., long. 076°21′59″ W.; to lat. 39°20′39″ N., long. 076°21′59″ W.; to lat. 39°19′56″ N., long. 076°21′02″ W.; to lat. 39°20′03″ N., long. 076°20′30″ W.; to lat. 39°18′42″ N., long. 076°18′48″ W.; to lat. 39°17′13″ N., long. 076°18′48″ W.; to lat. 39°16′24″ N., long. 076°16′17″ W.; to the point of beginning.

Using agency. U.S. Army, Commander, Aberdeen Proving Ground, MD.

3. R–4001C Aberdeen, MD [New]

Boundaries. Beginning at lat. 39°21′50″ N., long. 076°21′59″ W.; to lat. 39°23′01″ N., long. 076°16′35″ W.; to lat. 39°21′04″ N., long. 076°15′52″ W.; to lat. 39°19′56″ N., long. 076°21′02″ W.; to lat. 39°20′39″ N., long. 076°21′59″ W.; to the point of beginning.

Designated altitudes. Surface 10,000 feet MSL.

Time of designation. Continuous.

Controlling agency. FAA, Potomac TRACON.

Using agency. U.S. Army, Commander, Aberdeen Proving Ground, MD.

Issued in Washington, DC, on September 24, 2013.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–23951 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 130917809–3809–01]

RIN 0625–AA96

Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Proposed rule and request for comments.

SUMMARY: Import Administration proposes not to apply, upon the effective date of this rule if implemented, the previously withdrawn regulatory provisions governing targeted dumping in antidumping duty investigations. Following the Court of International Trade's decision in *Gold East (Jiangsu) Paper Co.* v. *United States,* Import Administration is seeking comments from parties to clarify the status of the previously withdrawn regulatory provisions with regard to antidumping duty investigations. Import Administration also invites comment on the effect of this proposed rulemaking on recent modifications to its regulations concerning the calculation of the weighted-average dumping margin and assessment rate in certain antidumping proceedings.

DATES: To be assured of consideration, written comments must be received no later than October 31, 2013.

ADDRESSES: All comments must be submitted through the Federal eRulemaking Portal at *http://www.regulations.gov,* Docket No. ITA–2013–0002, unless the commenter does not have access to the Internet. Commenters that do not have access to the Internet may submit the original and one electronic copy of each set of comments by mail or hand delivery/courier. All comments should be addressed to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Room 1870, Department of Commerce, 14th Street and Constitution Ave. NW., Washington, DC 20230. Comments submitted to the Department will be uploaded to the eRulemaking Portal at *www.Regulations.gov.*

The Department will consider all comments received before the close of the comment period. The Department will not accept comments accompanied by a request that part or all of the

material be treated confidentially because of its business proprietary nature or for any other reason. All comments responding to this notice will be a matter of public record and will be available on the Federal eRulemaking Portal at *www.Regulations.gov.*

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Moustapha Sylla, Import Administration Webmaster, at (202) 482–4685, email address: *webmaster-support@ita.doc.gov.*

FOR FURTHER INFORMATION CONTACT: James Maeder at (202) 482–3330; Charles Vannatta at (202) 482–4036; or Melissa Brewer (202) 482–1096.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 2008, the Department of Commerce (''the Department'') withdrew certain regulatory provisions governing targeted dumping in antidumping investigations. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations,* 73 FR 74930 (Dec. 10, 2008) (''*Withdrawal Notice*''). In the *Withdrawal Notice,* the Department explained that in antidumping duty investigations it normally calculates dumping margins by one of two methods: (1) By comparing the weighted average of the normal values to the weighted average of the export prices for comparable merchandise (known as the average-to-average method); or (2) by comparing the normal values of individual transactions to the export prices of individual transactions for comparable merchandise (known as the transaction-to-transaction method). *Id.* at 74930 (citing 19 U.S.C. 1677f–1(d)(1)(A)). The statute also provides for an exception to these two comparison methods when the Department finds that there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and where such differences cannot be taken into account using one of the above-described methods. *Id.* (citing 19 U.S.C. 1677f–1(d)(1)(B)). When these criteria are satisfied, the Department may compare the weighted average of the normal values to the export price of individual transactions for comparable merchandise (known as the average-to-transaction method). *Id.* In the *Withdrawal Notice,* the Department explained that in promulgating the regulations that established criteria for analyzing this issue, it ''may have established thresholds or other criteria that may have prevented the use of this comparison methodology to unmask dumping, contrary to the Congressional intent.'' *Id.* at 74931. For this reason, the Department withdrew the targeted dumping regulations, specifically 19 CFR 351.414(f) and (g), effective immediately. *Id.* Since the *Withdrawal Notice,* the Department has not applied the withdrawn regulations in antidumping duty investigations. No party has challenged as a stand-alone claim that this rulemaking violated the Administrative Procedure Act's (''APA'') requirements.

On June 17, 2013, the Court of International Trade issued an opinion in *Gold East (Jiangsu) Paper Co.* v. *United States,* Ct. No. 10–00371, Slip Op. 13–74 (June 17, 2013), remanding certain matters to the Department. Among them, the Court of International Trade ordered the Department, on remand, to reconsider its final determination in that proceeding as it applies to Gold East (Jiangsu) Paper Co. and to apply the withdrawn regulations. The Court disagreed with the Department's determination that the regulations were not applicable to Gold East (Jiangsu) Paper Co. in that antidumping investigation because the regulations had been properly withdrawn. During the underlying investigation, Gold East (Jiangsu) Paper Co. argued that the Department had improperly withdrawn the targeted dumping regulations because it did not satisfy the APA's notice and comment requirements.[1] Gold East (Jiangsu) Paper Co. claimed that the regulations were still in effect and that the Department should apply the alternative comparison method to only the sales that are targeted rather than to all sales. *See* 19 CFR 351.414(f)(2) (2007). The Department disagreed and determined that the regulations were properly withdrawn in 2008 in the *Withdrawal Notice* and, thus, did not apply to the underlying investigation. Therefore, the Department, consistent with its practice following the withdrawal of the regulations, applied the alternative comparison method to all of Gold East (Jiangsu) Paper Co.'s sales. Gold East (Jiangsu) Paper Co. appealed the Department's determination to apply the alternative comparison method to all sales to the Court of International Trade.

The Department continues to defend its position that the withdrawal of the targeted dumping regulations in the *Withdrawal Notice* was proper and that the withdrawn regulations are not operative. However, the Department recognizes that the Court of International Trade in *Gold East (Jiangsu) Paper* v. *United States* agreed with Gold East (Jiangsu) Paper Co.'s argument that the regulations should be applied to its dumping margin calculations in that proceeding because there was a procedural defect in the rulemaking process that withdrew the targeted dumping regulations. Therefore, without prejudice to the United States government's right to appeal the decision in *Gold East (Jiangsu) Paper* v. *United States,* or to argue in other cases before the Court of International Trade that the withdrawn regulations should not be applied in antidumping duty investigations after the withdrawal was made effective in 2008, the Department has determined to issue this proposed rule to clarify the status of the previously withdrawn regulations pursuant to APA notice and comment procedures and to invite comment.

Proposed Provision

The Department proposes to continue to not apply the withdrawn provisions governing targeted dumping in antidumping investigations, implemented previously through the *Withdrawal Notice.* This rulemaking would be effective for proceedings initiated on or after 30 days following the date of publication of the final rule.

The Department invites parties to comment on this proposed rulemaking and the proposed effective date. Further, any party may submit comments expressing its disagreement with the Department's proposal and may propose an alternative approach. If any party believes that the Department should reinstate the previously withdrawn regulations, that party should explain how to reinstate the withdrawn regulations and include suggestions on how to codify such reinstatement, as well as any suggestions on the effective date.

The Department also invites comment on the effect of this proposed rulemaking on recent modifications to 19 CFR 351.414. On February 14, 2012, the Department published *Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101 (Feb. 14, 2012) (''*Final Modification for Reviews*''). In

[1] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less than Fair Value,* 75 FR 59217 (Sept. 27, 2010), and Issues and Decision Memorandum at cmt. 3, *as amended by Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order,* 75 FR 70203 (Nov. 17, 2010) (''*Final Determination*'').

the *Final Modification for Reviews,* the Department modified the regulations governing comparison methods to be applied in antidumping investigations and administrative reviews. The *Final Modification for Reviews* revised 19 CFR 351.414, the section of the regulations that previously included the withdrawn targeted dumping regulations. The *Final Modification for Reviews* applies to preliminary results of review issued after April 16, 2012.

Classifications

Executive Order 12866

It has been determined that this proposed rule is not significant for purposes of Executive Order 12866 of September 30, 1993 (''Regulatory Planning and Review'') (58 FR 51735 (October 4, 1993)).

Paperwork Reduction Act

This proposed rule contains no new collection of information subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Executive Order 13132

This proposed rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132, dated August 4, 1999 (64 FR 43255 (August 10, 1999)).

Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'') under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed rule would not have a significant economic impact on a substantial number of small business entities. A summary of the need for, objectives of, and legal basis for this rule is provided in the preamble, and is not repeated here.

The entities upon which this rulemaking could have an impact include foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers. IA currently does not have information on the number of entities that would be considered small under the Small Business Administration's size standard for small business. However, some of these entities may be considered small entities under that standard. Although this rule may impact small entities, this rule is not expected to have a significant economic impact. The administrative action proposed herein is a continuation of the Department's practice. No additional compliance measures or expenditure would be required of entities. Moreover, the previously withdrawn regulations did not regulate the entities that practice before the Department. Rather, the withdrawn regulations governed what methodology the Department applied in a particular case. Specifically, the withdrawn regulations instructed the Department on how to compare normal value and export price or constructed export price under certain factual scenarios. Therefore, the Department does not anticipate that the proposed rule would have a significant economic impact on a substantial number of small business entities. For this reason, an Initial Regulatory Flexibility Analysis is not required and one has not been prepared.

Dated: September 20, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–23646 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–DS–P

Notices

Federal Register

Vol. 78, No. 190

Tuesday, October 1, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

MILITARY COMPENSATION AND RETIREMENT MODERNIZATION COMMISSION

Solicitation of Written Comments by the Military Compensation and Retirement Modernization Commission

AGENCY: Military Compensation and Retirement Modernization Commission.

ACTION: Notice seeking comments.

SUMMARY: The Military Compensation and Retirement Modernization Commission (MCRMC) was established by the National Defense Authorization Act FY 2013. Pursuant to the Act, the Commission is seeking written comments from the general public and interested parties on measures to modernize the military compensation and retirement systems.

DATES: Submit comments by November 1, 2013. Pursuant to the Act, the Secretary of Defense will transmit recommendations on the modernization of the military compensation and retirement systems to the Commission. After the Commission has received the Secretary's recommendations it will reopen the period for public comment by notice in the **Federal Register** and on the internet Web site of the Commission. *www.mcrmc.gov.*

ADDRESSES: Electronic responses are preferred and may be addressed to *www.mcrmc.gov.* Written responses should be addressed to Military Compensation and Retirement Modernization Commission, P.O. Box 13170, Arlington VA 22209. Email responses may be addressed to *response@mcrmc.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher Nuneviller, Associate Director, Military Compensation and Retirement Modernization Commission, P.O. Box 13170, Arlington, VA 22209, telephone 703–697–2080, fax 703–697–8330, email *christopher.nuneviller@mcrmc.gov.*

SUPPLEMENTARY INFORMATION: The Military Compensation and Retirement Modernization Commission (MCRMC) was established by the National Defense Authorization Act FY 2013, Public Law 112–239, 126 Stat. 1787 (2013). Pursuant to the Act, the Secretary of Defense will transmit recommendations on the modernization of the military compensation and retirement systems to the Commission and Congress. The Commission is required to seek written comment from the general public and interested parties, to hold public hearings on the recommendations of the Secretary and to transmit to the President a report containing the findings and conclusions of the Commission together with legislative language to implement its recommendations by May 1, 2014.

Under the Act, the Commission will make its recommendations only after it examines all laws, policies and practices of the Federal Government that result in any direct payment of authorized or appropriated funds to current and former members (veteran and retired) of the uniformed services, including the reserve components of those services, as well as the spouses, family members, children, survivors, and other persons authorized to receive such payments as a result of their connection to the members of these uniformed services. See § 671(b)(1)(A).

The Commission will also examine all laws, policies, and practices of the Federal Government that result in any expenditure of authorized or appropriated funds to support the persons named in § 671(b)(1)(A) and their quality of life, including:

- Health, disability, survivor, education, and dependent support programs of the Department of Defense and the Department of Veterans Affairs, including outlays from the various Federal trust funds supporting those programs;
- Department of Education impact aid;
- Support or funding provided to States, territories, colleges and universities;
- Department of Defense morale, recreation, and welfare programs, the resale programs (military exchanges and commissaries), and dependent school systems;
- The tax treatment of military compensation and benefits; and military family housing. See, § 671 (b)(1)(B).

In addition, the Act allows the Commission to examine such other matters as it considers appropriate. See, § 671 (b)(1)(C).

To begin its task the Commission will take comments from the public on measures to modernize the military compensation and retirement systems. After the Commission receives the recommendations of the Secretary of Defense, it will take further comment from the public and hold hearings on the recommendations of the Secretary.

It is the policy of the MCRMC to include all comments it receives in the public docket without change and to make them available on its Web site including any personal information provided unless comments include information claimed and identified as confidential business information (CBI) or other information whose disclosure is restricted by statute.

Christopher Nuneviller,

Associate Director, Administration and Operations.

[FR Doc. 2013–23969 Filed 9–30–13; 8:45 am]

BILLING CODE 7310–S1–P

MORRIS K. UDALL AND STEWART L. UDALL FOUNDATION

Sunshine Act Meetings

TIME AND DATE: 9 a.m. to 5 p.m., Thursday, October 10, 2013.

PLACE: The offices of the Morris K. Udall and Stewart L. Udall Foundation, 130 South Scott Avenue, Tucson, AZ 85701.

STATUS: This meeting of the Board of Trustees will be open to the public, unless it is necessary for the Board to consider items in executive session.

MATTERS TO BE CONSIDERED: (1) Minutes of the June 10–11, 2013, Board of Trustees Meeting and resolution conferring upon David J. Hayes the position of Trustee Emeritus of the Morris K. Udall and Stewart L. Udall Foundation; (2) Appropriations Update; (3) Financial and Management Report and resolution to ratify the Executive Committee vote approving the new Udall Foundation Senior Management structure; (4) Ethics Training Update and General Counsel's Report; (5) U.S. Institute for Environmental Conflict Resolution Report; (6) Education Programs Report and resolution to elect G. Stephen Mason to the Board of

Directors of Parks in Focus Fund, Inc.; (7) Udall Center for Studies in Public Policy, Native Nations Institute, and Udall Archives Report & Work Plan and resolutions regarding allocation and transfer of funds; and (8) personnel matters.

PORTIONS OPEN TO THE PUBLIC: All agenda items except as noted below.

PORTIONS CLOSED TO THE PUBLIC: Executive session to review personnel matters.

CONTACT PERSON FOR MORE INFORMATION: Philip J. Lemanski, Executive Director, 130 South Scott Avenue, Tucson, AZ 85701, (520) 901–8500.

Dated: September 23, 2013.

Elizabeth E. Monroe,

Executive Assistant, Morris K. Udall and Stewart L. Udall Foundation, and Federal Register Liaison Officer.

[FR Doc. 2013–23616 Filed 9–30–13; 8:45 am]

BILLING CODE 6820–FN–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 25, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to Office of Management and Budget (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, 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 within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utility Service

Title: Servicing of Water Programs Loans and Grants.

OMB Control Number: 0572–0137.

Summary of Collection: Authority for servicing of Water Programs Loan and Grants is contained in Section 306e of the Consolidated Farm and Rural Development Act, as amended. The information collected covers loan and grant servicing regulations, 7 CFR part 1782, which prescribes policies and responsibilities for servicing actions necessary in connection with Water and Environmental Programs (WEP) loans and grants. WEP provides loans, guaranteed loans and grants for water, sewer, storm water, and solid waste disposal facilities in rural areas and towns of up to 10,000 people.

Need and Use of the Information: The Rural Utilities Service will collect information using various forms. The collected information for the most part is financial in nature and needed by the Agency to determine if borrowers, based on their individual situations, qualify for the various servicing authorities. Servicing actions become necessary due to the development of financial or other problems and may be initiated by either a recipient which recognizes that a problem exists and wished to resolve it, or by the Agency. If a problem exists, a recipient must furnish financial information which is used to aid in resolving the problem through re-amortization, sale, transfer, debt restructuring, liquidation, or other means provided in the regulations.

Description of Respondents: Business or other for-profit; non-profit institutions; State and local governments.

Number of Respondents: 493.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 651.

Rural Utilities Service

Title: Broadband Initiatives Program—Rural Libraries, Technical Assistance and Satellite Grants.

OMB Control Number: 0572–0145.

Summary of Collection: The American Recovery and Reinvestment Act of 2009 appropriated $2.5 billion of budget authority for establishing the Broadband Initiatives Program (BIP), 2 CFR part 176, which may extend loans, grants, and loan/grant combinations to facilitate broadband deployment in rural areas. Rural Utilities Service (RUS) announced the application window for funding Rural Libraries, Technical Assistance and Satellite grants under the Broadband Initiatives Program on May 7, 2010. Applications for the three funding opportunities were reviewed and awards were made for Satellite and Technical Assistance funding. No awards were made for the Rural Libraries funding opportunity.

Need and Use of the Information: Collection of information is being extended to retain compliance with the Recovery Act. Information collected includes the burden associated with post-application requirements as well as other associated reporting requirements. The Recovery Act directs RUS to monitor recipients' progress through periodic reports, including through a quarterly reporting requirement.

Recipients of grants will need to submit a detailed list of all projects or activities for which Recovery Act funds were expended or obligated, including (a) the name of the project or activity; (b) a description of the project or activity; (c) an evaluation of the completion status of the project or activity; (d) an estimate of the number of jobs created and the number of jobs retained by the project or activity; and (e) for infrastructure investments made by State and local governments, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with Recovery Act funds. In addition, detailed information on any subcontracts or sub-grants awarded by the recipient are to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006.

Description of Respondents: Business or other for-profit.

Number of Respondents: 22.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly.

Total Burden Hours: 312.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–23870 Filed 9–30–13; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

September 25, 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), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Egg Product Industry Survey.

OMB Control Number: 0583–New.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031–1056). This statue mandates that FSIS protect the public by ensuring that egg products are safe, wholesome, unadulterated, and properly labeled and packaged. To assist FSIS in meeting its strategic goal to protect public health by significantly reducing the prevalence of foodborne hazards from egg products, the agency requires accurate and up-to-date information about industry's use of food safety practices and technologies. FSIS will use a survey to track trends and adoption rates of practices and technologies. In addition, FSIS will address issues currently facing FSIS and the egg products processing industry.

Need and Use of the Information: The results of the egg products industry survey will provide reliable and valid information regarding food safety practices in FSIS-regulated plants that can be used to address a broad variety of the agency's analyses needs. The survey will also provide information needed for analyses of public health risks that are not available from FSIS inspectors and other data sources.

Description of Respondents: Business or other for-profit.

Number of Respondents: 80.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 62.

Food Safety and Inspection Service

Title: Accredited Laboratory Program Annual Contact Update Form.

OMB Control Number: 0583–New.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 et. seq.), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, et. seq.), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031). These statues mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, not adulterated, and properly labeled and packaged.

Need and Use of the Information: FSIS will collect information using the Annual Contact Update form to maintain necessary information for responsible connected personnel at the laboratories. The form will also inform the Agency if a laboratory, or responsibly connected person or entity, has been charged, indicted, or convicted or any crime.

Description of Respondents: Business or other for-profit.

Number of Respondents: 60.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 15.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–23869 Filed 9–30–13; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

[Docket No. APHIS–2012–0039]

Privacy Act Systems of Records; LabWare Laboratory Information Management System

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of a proposed new system of records.

SUMMARY: The Animal and Plant Health Inspection Service proposes to add a system of records to its inventory of records systems subject to the Privacy Act of 1974, as amended. The system of records is the LabWare Laboratory Information Management System, USDA–APHIS–19. This notice is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of record systems maintained by the agency.

DATES: *Effective Date:* This system will be adopted without further notice on November 12, 2013 unless modified to respond to comments received from the public and published in a subsequent notice.

Comment Date: Comments must be received in writing on or before October 31, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0039-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0039, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0039* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m.,

Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Elizabeth A. Lautner, NVSL LabWare LIMS Owner, NVSL, APHIS, 1920 Dayton Avenue, Ames, IA 50010; (515) 337–7301.

SUPPLEMENTARY INFORMATION:

Background

The Privacy Act of 1974, as amended (5 U.S.C. 552a), requires agencies to publish in the **Federal Register** notice of new or revised systems of records maintained by the agency. A system of records is a group of any records under the control of any agency, from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to an individual.

The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) is proposing to add a new system of records, entitled LabWare Laboratory Information Management System (LabWare LIMS), to maintain a record of activities conducted by the agency pursuant to its mission and responsibilities authorized by the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*).

LabWare LIMS is used to track and save results of diagnostic testing performed by or under the auspices of APHIS' National Veterinary Services Laboratories (NVSL).

Diagnostic testing provides official test results for animal imports, exports, and interstate movements, and for certifying the disease status of herds and States or zones. Diagnostic testing is also done in connection with suspected foreign animal disease investigations and domestic control and eradication programs. Records in the system provide current and historical data used for detecting animal diseases, conducting emergency responses, conducting and evaluating animal disease control measures, performing epidemiological investigations, and forecasting possible animal disease occurrences and outbreaks.

The LabWare LIMS holds information related to submitters and owners of samples submitted for diagnostic testing, as well as sample specific information, testing data, and information on reagents used for tests.

Information about submitters and owners of diagnostic samples includes some or all of the following: Name, shipping address, invoice address, telephone number, email address, and National Finance Center account number or credit card number (last four digits only). This information is required in order to identify diagnostic samples and track and save test results, report test results, and bill for services.

Information about submitters and owners of diagnostic samples is from submission forms that accompany laboratory specimens sent to the NVSL for diagnostic testing. The NVSL receives approximately 50,000 submissions annually from State and private veterinary diagnostic laboratories, as well as private veterinary practitioners, Federal meat inspectors, Federal field veterinarians, and others. In addition, the NVSL receives laboratory samples from other countries related to imports and for cases where other countries request diagnostic assistance.

Additionally, the system contains information about APHIS employees who enter data into the system, including some or all of the following: Name, job title, business telephone number, business email address, supervisor's name, organizational group to which employee belongs within the NVSL and APHIS' Center for Veterinary Biologics, and training and proficiency records related to diagnostic testing. Employee information contained in the system creates data for APHIS' User Fees System application.

APHIS routinely shares records concerning diagnostic test results with the submitting veterinarian and State veterinarians of the submitter's State, animal owner's State, and animal's location State. They receive a test report with the data submitted and the results of the testing. The original submission form may also be included with the test report.

Other routine uses of records include releases related to litigation or investigations of violations of law. A complete listing of the routine uses of records maintained in this system is included in the document published with this notice.

Report on a New System of Records

A report on the new system of records, required by 5 U.S.C. 552a(r), as implemented by OMB Circular A–130, was sent to the Chairman, Committee on Homeland Security and Governmental Affairs, United States Senate; the Chairman, Committee on Oversight and Government Reform, House of Representatives; and the Administrator, Office of Information and Regulatory Affairs, OMB.

Thomas J. Vilsack,
Secretary.

SYSTEM NAME:

LabWare Laboratory Information Management System (LabWare LIMS), USDA–APHIS–19.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

The master data for the LabWare LIMS is stored and maintained on USDA-owned servers physically located in the secure USDA-owned facility, National Centers for Animal Health in Ames, IA. A backup site for the data is located in USDA offices in Ft. Collins, CO. Paper files are maintained by USDA's National Veterinary Services Laboratories (NVSL) at Ames, IA, and Plum Island, NY.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Submitters and owners of animal diagnostic samples received by the NVSL, and USDA employees who enter data into the LabWare LIMS from laboratory records or other paperwork provided by sample submitters.

CATEGORIES OF RECORDS IN THE SYSTEM:

The LabWare LIMS will collect some or all of the following information about submitters and owners of diagnostic samples: Name, shipping address, invoice address, telephone number, email address, and National Finance Center account number or credit card number (last four digits only). The LabWare LIMS will collect some or all of the following information about USDA employees who enter data into the system: Name, job title, business telephone number, business email address, supervisor's name, organizational group to which employee belongs within the NVSL and APHIS' Center for Veterinary Biologics, and diagnostic testing related training and proficiency records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Animal Health Protection Act (7 U.S.C. 8301 *et seq.*)

PURPOSE(S):

The LabWare LIMS is a laboratory information system that tracks and saves test results on animal diagnostic samples received at the NVSL.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C.

552a(b) of the Privacy Act, records maintained in the system may be disclosed outside USDA as follows:

(1) To the submitting veterinarian and State veterinarians of the submitter State, owner State, and animal location State to provide test results;

(2) To the appropriate agency, whether Federal, State, local, or foreign, charged with responsibility of investigating or prosecuting a violation of law or of enforcing, implementing, or complying with a statute, rule, regulation, or order issued pursuant thereto, of any record within this system when information available indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and either arising by general statute or particular program statute, or by rule, regulation, or court order issued pursuant thereto;

(3) To the Department of Justice when: (a) The agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation; provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected;

(4) For use in a proceeding before a court or adjudicative body before which the agency is authorized to appear, when: (a) The agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or (d) the United States, is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation; provided, however, that in each case, the agency determines that disclosure of the records to the court is a use of the information contained in the records that is compatible with the purpose for which the records were collected;

(5) To appropriate agencies, entities, and persons when: (a) The agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, a risk of identity theft or fraud, or a risk of harm to the security or integrity of this system or other systems or programs (whether maintained by the agency or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the agency's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm;

(6) To the National Archives and Records Administration for records management inspections conducted under 44 U.S.C. 2904 and 2906.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The system includes a database and paper records. The master electronic data is stored and maintained on USDA-owned servers physically located in a secure USDA-owned facility. Paper files, consisting of the submission forms for diagnostic samples, are stored in lockable cabinets in laboratory space or administrative offices.

RETRIEVABILITY:

Data may be retrieved by an accession number, which is a system generated identification number; or by a sample number assigned by the sample submitter; or by a number assigned by NVSL to a submitter; or by a submitter's name.

SAFEGUARDS:

Data are kept in a secure environment at USDA-owned facilities. All access to LabWare LIMS is internal to USDA APHIS staff.

All access to the electronic data in the system is controlled by formal authorization. Each employee's supervisor must identify what functional roles an employee needs in the LabWare LIMS. Once the roles have been identified, the employee must pass a proficiency test and perform tasks associated with that role before he or she is given access to the production system. All access to the system is limited by username/password. Employees must acknowledge a warning banner before logging in. The application limits access to relevant information and prevents access to unauthorized information. Users are trained and are required to formally confirm that they understand value and sensitivity of data in the system. Submitting veterinarians and State veterinarians receive test reports by email and/or through a Lotus Notes-based system that is fed by LabWare LIMS, but they have no direct access to LabWare LIMS.

Electronic and paper records are further protected by security measures in place at both the Ames and Plum Island facilities related to laboratory work conducted there. In Ames, the entire facility is protected by perimeter fencing and monitored by closed circuit cameras. Access to Plum Island is restricted to contracted and monitored ferry service. At both locations, buildings are locked, guarded, and monitored around the clock, and laboratory spaces have additional security measures.

RETENTION AND DISPOSAL:

Records will be retained indefinitely pending approval of a records retention schedule by the National Archives and Records Administration. Under the schedule submitted for approval, paper records would be retained for a minimum of 3 years, data would be maintained in the system for 25 years, and would be archived at 5-year intervals.

SYSTEM MANAGER(S) AND ADDRESS:

Director, National Veterinary Services Laboratories, 1920 Dayton Avenue, Ames, IA 50010.

NOTIFICATION PROCEDURE:

Any individual may request general information regarding this system of records or information as to whether the system contains records pertaining to him/her from the system manager at the address above. All inquiries pertaining to this system should be in writing, must name the system of records as set forth in the system notice, and must contain the individual's name, telephone number, address, and email address.

RECORD ACCESS PROCEDURES:

Any individual may obtain information from a record in the system that pertains to him or her. Requests for hard copies of records should be in writing, and the request must contain the requesting individual's name, address, name of the system of records, timeframe for the records in question, any other pertinent information to help identify the file, and a copy of his/her photo identification containing a current address for verification of

identification. All inquiries should be addressed to the Freedom of Information and Privacy Act Staff, Legislative and Public Affairs, APHIS, 4700 River Road Unit 50, Riverdale, MD 20737–1232.

CONTESTING RECORD PROCEDURES:

Any individual may contest information contained within a record in the system that pertains to him/her by submitting a written request to the system manager at the address above. Include the reason for contesting the record and the proposed amendment to the information with supporting documentation to show how the record is inaccurate.

RECORD SOURCE CATEGORIES:

The sources of information in the system are from submission forms that accompany laboratory specimens sent into the laboratory for diagnostic testing. The NVSL receives submissions from State and private veterinary diagnostic laboratories as well as private veterinary practitioners, Federal meat inspectors, Federal field veterinarians, and others. In addition, the NVSL receives laboratory samples from other countries associated with imports and for cases where diagnostic assistance is requested.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2013–23868 Filed 9–30–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–88–2013]

Foreign-Trade Zone (FTZ) 183—Austin, Texas; Notification of Proposed Production Activity; Flextronics America, LLC (Automatic Data Processing Machines); Austin, Texas

Flextronics America, LLC (Flextronics) submitted a notification of proposed production activity to the FTZ Board for its facility in Austin, Texas. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on September 20, 2013.

A separate application for zone status at the Flextronics facility will be processed under Section 400.38 of the Board's regulations. The facility is used for the machining, assembly, programming, testing, packaging, final stage processing and repair of automatic data processing machines. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Flextronics from customs duty payments on the foreign status components used in export production. On its domestic sales, Flextronics would be able to choose the duty rate during customs entry procedures that applies to automatic data processing machines (duty-free) for the foreign status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

The components and materials sourced from abroad include: gaskets; input/output assemblies; electromagnetic interference support walls; bumpers; adhesives; sleeves; rubber bushings; screws; alignment and connector pins; spacers; locking pin screws; springs; clips; shields; standoffs; lock clamps; fans; input/output structural wall subassemblies; spring latch buttons; exhaust rub rail adhesives; AC inlet, busbar, button, cover, mechanism, shielding, CPU stiffener, inlet, roof and shroud assemblies; mechanism bases; storage; busbars; button dim links; electromagnetic interference fans and fan tops; exhaust finishes; heat sinks; upper ring housing gaskets; WiFi flex holder finishes; connector brackets; frames; holders; insulators; link torsion; manifold exhausts; stiffeners; subassemblies; thermal pads; insert mold torsion bars; torsion springs; vapor chambers; power supplies; housing magnets; speakers; antenna assemblies; printed circuit boards; flexible printed circuit board assemblies; backer, switch and button subassemblies; connectors; printed circuit board assemblies; WiFi interposers; and, cables (duty rate ranges from duty-free to 8.6%).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is November 12, 2013.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

FOR FURTHER INFORMATION CONTACT: Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: September 25, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–23779 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Denying Export Privileges

In the Matter of: Volha Dubouskaya, Inmate #–67621–066–30, U.S.P. Hazelton, U.S. Penitentiary, P.O. Box 2000, Bruceton Mills, WV 26525.

On February 6, 2013, in the U.S. District Court, Eastern District of Pennsylvania, Volha Dubouskaya (''Dubouskaya''), was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)) (''IEEPA''). Specifically, Dubouskaya was convicted of conspiring and agreeing, together with others known and unknown to the grand jury, to commit an offense against the United States, that is, to willfully export from the United States to Belarus export-controlled items, including but not limited to L–3 x200xp Handheld Thermal Imaging Cameras, without first obtaining from the United States Department of Commerce a license or written authorization. Dubouskaya was sentenced to six months in prison followed by three years of supervised release, a $3,000 criminal fine and an assessment of $100.00.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'')[1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the Export Administration Act (''EAA''), the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR Parts 730–774 (2013). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. app. 2401–2420 (2000)) (''EAA''). Since August 21, 2001, the EAA 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 8, 2013 (78 FR 49107 (August 12, 2013)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)).

Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. app. 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. app. 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of Dubouskaya's conviction for violating the IEEPA, and have provided notice and an opportunity for Dubouskaya to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have not received a submission from Dubouskaya.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Dubouskaya's export privileges under the Regulations for a period of 10 years from the date of Dubouskaya's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Dubouskaya had an interest at the time of her conviction.

Accordingly, it is hereby

Ordered

I. Until February 6, 2023, Volha Dubouskaya, with a last known address at: Inmate Number #67621–066–30, U.S.P. Hazelton, U.S. Penitentiary, P.O. Box 2000, Bruceton Mills, WV 26525, and when acting for or on behalf of Dubouskaya, her representatives, assigns, agents or employees (the ''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, 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.

II. 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.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Dubouskaya by affiliation, ownership, control or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until February 6, 2023.

VI. In accordance with Part 756 of the Regulations, Dubouskaya may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of part 756 of the Regulations.

VII. A copy of this Order shall be delivered to the Dubouskaya. This Order shall be published in the **Federal Register**.

Issued this 25th day of September, 2013.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. 2013–23913 Filed 9–30–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Denying Export Privileges

In the Matter of: Andrew Silcox, Inmate #–84941–280, FCI Bastrop, Federal Correctional Institution, P.O. Box 1010, Bastrop, TX 53952.

On March 1, 2012, in the U.S. District Court, Western District of Texas, Andrew Silcox (''Silcox''), was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2006 & Supp. IV 2010)) (''AECA''). Specifically, Silcox was convicted of knowingly and willfully exporting from the United States a defense article, to-wit: a Naval Radar Control Unit AN/SPS–40B/C/D, part number 161664, also known as a Sensitivity Time Control Generator Assembly, which is designated as a defense article on the United States Munitions List, Category XI(c), without having first obtained from the United States Department of State a license for such export or written authorization for such export. Silcox was sentenced to 24 months of imprisonment and three years of supervised release. Silcox is also listed on the U.S. Department of State Debarred List.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'') [1] provides, in pertinent

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2013). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. app. 2401–2420 (2000)) (''EAA''). Since August 21, 2001, the EAA has been in lapse and the President, through

Continued

part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the Export Administration Act (''EAA''), the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. app. 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. app. 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of Silcox's conviction for violating the AECA, and have provided notice and an opportunity for Silcox to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have not received a submission from Silcox.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Silcox's export privileges under the Regulations for a period of 10 years from the date of Silcox's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Silcox had an interest at the time of his conviction.

Accordingly, it is hereby

Ordered

I. Until March 1, 2022, Andrew Silcox, with a last known address at: Inmate Number #84941–280, FCI Bastrop, Federal Correctional Institution, P.O. Box 1010, Bastrop, TX 53952, and when acting for or on behalf of Silcox, his representatives, assigns, agents or employees (the ''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, 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.

II. 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.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Silcox by affiliation, ownership, control or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until March 1, 2022.

VI. In accordance with Part 756 of the Regulations, Silcox may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VII. A copy of this Order shall be delivered to the Silcox. This Order shall be published in the **Federal Register**.

Issued this 25th day of September, 2013.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. 2013–23912 Filed 9–30–13; 8:45 am]

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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 8, 2013 (78 FR 49107 (August 12, 2013)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)).

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Order Denying Export Privileges

In the Matter of: Vikramaditya Singh, a.k.a. Vik A, 16810 E. Avenue of the Fountains, Suite 108, Fountain Hills, AZ 85268.

On March 3, 2011, in the U.S. District Court, District of Delaware, Vikramaditya Singh, a.k.a.Vik A (''Singh'') was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)) (''IEEPA''). Specifically, Singh was convicted of knowingly and willfully causing and attempting to cause the export of digital microwave radios to Iran without the required authorization from the Office of Foreign Assets Control, Department of Treasury. Singh was sentenced to three years of probation, six months of home confinement and a $100,000 fine.

Section 766.25 of the Export Administration Regulations (''EAR'' or

''Regulations'')[1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the Export Administration Act (''EAA''), the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. app. 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. app. 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of Singh's conviction for violating the IEEPA, and have provided notice and an opportunity for Singh to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have received a submission from Singh.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Singh's export privileges under the Regulations for a period of 10 years from the date of Singh's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Singh had an interest at the time of his conviction.

Accordingly, it is hereby

Ordered

I. Until March 3, 2021, Vikramaditya Singh, a.k.a. Vik A, with a last known address at: 16810 E. Avenue of the Fountains, Suite 108, Fountain Hills, AZ 85268, and when acting for or on behalf of Singh, his representatives, assigns, agents or employees (the ''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, 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.

II. 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.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Singh by affiliation, ownership, control or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until March 3, 2021.

VI. In accordance with Part 756 of the Regulations, Singh may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VII. A copy of this Order shall be delivered to the Singh. This Order shall be published in the **Federal Register**.

Issued this 25th day of September, 2013.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. 2013–23910 Filed 9–30–13; 8:45 am]

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[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2013). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. app. 2401–2420 (2000)) (''EAA''). Since August 21, 2001, the EAA 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 8, 2013 (78 Fed. Reg. 49107 (August 12, 2013)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)).

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on October 29, 2013, 9:30 a.m., in the Herbert C. Hoover Building, Room 6087B, 14th Street between Constitution and Pennsylvania Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Public Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than October 22, 2013.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on September 23, 2013 pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Yvette Springer on (202) 482–2813.

Dated: September 26, 2013.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2013–23974 Filed 9–30–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for November 2013

The following Sunset Reviews are scheduled for initiation in November 2013 and will appear in that month's Notice of Initiation of Five-Year Sunset Review (''Sunset Review'').

	Department contact
Antidumping Duty Proceedings	
Ferrovanadium from China (A–570–873) (2nd Review)	Jennifer Moats, (202) 482–5047.
Freshwater Crawfish Tailmeat from China (A–570–848) (3rd Review)	David Goldberger, (202) 482–4136.
Ferrovanadium from South Africa (A–791–815) (2nd Review)	David Goldberger, (202) 482–4136.
Uncovered Innerspring Units from China (A–570–928) (1st Review)	Jennifer Moats, (202) 482–5047.
Uncovered Innerspring Units from South Africa (A–791–821) (1st Review)	David Goldberger, (202) 482–4136.
Uncovered Innerspring Units from Vietnam (A–552–803) (1st Review)	David Goldberger, (202) 482–4136.
Countervailing Duty Proceedings	
No Sunset Review of countervailing duty order is scheduled for initiation in November 2013.	
Suspended Investigations	
No Sunset Review of suspended investigations is scheduled for initiation in November 2013.	

The Department's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin,* 63 FR 18871 (April 16, 1998). The Notice of Initiation of Five-Year (''Sunset'') Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Please note that if the Department receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: September 20, 2013.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2013–23963 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (''Sunset'') Review

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') is automatically initiating five-year reviews (''Sunset Reviews'') of the antidumping and countervailing duty (''AD/CVD'') orders listed below. The International Trade Commission (''the Commission'') is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers the same orders.

DATES: *Effective Date:* October 1, 2013.

FOR FURTHER INFORMATION CONTACT: The Department official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders: Policy Bulletin,* 63 FR 18871 (April 16, 1998), and in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating Sunset Reviews of the following antidumping duty orders:

DOC case No.	ITC case No.	Country	Product	Department contact
A–351–841	731–TA–1131	Brazil	Polyethylene Terephthalate (Pet) Film (1st Review)	Dana Mermelstein (202) 482–1391.
A–570–924	731–TA–1132	China	Polyethylene Terephthalate (Pet) Film (1st Review)	Dana Mermelstein (202) 482–1391.
A–570–920	731–TA–1126 (1st Review)	China	Lightweight Thermal Paper	David Goldberger (202) 482–4136.
C–570–921	701–TA–451	China	Lightweight Thermal Paper (1st Review)	David Goldberger (202) 482–4136.
A–428–840	731–TA–1127	Germany	Lightweight Thermal Paper (1st Review)	David Goldberger (202) 482–4136.
A–520–803	731–TA–1134	United Arab Emirates	Polyethylene Terephthalate (Pet) Film (1st Review)	Dana Mermelstein (202) 482–1391.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Department's regulations, the Department's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's Web site at the following address: ''*http://ia.ita.doc.gov/sunset/.*'' All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''), can be found at 19 CFR 351.303. *See also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

This notice serves as a reminder that any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. *See* section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all AD/CVD investigations or proceedings initiated on or after August 16, 2013. *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (''*Final Rule*'') (amending 19 CFR 351.303(g)). The formats for the revised certifications are provided at the end of the *Final Rule.* The Department intends to reject factual submissions if the submitting party does not comply with the revised certification requirements.

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 and countervailing duty 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 segments initiated on or after May 10, 2013. Please review the final rule, available at *http://ia.ita.doc.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in this segment. To the extent that other regulations govern the submission of factual information in a segment (such as 19 CFR 351.218), these time limits will continue to be applied.

Pursuant to 19 CFR 351.103(d), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties to apply for access to proprietary information under administrative protective order (''APO'') immediately following publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review. *See* 19 CFR 351.218(d)(1)(iii).

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Please consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews.[1] Please consult the Department's regulations at 19 CFR Part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: September 20, 2013.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2013–23958 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–DS–P

[1] In comments made on the interim final sunset regulations, a number of parties stated that the proposed five-day period for rebuttals to substantive responses to a notice of initiation was insufficient. This requirement was retained in the final sunset regulations at 19 CFR 351.218(d)(4). As provided in 19 CFR 351.302(b), however, the Department will consider individual requests to extend that five-day deadline based upon a showing of good cause.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC896

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Applications for three new scientific research permits.

SUMMARY: Notice is hereby given that NMFS has received three scientific research permit application requests relating to Pacific salmon. The proposed research is intended to increase knowledge of species listed under the Endangered Species Act (ESA) and to help guide management and conservation efforts. The applications may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm.*

DATES: Comments or requests for a public hearing on the applications must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on October 31, 2013.

ADDRESSES: Written comments on the applications should be sent to the Protected Resources Division, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232–1274. Comments may also be sent via fax to 503–230–5441 or by email to *nmfs.nwr.apps@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Rob Clapp, Portland, OR (ph.: 503–231–2314), Fax: 503–230–5441, email: *Robert.Clapp@noaa.gov*). Permit application instructions are available from the address above, or online at *https://apps.nmfs.noaa.gov.*

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following listed species are covered in this notice:

Chinook salmon (*Oncorhynchus tshawytscha*): endangered upper Columbia River (UCR).

Steelhead (*O. mykiss*): threatened UCR; threatened middle Columbia River (MCR).

Authority

Scientific research permits are issued in accordance with section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et. seq*) and regulations governing listed fish and wildlife permits (50 CFR 222–226). NMFS issues permits based on findings that such permits: (1) Are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species that are the subject of the permit; and (3) are consistent with the purposes and policy of section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Applications Received

Permit 18045

The Washington Department of Ecology (WDOE) is seeking a three-year permit to assess biological and habitat conditions in Wide Hollow Creek, a tributary to the Yakima River in Washington State. The creek is currently listed as water-quality impaired and the WDOE is attempting to determine the causes of that impairment. To that end, the researchers working under Permit 18045 would conduct water quality,

habitat, and fish and macroinvertebrate assessments in the creek. The researchers would take chemical and temperature measurements, capture some insects, and conduct a single pass through a single stream reach (approximately 150 meters long) with a backpack electrofishing unit. They would use the information they gather to assess the community assemblage and the relative fish species abundance. Any listed steelhead the researchers encounter would simply be identified in the capture net and immediately released; they would not be removed from the stream. The research would benefit listed species by helping managers design actions to address water and habitat quality impairments in the stream and thus make it more habitable for listed fish in the future. It is possible, but unlikely, that a very small number of the captured fish may be killed as an inadvertent result of the research.

Permit 18049

The Colville Confederated Tribes (CCT) are seeking a five-year permit to monitor UCR steelhead population sizes, habitat use, and emigration rates in the Okanogan River and its tributaries in Washington State. The researchers would conduct their work in randomly-selected sites on eleven tributaries to the Okanogan River. They would capture juvenile steelhead using backpack electrofishing units and soft-mesh dipnets. The captured fish would be anesthetized and measured, and any steelhead greater than 95mm in fork length would be marked by experienced taggers with a 12mm passive integrated transponder (PIT) tag injected from a single-use needle. All fish less than 95mm in length would have their caudal fins clipped for marking purposes and, in some cases, the tissue would be retained for DNA analysis. The researchers would make two passes with the electrofishing unit in each stream reach. The research would benefit the listed fish in two ways: First, UCR steelhead status in the Okanogan River subbasin is poorly understood and the information generated by the research would fill that gap and thereby help managers design recovery strategies for the listed fish in that area; it would also help them guide and mitigate any future land management activities that could affect the fish. Second, the collected genetic material would be used to examine the relationship between natural and hatchery fish in the area—and given that hatchery influence is considered a limiting factor for the UCR steelhead, more knowledge about that interaction would help managers design actions to address the negative effects local hatchery programs may be having. The researchers do not intend to kill any of the fish being captured, but a small number may die as an inadvertent result of the research activities.

Permit 18079

The University of Idaho is seeking a two-year permit to study the effects of hyporheic exchange on the growth of post-emergent Chinook salmon. The research is designed to study hydrological exchange between surface and ground and determine the ways in which it may affect the factors that affect rearing conditions for juvenile salmon. The project has two components. The first component involves a cage experiment in which post-emergent hatchery Chinook salmon would be held and their growth monitored. The second component involves sampling wild (natural) post-emergent Chinook salmon to compare fish lengths and weights and estimate relative fish abundances. Both components would be carried out at up to 18 sites in the Methow River subbasin in Washington State. The first component would only affect hatchery fish that have already been accounted for in a hatchery plan of operations (Winthrop hatchery). The second component of the study would involve fish snorkeling surveys supplemented by dip netting three times before and after cage experiments to measure relative fish abundance in groundwater upwelling and downwelling areas at the selected sites. The fish would be captured, anaesthetized with MS–222 and a buffer solution, measured, weighed, and released. The research would produce important information on how a key river characteristic (groundwater/surface water exchange) affects salmonid growth and survival. The researchers do not intend to kill any fish, but a small number may die as an inadvertent result of the research.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the applications, associated documents, and comments submitted to determine whether the applications meet the requirements of section 10(a) of the ESA and Federal regulations. The final permit decisions will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final action in the **Federal Register**.

Dated: September 26, 2013.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–23893 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC861

Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fisheries; Notice That Vendor Will Provide Year 2014 Cage Tags

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

ACTION: Notice of vendor to provide fishing year 2014 cage tags.

SUMMARY: NMFS informs surfclam and ocean quahog individual transferable quota (ITQ) allocation holders that they will be required to purchase their fishing year 2014 (January 1, 2014–December 31, 2014) cage tags from the National Band and Tag Company. The intent of this notice is to comply with regulations for the Atlantic surfclam and ocean quahog fisheries and to promote efficient distribution of cage tags.

ADDRESSES: Written inquiries may be sent to: Regional Administrator, National Marine Fisheries Service, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930–2298.

FOR FURTHER INFORMATION CONTACT: Anna Macan, Fishery Management Specialist, (978) 281–9165; fax (978) 281–9161.

SUPPLEMENTARY INFORMATION: The Federal Atlantic surfclam and ocean quahog fishery regulations at 50 CFR 648.77(b) authorize the Regional Administrator of the Northeast Region, NMFS, to specify in the **Federal Register** a vendor from whom cage tags, required under the Atlantic Surfclam and Ocean Quahog Fishery Management Plan (FMP), shall be purchased. Notice is hereby given that National Band and Tag Company of Newport, Kentucky, is the authorized vendor of cage tags required for the fishing year 2014 Federal surfclam and ocean quahog fisheries. Detailed instructions for purchasing these cage tags will be provided in a letter to ITQ allocation holders in these fisheries from NMFS within the next several weeks.

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

Dated: September 26, 2013.

Kelly Denit,

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

[FR Doc. 2013–23966 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC886

Marine Fisheries Advisory Committee Meeting

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

ACTION: Notice of open public meeting.

SUMMARY: This notice sets forth the proposed schedule and agenda of a forthcoming meeting of the Marine Fisheries Advisory Committee (MAFAC). The members will discuss and provide advice on issues outlined under **SUPPLEMENTARY INFORMATION** below.

DATES: The meeting will be held October 22–24, 2013 from 8 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the NOAA Science Center, 1301 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Mark Holliday, MAFAC Executive Director; (301) 427–8004; email: *Mark.Holliday@noaa.gov.*

SUPPLEMENTARY INFORMATION: As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, notice is hereby given of a meeting of MAFAC. The MAFAC was established by the Secretary of Commerce (Secretary), and, since 1971, advises the Secretary on all living marine resource matters that are the responsibility of the Department of Commerce. The complete charter and summaries of prior meetings are located online at *http://www.nmfs.noaa.gov/ocs/mafac/.*

Matters To Be Considered

This meeting time and agenda are subject to change.

The meeting is convened to hear presentations and discuss policies and guidance on the following topics: seafood certification and sustainability, Endangered Species Act and section 7 consultations, outcomes of the Managing Our Nation's Fisheries 3 conference and next steps, recreational fisheries issues, and the NMFS budget. The meeting will include discussion of various MAFAC administrative and organizational matters and may include meetings of the standing subcommittees.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mark Holliday, MAFAC Executive Director; 301–427–8004 by October 11, 2013.

Dated: September 25, 2013.

Samuel D. Rauch III,

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

[FR Doc. 2013–23968 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Initial Patent Applications

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing efforts to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on this revision of a continuing information collection.

DATES: Written comments must be submitted on or before December 2, 2013.

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

- *Email: InformationCollection@uspto.gov.* Include ''0651–0032 comment'' in the subject line of the message.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.
- *Federal Rulemaking Portal: http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of Raul Tamayo, Senior Legal Advisor, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7728; or by email to *raul.tamayo@uspto.gov.* Additional information about this collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

The USPTO is required by Title 35 of the United States Code, including 35 U.S.C. 131, to examine applications for patents. The USPTO administers the patent statutes through various rules in Chapter 37 of the Code of Federal Regulations, including 37 CFR 1.16 through 1.84. The patent statutes and regulations require applicants to provide sufficient information to allow the USPTO to properly examine the application to determine whether it meets the criteria set forth in the patent statutes and regulations to be issued as a patent.

Most applications for patent, including new utility, design, and provisional applications, can be submitted to the USPTO through EFS-Web. EFS-Web is the USPTO's system for electronic filing of patent correspondence. EFS-Web is accessible via the Internet on the USPTO Web site. The Legal Framework for EFS-Web, available at *http://www.uspto.gov/patents/process/fiie/efs/guidance/New legal framework.jsp,* provides a listing of patent applications and documents permitted to be filed via EFS-Web and patent applications and documents not permitted to be filed via EFS-Web.

There are 69 forms in this collection. This total includes versions of the inventor's oath and declaration forms that were created to comply with the changes resulting from the Leahy-Smith America Invents Act, e.g., forms AIA/01, AIA/02, etc., as well as pre-America Invents Act versions of the oath and declaration forms, e.g., forms SB/01, SB/02, etc., and foreign language translations of the oath and declaration forms, e.g., forms AIA/01CN, SB/02CN, etc. On the other hand, the petitions and the papers filed to supply the name or names of the inventor or inventors after the filing date without a cover sheet in a provisional application, to correct inventorship in a provisional application, and to convert a nonprovisional application to a provisional application do not have forms associated with them.

The Office of Management and Budget (OMB) approved this collection on January 8, 2011, but the Notice of Action included terms of clearance stating that the USPTO should conduct outreach to stakeholders regarding the burden of 0651–0032 Initial Patent Applications and ways to potentially reduce it before the next renewal of the

collection. The terms of clearance also instructed the USPTO to include the results of this outreach in the next Information Collection Request submission. To fulfill this requirement, the USPTO will be conducting a special roundtable session later this year to collect feedback regarding the burden of the collection and ways to potentially reduce it. The results will be included in the Information Collection Request for the renewal of the collection. A subsequent notice will be published in the **Federal Register** detailing the date and format of the roundtable.

The petitions and the papers filed under 37 CFR 1.41, 1.48, and 1.53(c)(2) can be filed electronically as well as in paper. The electronic options for these items are being added into the collection.

This collection currently has capital start-up costs associated with the compact disc copies of patent applications containing large computer program listings or mega tables, postage costs for these oversized submissions, and recordkeeping costs approved as part of the annual (non-hour) cost burden. As part of this renewal, the capital start-up costs are being deleted because these costs are usual and customary costs that are part of everyday business activities. The postage costs for the CD submissions for the oversized program listing or mega table applications are being deleted from this collection because the USPTO is projecting that a negligible number of them will be submitted. The recordkeeping costs associated with keeping a copy of the electronically-submitted patent application files and acknowledgment receipts are being deleted because the USPTO only suggests, but does not require, that applicants keep copies of their electronically-filed applications. In addition, the recordkeeping costs for retaining a copy of the application transmittal form and a back-up copy of the CD submissions of applications with oversized computer program listings and mega tables are also being deleted at this time.

The USPTO is removing the fees associated with the majority of the information requirements in this collection because these fees have been moved into information collection 0651–0072 America Invents Act Section 10 Patent Fee Adjustments, which was approved by OMB in January 2013 in conjunction with the USPTO rulemaking ''Setting and Adjusting Patent Fees'' (RIN 0651–AC54). The corresponding fees are now being deleted from 0651–0032 to avoid double-counting these annual (non-hour) costs in the USPTO's inventory.

II. Method of Collection

As set forth in the Legal Framework for EFS-Web, available at *http://www.uspto.gov/patents/process/file/efs/guidance/New legal framework.jsp,* most of the items in this collection can be submitted electronically through EFS-Web. The USPTO will also accept submissions by mail, facsimile (limited to petitions to accept unintentionally delayed priority/benefit claims, petitions to accept a filing by other than all the inventors or a person not the inventor, petitions to accord the application under 37 CFR 1.495(b) a receipt date, and papers filed under 37 CFR 1.41, 1.48, and 1.53(c)(2)), or hand delivery to the USPTO.

III. Data

OMB Number: 0651–0032.

Form Number(s): PTO/SB/01, 01A, 02, 02A, 02B, 02CN, 02DE, 02ES, 02FR, 02IT, 02JP, 02KR, 02LR, 02NL, 02RU, 02SE, 03, 03A, 04, 06, 07, 14 EFS-Web, 16, 16 EFS-Web, 17, 29, 29A, and 101–110. This collection also includes the following AIA forms: PTO/AIA01 through AIA04, AIA08 through AIA11, AIA14 and 15, AIA18 and 19, and AIA01CN and 01DE, 01ES, 01FR, 01IT, 01JP, 01KR, 01NL, 01RU, 01SE, 02CN, 02DE, 02ES, 02FR, 02IT, 02JP, 02KR, 02NL, 02RU, and 02SE.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households; businesses or other for profits; not-for-profit institutions; and the Federal Government.

Estimated Number of Respondents: 597,047 responses per year. The USPTO estimates that approximately 157,950 of these responses will be from small entities (this estimate reflects a 25% small entity response rate for all items in the collection, except for design-related items in the collection, for which a 50% small entity response rate is estimated). The USPTO estimates that 577,624 of the responses will be filed electronically.

Estimated Time per Response: The USPTO estimates that it takes the public approximately 24 minutes to 33 hours and 12 minutes (0.40 to 33.2 hours) to complete this information, depending on the complexity of the request. This includes the time to gather the necessary information, prepare the application, petition, or paper submission, and submit the completed request to the USPTO. The USPTO calculates that, on balance, it takes the same amount of time to gather the necessary information, prepare the applications, petitions, and other papers and submit them to the USPTO, whether the applicant submits it in paper form or electronically.

Estimated Total Annual Respondent Burden Hours: 12,522,680 hours per year.

Estimated Total Annual Respondent Cost Burden: $4,871,322,520 per year. The USPTO expects that all of the information in this collection will be prepared by an attorney. Using the professional hourly rate of $389 for attorneys in private firms, the USPTO estimates that the total respondent cost burden for this collection is $4,871,322,520 per year.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Original New Utility Applications—No Application Data Sheet	33 hours and 12 minutes	800	26,560
Electronic Original New Utility Applications—No Application Data Sheet.	33 hours and 12 minutes	26,500	879,800
Original New Plant Applications—No Application Data Sheet	7 hours and 36 minutes	100	760
Original New Design Applications—No Application Data Sheet	5 hours and 48 minutes	100	580
Electronic Original Design Applications—No Application Data Sheet.	5 hours and 48 minutes	2,900	16,820
Original New Utility Applications—Application Data Sheet	33 hours and 12 minutes	7,500	249,000
Electronic Original New Utility Applications—Application Data Sheet.	33 hours and 12 minutes	238,200	7,908,240
Original New Plant Applications—Application Data Sheet	7 hours and 36 minutes	1,200	9,120
Original New Design Applications—Application Data Sheet	5 hours and 48 minutes	800	4,640
Electronic New Design Applications—Application Data Sheet	5 hours and 48 minutes	26,500	153,700
Continuation/Divisional of an International Application	3 hours and 18 minutes	300	990

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Electronic Continuation/Divisional of an International Application	3 hours and 18 minutes	10,200	33,660
Utility Continuation/Divisional Applications	3 hours and 18 minutes	2,200	7,260
Electronic Utility Continuation/Divisional Applications	3 hours and 18 minutes	71,600	236,280
Plant Continuation/Divisional Applications	2 hours and 12 minutes	200	440
Design Continuation/Divisional Applications	1 hour and 6 minutes	100	110
Electronic Design Continuation/Divisional Applications	1 hour and 6 minutes	2,700	2,970
Continued Prosecution Applications—Design (Request Transmittal and Receipt).	24 minutes	25	10
Electronic Continued Prosecution Applications—Design (Request Transmittal and Receipt).	24 minutes	800	320
Utility Continuation-in-Part Applications	16 hours and 30 minutes	400	6,600
Electronic Utility Continuation-in-Part-Applications	16 hours and 30 minutes	13,100	216,150
Plant Continuation-in-Part Applications	3 hours and 48 minutes	1	4
Design Continuation-in-Part Applications	2 hours and 42 minutes	20	54
Electronic Design Continuation-in-Part Applications	2 hours and 42 minutes	800	2,160
Provisional Application for Patent Cover Sheet	15 hours	5,500	82,500
Electronic Provisional Application for Patent Cover Sheet	15 hours	178,600	2,679,000
Petition to Accept Unintentionally Delayed Priority/Benefit Claim	1 hour	30	30
Electronic Petition to Accept Unintentionally Delayed Priority/Benefit Claim.	1 hour	970	970
Petition to Accept a Filing by Other Than all the Inventors or a Person not the Inventor.	1 hour	33	33
Electronic Petition to Accept a Filing by Other Than all the Inventors or a Person not the Inventor.	1 hour	1,067	1,067
Petition under 37 CFR 1.6(g) to Accord the Application under 37 CFR 1.495(b) a Receipt Date.	30 minutes	1	1
Papers filed under the following: 1.41—to supply the name or names of the inventor or inventors after the filing date without a cover sheet as prescribed by 37 CFR 1.51 (c)(1) in a provisional application. 1.48—for correction of inventorship in a provisional application. 1.53(c)(2)—to convert a nonprovisional application filed under 1.53(b) to a provisional application filed under 1.53(c).	45 minutes	114	86
Electronic Papers filed under the following: 1.41—to supply the name or names of the inventor or inventors after the filing date without a cover sheet as prescribed by 37 CFR 1.51(c)(1) in a provisional application. 1.48—for correction of inventorship in a provisional application. 1.53(c)(2)—to convert a nonprovisional application filed under 1.53(b) to a provisional application filed under 1.53(c).	45 minutes	3,686	2,765
Total		597,047	12,522,680

Estimated Total Annual Non-hour Respondent Cost Burden: $431,933,422 per year. There are no maintenance, operation, capital start-up, or recordkeeping costs associated with this information collection. However, this collection does have annual (non-hour) costs in the form of postage and drawing costs, as well as a petition fee.

The applications, the petitions, and the papers filed under 37 CFR 1.41, 1.48, and 1.53(c)(2) may be submitted by mail through the United States Postal Service. The USPTO recommends that applicants file initial patent applications (which also include the continued prosecution, continuation and divisional, continuation-in-part, and provisional applications) by Express Mail to establish the filing date (otherwise the filing date of the application will be the date that it is received at the USPTO). The USPTO estimates that an application package will weigh at least one pound. Using the Express Mail flat rate cost for mailing envelopes, the USPTO estimates that the average cost for sending an initial application by Express Mail will be $19.95 and that up to 19,246 may be mailed to the USPTO.

The petitions to accept unintentionally delayed priority/benefit claim, to accept a filing by other than all the inventors or a person not the inventor, and the papers filed under 37 CFR 1.41, 1.48, and 1.53(c)(2) can be sent by first-class mail. The USPTO estimates that these submissions will average two ounces, for a first-class postage rate of $0.66 cents. The USPTO estimates that up to 177 submissions may be mailed per year.

The USPTO estimates that the total postage cost for this collection will be $384,075 per year.

Item	Responses	Postage cost ($)	Total postage cost ($)
Express Mailing Costs			
Original New Utility Applications—No Application Data Sheet	800	19.95	15,960.00
Original New Plant Applications—No Application Data Sheet	100	19.95	1,995.00
Original New Design Applications—No Application Data Sheet	100	19.95	1,995.00
Original New Utility Applications—Application Data Sheet	7,500	19.95	149,625.00
Original New Plant Applications—Application Data Sheet	1,200	19.95	23,940.00
Original New Design Applications—Application Data Sheet	800	19.95	15,960.00
Continuation/Divisional of an International Application	300	19.95	5,985.00
Utility Continuation/Divisional Applications	2,200	19.95	43,890.00
Plant Continuation/Divisional Applications	200	19.95	3,990.00
Design Continuation/Divisional Applications	100	19.95	1,995.00
Continued Prosecution Applications—Design (Request Transmittal and Receipt)	25	19.95	499.00
Utility Continuation-in-Part Applications	400	19.95	7,980.00
Plant Continuation-in-Part Applications	1	19.95	20.00
Design Continuation-in-Part Applications	20	19.95	399.00
Provisional Application for Patent Cover Sheet	5,500	19.95	109,725.00
Total Express Mailing Costs			383,958.00
First–Class Mailing Costs			
Petition to Accept Unintentionally Delayed Priority/Benefit Claim	30	0.66	20.00
Petition to Accept a Filing by Other Than all the Inventors or a Person not the Inventor	33	0.66	22.00
Papers Filed Under the Following:	114	0.66	75.00
1.41—to supply the name or names of the inventor or inventors after the filing date without a cover sheet as prescribed by 37 CFR 1.51 (c)(1) in a provisional application.			
1.48—for correction of inventorship in a provisional application.			
1.53(c)(2)—to convert a nonprovisional application filed under 1.53(b) to a provisional application filed under 1.53(c).			
Total First–Class Mailing Costs			117.00
Total Postage Costs			384,075.00

Patent applicants can submit drawings with the utility, design, plant, and provisional applications. Applicants can prepare these drawings on their own or they can hire patent illustration services firms to create them. As a basis for estimating the drawing costs, the USPTO expects that all applicants will have their drawings prepared by patent illustration firms. Estimates for the drawings can vary greatly, depending on the number of figures that need to be produced, the total number of pages for the drawings, and the complexity of the drawings. Because there are many variables involved, the USPTO is using the average of the cost ranges found for the application drawings to derive the estimated cost per sheet that is then used to calculate the total drawing costs.

The utility, plant, and design continuation and divisional applications use the same drawings as the initial filings, so they are not included in these totals. The continuation-in-part applications may use some of the same drawings as the initial applications and some new drawings may be submitted, so those numbers are included in these estimates. The drawings for the continued prosecution applications are also included in the drawing cost totals. There are no continuation, divisional, or continuation-in-part provisional applications.

Costs to produce utility drawings can range from $30 to $200 per sheet. The USPTO estimates that it can cost $115 per sheet to produce the utility drawings and that on average, 9 sheets of drawings are submitted, for an average cost of $1,035 to produce the utility drawings. Out of 286,500 utility applications submitted per year, the USPTO estimates that 77% or 220,605 applications will be submitted with drawings.

Costs to produce design drawings can range from $35 to $350 per sheet. The USPTO estimates that it can cost $193 per sheet to produce design drawings and that on average 9 sheets of drawings are submitted, for an average cost of $1,737 to produce design drawings. The USPTO estimates that all of the design applications filed per year (31,945) will be submitted with drawings.

Photographs are generally submitted for the plant applications, although drawings can also be submitted. The USPTO therefore estimates that the costs to produce the photographs or drawings could range from $35 to $100. The USPTO estimates that it can cost $68 per sheet to produce plant drawings and that on average 9 sheets of drawings are submitted, for an average cost of $612 to produce plant drawings. The USPTO estimates that all of the plant applications filed per year (1,301) will be submitted with drawings.

Costs to produce the provisional drawings can range from $30 to $200 per sheet. The USPTO estimates that it can cost $115 per sheet to produce provisional drawings and that on average 9 sheets of drawings are submitted, for an average cost of $1,035 to produce provisional drawings. Out of 184,100 provisional applications submitted per year, the USPTO estimates that 77% or 141,757 applications will be submitted with drawings.

The USPTO estimates the total non-hour cost burden as a result of patent applicants using patent illustration firms to produce the drawings for their utility, design, plant, and provisional applications is $431,329,347.

Item	Responses	Average drawing cost ($)	Average total drawing cost ($)
Utility Application Drawings	220,605	$1,035	$228,326,175.00
Design Application Drawings	31,945	1,737	55,488,465.00
Plant Application Drawings (Photographs)	1,301	612	796,212.00
Provisional Application Drawings	141,757	1,035	146,718,495.00
Total			431,329,347.00

There is also annual (non-hour) cost burden in the way of filing fees for the petitions to accept a filing by other than all the inventors or a person not the inventor. The filing fees for the applications, the petitions to accept unintentionally delayed priority/benefit claims, the processing fees for the papers filed under 37 CFR 1.41, 1.48, and 1.53(c)(2), the additional fees incurred when an application is filed with additional sheets or excess claims, and the surcharges and fees incurred when an application, the search or examination fee, or the oath or declaration is filed late, when the application is filed with multiple dependent claims, or when the application is filed with a non-English specification are covered under 0651–0072 America Invents Act Section 10 Patent Fee Adjustments.

The total estimated filing costs of $220,000 for this collection are calculated in the following table.

Item	Resps (yr) (a)	Filing fee ($)	Total non-hour cost burden (yr) (a) × (b)
Petition to Accept a Filing by Other Than all the Inventors or a Person not the Inventor	33	$200.00	$6,600.00
Electronic Petition to Accept a Filing by Other Than all the Inventors or a Person not the Inventor	1,067	200.00	213,400.00
Petition under 37 CFR 1.6(g) to accord the Application under 37 CFR 1.495(b) a Receipt Date	1	N/A	0.00
Totals	1,101		220,000.00

The USPTO estimates that the total annual (non-hour) respondent cost burden for this collection, in the form of postage and drawing costs, in addition to petition fees, is estimated to be approximately $431,933,422 per year.

IV. Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the USPTO's request for OMB approval. All comments will become a matter of public record.

The USPTO is soliciting public comments to: (a) 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; (b) 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; (c) Enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Dated: September 25, 2013.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2013–23790 Filed 9–30–13; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Order of the Commodity Futures Trading Commission Relating to the Continuation, Shutdown, and Resumption of Certain Commission Operations in the Event of a Lapse in Appropriations

AGENCY: Commodity Futures Trading Commission

ACTION: Notice of order; final order.

SUMMARY: This order is being issued to provide for the continuation, shutdown, and resumption of certain operations of the Commodity Futures Trading Commission (the ''Commission'') in the event of a lapse in appropriations, and to alert all persons regulated by or engaged in proceedings at the Commission of these provisions.

DATES: This notice and order is effective on September 27, 2013.

FOR FURTHER INFORMATION CONTACT: For market oversight matters contact David Van Wagner, Chief Counsel, Division of Market Oversight (DMO), at 202–418–5481 or *dvanwagner@cftc.gov,* Matthew Hunter, Deputy Director, DMO at 202–418–5861 or *mhunter@cftc.gov.* For clearing matters, contact Ananda Radhakrishnan, Director, Division of Clearing and Risk (DCR), at 202–418–5188 or *aradhakrishnan@cftc.gov;* Robert B. Wasserman, Chief Counsel, DCR, at 202–418–5092 or *rwasserman@cftc.gov;* or John C. Lawton, Deputy Director, DCR, at 202–418–5480, or *jlawton@cftc.gov.* For matters involving intermediaries, contact Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight (DSIO), 202–418–5977 or *gbarnett@cftc.gov;* Thomas Smith, Deputy Director, DSIO, at 202–418–5495 or *tsmith@cftc.gov;* Erik Remmler, Deputy Director, DSIO, at 202–418–7630 or *eremmler@cftc.gov;* or Kevin Piccoli, Deputy Director, DSIO, at 646–746–9834 or *kpiccoli@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

As of 12:01 a.m. on October 1, 2013, the funding of many federal government activities is set to expire. Unless

appropriations are enacted for Fiscal Year 2014, federal departments and agencies whose continued operations are dependent upon such funding—including the Commission—will be required to execute contingency plans for this lapse in appropriations (commonly referred to as a ''shutdown''). Under 31 U.S.C. 1341 (the ''Antideficiency Act''), the Commission is prohibited from expending or obligating any funds in the absence of appropriations, subject to a narrow set of exceptions.[1] The Commission may use one of the exceptions to the Antideficiency Act set forth in 31 U.S.C. 1342, which permits agencies to obligate funds before an appropriations measure has been enacted and to accept voluntary services during a lapse when certain employees are needed to perform emergency or ''excepted'' functions.[2]

The Department of Justice's Office of Legal Counsel has determined that government work performed so that the commodities and futures markets can continue to operate and so that trading may continue qualifies as an ''excepted'' function as set forth in 31 U.S.C. 1342.[3] OLC Memorandum for the Director of the Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations,* OLC Opinion, at 2–3 (Aug. 16, 1995). Consequently, in the event of a lapse in appropriations, the Commission may incur obligations to allow certain employees who perform ''excepted'' functions to continue to perform those functions. This authority, however, does not permit the Commission to fund ongoing, regular functions, the suspension of which would not imminently threaten the safety of human life or the protection of property during a lapse in appropriations. Id. at 1 (*citing* 31 U.S.C. 1342). Thus, the Commission has designated certain essential personnel to fulfill its obligation to protect property.

The Commission's regulations, found in title 17 of the Code of Federal Regulations, place a number of filing obligations on registered entities, intermediaries, market participants and the public within specified time frames, establish Commission authority to stay certain actions by designated and registered entities, and also include provisions relating to requests for Commission approval and issuance of exemption and interpretative relief and guidance with specific time frames for Commission action. The Commission has reviewed its statute and regulations in light of its obligation to protect the safety of human life or the protection of property to determine which Commission operations will continue during a lapse in appropriations.

A. Tolling and Extension of Certain Procedural Time Limits Applicable to the Commission

In the event of a lapse in appropriations, the Commission will not be processing or reviewing filings for Commission discretionary or mandatory approval or any other actions that are not directly related to the safety of human life or the protection of property. Matters not directly related to the protection of property include rule, rule amendment, and contract certifications filed with the Commission, rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation, swap execution facility, swap data repository, derivatives clearing organization, and foreign board of trade registration; and other requests for Commission approval or other action.

The above-mentioned matters do not include any emergency notifications that may be required by Commission regulations of designated or registered entities and intermediaries, or that are required by any rule of a registered entity that has been approved by or self-certified to the Commission. This includes emergency rules certified pursuant to regulation 40.6(a)(6) and (7) and emergency changes certified by a systemically important derivatives clearing organization pursuant to regulation 40.10(h).

More specifically, matters not directly related to the protection of property include filings under judicially reinstated regulations 1.47 and 1.48 (bona fide hedge requests), part 30 (regulation 30.10 petitions for exemption and regulation 30.13 requests for certification), part 37 (swap execution facilities applications, demonstrations of compliance with core principles), part 38 (designated contract market applications, certifications of continued compliance in situations of merger or sale, and demonstrations of compliance with the core principles), part 39 (derivatives clearing organization applications, Commission review of swaps for determinations on clearing requirement, requests for orders regarding competition, and demonstrations of compliance with the core principles), part 40 (rule and contract filings–certifications and approvals and requests for confidential treatment of submissions, stays of certifications pursuant to regulation 40.12, determinations related to making swaps available to trade), part 41 (filing of notice-designated contract markets trading security futures products), part 48 (foreign board of trade registrations, adjudication of additional contracts for trading), and part 49 (swap data repository applications, registration of successor entities).

Matters not directly related to the protection of property additionally include requests pursuant to regulations 145.7 and 145.9 (requests for Commission records, petitions for confidential treatment of information submitted to the Commission, and appeals of FOIA decisions), regulation 140.99 filings (requests for exemptive, no-action and interpretive letters), and part 165 (processing of whistleblower applications and appeals, and payments related to whistleblower awards).

For the foregoing matters that are currently pending before the Commission pursuant to any of these provisions, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations. For such matters, the time remaining for Commission action will begin to run on the first business day following the resumption of Commission operations. For the foregoing matters arising during a lapse in appropriations, any time limit for Commission action shall begin to run on

[1] The Antideficiency Act provides that an officer or employee of the United States may not make or authorize an expenditure or obligation exceeding an amount in an appropriation or fund for the expenditure or obligation; involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or involve the government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

[2] Section 1342 of Title 31 of the U.S. code provides that an officer or employee of the United States Government may not accept voluntary services for the government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. As used in this section, the term ''emergencies involving the safety of human life or the protection of property'' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

[3] Specifically, the Department of Justice's Office of Legal Counsel has opined that: ''In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate . . . these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss.'' Id.

the first business day following the resumption of Commission operations.

Matters not directly related to the protection of property also include certain procedural regulations associated with Commission adjudicatory actions, in particular certain rules under part 3 (procedure to deny, condition, or suspend, revoke, or place restrictions on registration), part 9 (related to review of exchange disciplinary, access denial or other adverse actions), part 10 (the Commission's rules of practice for adjudicatory proceedings before the Commission), part 12 (rules related to reparations proceedings), and part 171 (review of National Futures Association decisions). For these matters that are currently pending before the Commission pursuant to any of these provisions, or that arise during a lapse in appropriations, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations. Moreover, all applicable filing deadlines for parties to an adjudicative proceeding that arise during a lapse in appropriations will be extended until one business day after the Commission resumes its operations.

B. Continued Processing, Review, and Action Related to Certain Agency Regulations

The Commission's regulations also impose filing obligations on registered entities, intermediaries, market participants and the public. The Commission has determined that certain filing requirements relate to the Commission's obligation to protect the safety of human life or property even during a lapse of appropriations. Accordingly, such filings will continue to review, process, and take any necessary or appropriation action taken, during a lapse in appropriations for the purpose of protecting the safety of human life or the property in accordance with the Commodity Exchange Act (CEA) and its implementing regulations..

This category includes regulation 1.10 and 5.12 filings (financial reports of futures commission merchants (FCMs), introducing brokers (IBs), and retail foreign exchange dealers), regulation 1.12 and 5.6 filings (notice provisions required of FCMs, IBs, and RFEDs), regulation 1.15 filings (risk assessment reporting requirements), regulation 1.16 filings (reports of accountants), regulation 1.17 filings (capital requirements (business days would include those days the Commission is shut down for purposes of requirements relating to margin calls and the computation of margin) and any notice provision requirements),[4] regulation 1.18 filings (current books and records), regulation 1.65 and 5.23 filings (notice of bulk transfers (a business day would include those days the Commission is shutdown)), regulation 39.19 (derivatives clearing organization reporting requirements), regulation 40.6(a)(6) and (7) (emergency rule certifications), and regulation 40.10(h) (emergency changes certified by systemically important derivatives clearing organizations).

This category also includes part 15 filings (general reporting requirements), part 16 filings (clearing member reports), part 17 filings (FCM reports), part 18 filings (reports by traders), part 19 filings (bona fide hedge position reports), part 20 filings (large trader reporting for physical commodity swaps), part 21 filings (special call provisions), part 190 filings (bankruptcy rules), and regulation 40.6 filings (emergency rules of a registered entity). In addition, the Commission shall process, review, and take any necessary or appropriate action related to, chief compliance officer, swap valuation dispute, and risk exposure reports, pursuant to regulations 3.3(e), 23.502(c), and 23.600(c), respectively, from swap dealers, major swap participants, and futures commission merchants, as applicable.[5] Swap execution facilities, designated contract markets, derivatives clearing organizations, and swap data repositories financial resources reports required by regulations 37.1306, 38.1101, 39.11, and 49.25, respectively, also will continue to be processed, reviewed, and subject to necessary and appropriate action.

The Commission's regulations require and industry practice provides for notification to the Commission and its staff of certain emergency situations. Thus, the Commission will continue to process, review, and take any necessary or appropriate action related to notifications by registered entities and intermediaries of emergency situations such as system malfunctions, cyber security incidents or financial emergencies throughout a lapse in appropriations.

C. Extension of Open Comment Periods on Proposed Regulation and Other Matters That May Be Subject to a Request for Comment by the Commission.

Finally, the Commission has proposed a number of rules to implement the CEA and certain provisions of the Wall Street Reform and Consumer Protection Act for which the comment period may expire while the Commission is shutdown. The Commission will be unable to process comment submissions until it resumes full operations, as such processing is unrelated to the protection of property. Therefore, the Commission is extending the comment periods for such rules, and for any other matters that may be subject to a request for comment by the Commission, until one business day after the Commission is able to resume full operations. Notice of the resumption of Commission operations at the conclusion of a shutdown will be provided on the Commission's Web site.

II. Administrative Compliance

A. Administrative Procedure Act

To the extent that some of the provisions of this order may be subject to notice and comment under the Administrative Procedure Act (APA),[6] and may be subject to the provisions of the APA that require publication or service of a substantive rule be made not less than 30 days before its effective date,[7] the Commission for good cause finds that notice and comment and a delayed effective date are impracticable and contrary to the public interest. The Commission may be obligated to commence orderly shutdown of its operations at the commencement of business on October 1 and has determined that it is in the interest of the public and the markets it regulates to have established and publicized its procedures for limiting its operations to only those that are essential to the protection of property before that time.

Moreover, though the tolling of certain procedural time limits will delay the Commission's review and approval of certain industry filings, the review and approval provisions in the Commission's regulations implement review and approval provisions of the CEA in order to protect the public interest. It would be contrary to the CEA, and to the public interest, if these review and approval time limits continued to run while the Commission is unable to conduct routine business.

[4] Generally, the Commission's regulations define business day to exclude only Saturday, Sunday, and federal holidays. Thus, a shutdown would not affect the timely processing, review, and action that may be necessary and appropriate related to the operation of these rules.

[5] Futures commission merchants are not required to submit swap valuation dispute or risk exposure reports to the Commission under regulations 23.502(c) and 23.600(c), respectively.

[6] *See* 5 U.S.C. 553(b).

[7] *See* 5 U.S.C. 553(d).

Finally, in order to protect the property interests of the public related to the orderly operation of the futures markets, the Commissioners will be supported by essential personnel in the surveillance of the markets in order to identify any emergency market situations that may require action to protect the safety of human life or property during a lapse in appropriations. It therefore is essential that reporting regulations associated with market surveillance and emergency notices continue to be processed and reviewed.

B. Paperwork Reduction Act

The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has been approved by the Office of Management and Budget (OMB) and displays a currently valid control number.[8] The collections of information referenced in this notice and order have valid control numbers that are currently in effect. Therefore, the Commission is not obligated to seek a control number in connection with this order.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires the Commission to consider whether a rule it proposes will have a significant economic impact on a substantial number of small entities and either provide a regulatory flexibility analysis respecting the significant impact or certify that the rule will not have such an impact.[9] The RFA is applicable only to a rule for which the Commission publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).[10]

The Commission is not publishing this order as a general notice of proposed rulemaking. Therefore, neither a regulatory flexibility analysis nor a certification is required for this rulemaking action. Nonetheless, this order will impose no new regulatory obligations on any party. Rather, it simply establishes the limited regulatory framework under which the Commission will operate during a shutdown in order to ensure the protection of property.

D. Cost Benefit Analysis

Section 15(a) of the CEA [11] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. Section 15(a) specifies that the costs and benefits shall be considered against five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may give greater weight to one or more of the five enumerated considerations to determine, in its discretion, that a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

This order imposes the cost of delay on parties with petitions for approval, self-certification filings, rights of review, and adjudicative matters before the Commission. As the Commission would be limited by law during a lapse in appropriations to function only with respect to the protection of property, these costs are unavoidable.

In terms of benefits, this order provides for the limited continuation of Commission business. The order also confirms the ongoing regulatory obligations of registered entities and intermediaries notwithstanding a shutdown, in order to ensure that the Commission has available to it all information necessary to identify emergency situations and take action to protect property and, hence, to protect market participants and the public, the efficiency and financial integrity of the futures markets, and price discovery.

The order also notifies market participants and the public of the matters in which the Commission will be engaged, as well as of the tolling and extensions of time put in place with respect to filings under Commission regulations. Tolling ensures that the Commission will have an opportunity to review routine industry filings once a lapse in appropriations is resolved and take steps if necessary to protect the interests of the market and the public before those filings are finalized. The extensions of time ensure that all persons with filing obligations in certain adjudicative proceedings that arise during a shutdown or who wish to submit comments during a comment period that will close during a shutdown will not be prejudiced by the inability of the Commission to accept those filings or comments.

III. Order

In light of the foregoing, the Commission has determined to issue the following Order, pursuant to its authority under the provisions of the Commodity Exchange Act, 7 U.S.C. 1 et seq., and in compliance with the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342.

It is hereby ordered that, in the event of a lapse in appropriations (also referred to as ''shutdown'') commencing at 12:01 a.m. on October 1, 2013, the Commission will commence operating according to the procedures set forth in this Order, with respect to its regulations found in title 17 of the Code of Federal Regulations:

1. *Tolling and Extension of Certain Procedural Time Limits.* The Commission shall not process any filings, or review any matters for Commission approval or action to the extent that the matters are not directly related to the protection of property for the duration of a shutdown. This applies to rule, rule amendment and contract certifications, except for emergency rules certified pursuant to regulation 40.6(a)(6) and (7), and emergency changes certified pursuant to regulation 40.10(h); rules, rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation, and swap execution facility, swap data repository, derivatives clearing organization, and foreign board of trade registration; and other requests for Commission approval or other action.

Specifically, except as otherwise provided in this order, applications under judicially reinstated sections 1.47 and 1.48, sections 30.10 and 30.13, and parts 36, 37, 38, 39, 40 41, 48, and 49 of the Commission's regulations officially shall not be processed or reviewed during a lapse in appropriations, and the time limits for Commission action shall be tolled until the resumption of Commission operations at the conclusion of a shutdown. Requests and appeals submitted under sections 145.7 and 145.9 of the Commission's regulations, requests submitted under section 140.99, and filings and payments under part 165 additionally shall not be processed until the resumption of Commission operations.

The time Commission shall process and commence review of any new matters under these provisions of the Commission's regulations beginning on the first full business day after the Commission is able to resume full operations at the conclusion of a shutdown. For matters that are pending under these provisions at the time a shutdown may commence, all applicable time deadlines for Commission action shall be tolled. The

[8] 44 U.S.C. 3501 et seq.

[9] 5 U.S.C. 601 et seq.

[10] 5 U.S.C. 601(2).

[11] 7 U.S.C. 19(a).

time remaining for Commission action will begin to run on the first full business day after the Commission is able to resume full operations.

This tolling and extension of time limits also shall apply to certain procedural regulations associated with Commission adjudicatory actions, in particular the time-limited procedural regulations in parts 3, 9, 10, 12, and 171. For matters that are currently pending before the Commission under any of these parts, all applicable time deadlines for Commission action shall toll, and the time remaining for Commission action shall begin to run on the first full business day after the Commission is able to resume full operations. Moreover, all time deadlines for filings by a party in an adjudicative proceeding that arise during a shutdown shall be extended until one business day after the Commission resumes its full operations. When a filing in an adjudicatory action is delayed by a shutdown, the time to reply to any delayed filing shall commence on the day the delayed filing is effected under this order.

2. *Procedures and Time Limits Not Extended or Tolled.* In order to fulfill its obligations to protect property during a lapse in appropriations, which includes market surveillance and intermediary oversight, the Commission shall continue to process and review filings required of a registered entity or intermediary under certain Commission regulations, and take any action necessary and appropriate to preserve property with respect to these filings. These filings are contained in sections 1.10, 1.12, 1.15, 1.16, 1.17, 1.18, 1.65, 5.6, 5.12, 5.23, 39.19, 40.6(a)(6) and (7), and 40.10(h) of the Commission's regulations, and also apply to any emergency notification to the Commission that may be required by any rule of a registered entity that has been approved by or self-certified to the Commission. In addition, the Commission shall continue to process and review reports to the extent they are required by regulations 3.3(e), 23.502(c), and 23.600(c)(2). Filings under parts 15, 16, 17, 18, 19, 21, and 190 of the Commission's regulations also shall continue to be processed and reviewed.

Review and processing of any notice of emergency actions designated or registered entities are required to report related to situations such as system malfunctions, cyber-security incidents, and financial emergencies shall continue during a shutdown. The Commission additionally shall receive and process reports related to the financial resources of a swap execution facility, designated contract market, derivatives clearing organization, and swap data repository pursuant to regulations 37.1306, 38.1101, 39.11, and 49.25, respectively.

3. *Extension of Open Comment Periods on Proposed Regulation and Other Matters That May Be Subject to a Request for Comment by the Commission.* Any comment period for a proposed rulemaking or other matter that may be subject to a request for comment by the Commission that terminates during a shutdown shall be extended until one business day after the Commission resumes full operations after a shutdown.

4. *Resumption of Commission Operations.* The Commission shall provide notice of the resumption of its operations at the conclusion of a shutdown on its Web site at *www.cftc.gov.*

Issued in Washington, DC, on September 27, 2013 by the Commission.

Melissa D. Jurgens,

Secretary of the Commission.

[FR Doc. 2013–24084 Filed 9–30–13; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0200]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Notice to add a new System of Records.

SUMMARY: The Office of the Secretary of Defense proposes to add a new system of records in its inventory of record systems subject to the Privacy Act of 1974, as amended.

DATES: This proposed action will be effective on November 1, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before October 31, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Service, 1155 Defense Pentagon, Washington, DC 20301–1155, or by telephone at (571) 372–0461.

SUPPLEMENTARY INFORMATION: The Defense Information Systems Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or from the Defense Privacy and Civil Liberties Office Web site at *http://dpclo.defense.gov/privacy/SORNs/component/osd/index.html.* The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on August 22, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: September 25, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DPFPA 04

SYSTEM NAME:

Shift Management System.

SYSTEM LOCATION:

Pentagon Force Protection Agency (PFPA), 9000 Defense Pentagon, Washington, DC 20301–9000.

Pentagon Force Protection Agency (PFPA), 4800 Mark Center Drive, Alexandria, VA 22350.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

PFPA Police Officers.

CATEGORIES OF RECORDS IN THE SYSTEM:

Employee name, badge number, home or mobile phone, home city and state, personal email address, work phone and email address, official training certifications, grade, rank, tenure, security clearance, work schedules and

assignments (to include leave and overtime), specialties and skills relevant to their job, and duty limitations relevant to job requirements.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 2674, Operation and control of Pentagon Reservation and defense facilities in National Capital Region; and DoD Directive 5105.68, Pentagon Force Protection Agency (PFPA).

PURPOSES:

To manage the assignment of police officers, who work shifts to specific posts while conforming to workforce rules, policies, and post requirements. Police officer availability for different posts is determined through Officer's leave status, overtime policies, and skills and certifications required for various posts. Police officer contact information will be used to notify officers of overtime or special event opportunities and incorporate them into the schedule, if accepted.

To provide an automated method for PFPA police officers to request leave or overtime and review post assignments.

To serve as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness and conducting research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD Blanket Routine Uses set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices may apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Name or badge number.

SAFEGUARDS:

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, an intrusion detection system, guards, and is accessible only to authorized personnel. Access to records is limited to person(s) responsible for servicing the record in performance of their official duties and who are properly screened and cleared for need-to-know. Access to computerized data is restricted by Common Access Card (CAC) and username/passwords, which are changed periodically. Data is encrypted and the server is maintained behind a technical safeguard/firewall titled demilitarized zone (DMZ). Audits of user activity will be conducted on a periodic basis.

RETENTION AND DISPOSAL:

Destroy after GAO audit or after 6 years, whichever is sooner.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Division Chief of the Technical Services Division, Pentagon Force Protection Agency, Pentagon Police Directorate, 9000 Defense Pentagon, Washington, DC 20301–9000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if their information is contained in this system should address written inquiries to Deputy Division Chief of the Technical Services Division, Pentagon Force Protection Agency, Pentagon Police Directorate, 9000 Defense Pentagon, Washington, DC 20301–9000.

Signed, written requests should contain the full name and badge number of the individual.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves should address written inquiries to the Office of the Secretary of Defense/Joint Staff, Freedom of Information Act Requester Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

Signed, written requests should contain the full name, current address and telephone number of the individual, the name and number of this system of records notice.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR Part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individuals.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2013–23788 Filed 9–30–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0201]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to delete a System of Records.

SUMMARY: The Office of the Secretary of Defense is deleting a systems of record notice from its existing inventory of record systems subject to the Privacy Act of 1974, as amended.

DATES: This proposed action will be effective without further notice on November 1, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before October 31, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

ADDRESSES: Send comments to the Privacy Act Officer, Office of Freedom of Information, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Mrs. Cindy Allard at (571) 372–0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above or from the Defense Privacy and Civil Liberties Office Web site at *http://dpclo.defense.gov/privacy/SORNs/component/osd/index.html*. The Office of the Secretary of Defense proposes to delete one system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy

Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: September 25, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Deletion:
DHRA 03

PERSEREC Export Violations Database (November 15, 2002, 67 FR 69205).

REASON:

The NARA approved records retention is TEMPORARY. Destroy 2 years after completion of final action (GRS 18, Item 24). The final cases were closed in the late 1990s and those records were subsequently destroyed. Since all records have properly been destroyed, there is no longer a need to maintain this system of records notice. Therefore, DHRA 03, PERSEREC Export Violations Database can be deleted.

[FR Doc. 2013–23796 Filed 9–30–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors, United States Military Academy (USMA)

AGENCY: Department of the Army, DoD.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting will take place:

1. *Name of Committee:* United States Military Academy Board of Visitors.

2. *Date:* Wednesday, October 16, 2013.

3. *Time:* 2:00 p.m.–5:30 p.m. Members of the public wishing to attend the meeting will need to show photo identification in order to gain access to the meeting location. All participants are subject to security screening.

4. *Location:* Haig Room, Jefferson Hall, West Point, New York 10996.

5. *Purpose of the Meeting:* This is the 2013 Fall Meeting of the USMA Board of Visitors (BoV). Members of the Board will be provided updates on Academy issues.

6. *Agenda:* The Academy leadership will provide the Board updates on the following: New Superintendent's Assessment, Vision, and Focus Areas; Academic, Military, and Physical Program Updates; Budget, MILCON, Sustainment Restoration and Modernization (SRM) Updates; Furlough Impacts; and an update on Sexual Harassment/Sexual Assault issues and training. This final update will include discussions on the case of Sergeant First Class Michael McClendon, a former tactical non-commissioned officer in the US Corps of Cadets; the Army Regulation 15–6 Investigation and Department of the Army Inspector General (DAIG) Findings concerning respect violations by the Army Rugby Team; and the removal of a Head of an academic department, and an athletic coach for inappropriate behavior.

7. *Public's Accessibility to the Meeting:* Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165 and the availability of space, this meeting is open to the public. Seating is on a first-come basis.

8. *Committee's Designated Federal Officer or Point of Contact:* Ms. Deadra Ghostlaw, (845) 938–4200, *Deadra.Ghostlaw@us.army.mil.*

SUPPLEMENTARY INFORMATION: Any member of the public is permitted to file a written statement with the USMA Board of Visitors. Written statements should be sent to the Designated Federal Officer (DFO) at: United States Military Academy, Office of the Secretary of the General Staff (MASG), 646 Swift Road, West Point, NY 10996–1905 or faxed to the Designated Federal Officer (DFO) at (845) 938–3214. Written statements must be received no later than five working days prior to the next meeting in order to provide time for member consideration. By rule, no member of the public attending open meetings will be allowed to present questions from the floor or speak to any issue under consideration by the Board.

FOR FURTHER INFORMATION CONTACT: The Committee's Designated Federal Officer or Point of Contact is Ms. Deadra Ghostlaw, (845) 938–4200, *Deadra.Ghostlaw@us.army.mil.*

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2013–23787 Filed 9–30–13; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0090]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Implementation of Title I/II Program Initiatives

AGENCY: Institute of Education Sciences/National Center for Education Statistics (IES), 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 October 31, 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–0090 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: For questions related to collection activities or burden, please call Kathy Axt, 540–776–7742 or 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: Implementation of Title I/II Program Initiatives.

OMB Control Number: 1850–NEW.

Type of Review: A new collection.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 12,321.

Total Estimated Number of Annual Burden Hours: 6,573.

Abstract: The Implementation of Title I/II Program Initiatives study will examine the implementation of policies promoted through the Elementary and Secondary Education Act (ESEA) at the state, district and school levels, in four core areas: state content standards, aligned assessments, accountability and school turnaround, and development of effective teachers and leaders.

The purpose of this new data collection is to provide policy makers with detailed information on the progress being made on the core policies promoted by Title I and Title II, and the recent granting of ESEA Flexibility to states. Although other research studies cover similar topics on recent federal education policy, the breadth of research questions and the depth of responses from all SEAs and three levels of nationally representative samples, sets the Title I/II study apart from other studies.

This study will rely on information collected from existing sources, for which there are no respondents or burden, and on a new set of surveys in order to address the study's research questions. Extant data sources include (a) the National Assessment of Educational Progress (NAEP); (b) EDFacts data; (c) information about teacher preparation and certification programs and policies; and (d) state documents.

The new surveys of states and districts will begin in 2013 and the surveys of schools (principals) and teachers will begin in 2014. All respondents will have the opportunity to complete an electronic (email or web-based) survey (or paper survey, if preferred). The survey respondents are described briefly below.

State Surveys. The state survey will be sent to the chief state school officer in each of the 50 states and the District of Columbia. The state surveys will be administered using an electronic instrument divided into modules corresponding to the four core areas.

District Surveys. The district survey will be sent to school superintendents from a nationally representative sample of 570 school districts. The district survey will be web-based and modularized, corresponding to the four core areas, to allow for completion by one or multiple respondents.

School Surveys. The school survey will be sent to principals from a nationally representative sample of 1,300 schools. The school survey will be web-based and address issues in the four core areas.

Teacher Surveys. The teacher survey will be sent to a nationally representative sample of teachers selected from the sampled schools. A total of 9,100 teachers will be asked to complete a web-based survey that addresses issues in the four core areas.

Teacher Rosters. Principals from sampled schools will be asked to provide a comprehensive list of teachers in their schools, which will be used as the sampling frame for the teacher sample. Principals will be asked to identify their school's grade span and list all teachers along with their email address, main grade, subjects taught, (e.g., Reading/English/Language Arts, Mathematics, Science and Other), and whether the teacher teaches a class in which students are tested for accountability requirements under ESEA.

Dated: September 25, 2013.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–23799 Filed 9–30–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0127]

Agency Information Collection Activities; Comment Request; Special Education—Personnel Preparation To Improve Services and Results for Children with Disabilities

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), 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 December 2, 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–0127 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 2E115, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For questions related to collection activities or burden, please call Tomakie Washington, 202–401–1097 or 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: Special Education—Personnel Preparation to Improve Services and Results for Children with Disabilities.

OMB Control Number: 1820–0622.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Private Sector, Individuals or households.

Total Estimated Number of Annual Responses: 2,550.

Total Estimated Number of Annual Burden Hours: 6,900.

Abstract: The data collection under this request are governed by 34 CFR Section 304.1–304.32 regulations that implement section 673(h) of the Individuals with Disabilities Education Act, which requires that individuals who receive a scholarship through the Personnel Preparation Program funded under the Act subsequently provide special education and related services to children with disabilities for a period of two years for every year for which assistance was received. Scholarship recipients who do not satisfy the requirements of the regulations must repay all or part of the cost of assistance in accordance with regulations issued by the Secretary. These regulations implement requirements governing among other things, the service obligation for scholars, oversight by grantees, and repayment of scholarship. In order for the Federal government to ensure the goals of the program are achieved, the collection of data, record keeping, and documentation are necessary.

Dated: September 26, 2013.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–23923 Filed 9–30–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Race to the Top—District

AGENCY: Office of the Deputy Secretary, Department of Education.

ACTION: Notice extending the deadline of the fiscal year (FY) 2013 Race to the Top—District competition for certain local educational agencies.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.416.

SUMMARY: The Secretary is extending the application deadline in the FY 2013 Race to the Top—District competition for certain local educational agencies (LEAs). The Secretary takes this action to allow more time for the preparation and submission of applications by potential applicants adversely affected by flooding in certain counties in Colorado. The extension is intended to help these potential applicants compete fairly with other applicants in this competition.

DATES: *Deadline for Transmittal of Applications:* For LEAs located in Colorado counties designated for Individual Assistance or Public Assistance under the Presidential major disaster (DR–4145) or emergency (EM–3365) declarations resulting from the September 2013 severe storms, flooding, landslides, and mudslides (the Affected Counties), and for consortium applicants that include one or more LEAs located in those counties, the new deadline is 4:30:00 p.m. Washington, DC time on Thursday, October 10, 2013.

FOR FURTHER INFORMATION CONTACT: James Butler, U.S. Department of Education, 400 Maryland Avenue SW., Room 7e214, Washington, DC 20202. Telephone: (202) 453–6800 or by email: *2013.racetothetop.district@ed.gov.*

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

SUPPLEMENTARY INFORMATION: See Emergency (EM–3365) available at: *http://www.fema.gov/disaster/3365/designated-areas* and Major Disaster (DR–4145) available at: *http://www.fema.gov/disaster/4145/designated-areas.*

This extended deadline applies to consortium applicants that include one or more LEAs located in the Affected Counties.

The original deadline of October 3, 2013, still applies for individual LEA applicants not located in the Affected Counties and for consortium applicants that consist solely of LEAs not located in the Affected Counties.

All other information in the August 6, 2013, Notice Inviting Applications (78 FR 48006) for this competition remains the same.

Information about the Race to the Top—District program is available on the Department's Web site at *http://www2.ed.gov/programs/racetothetop-district/index.html.*

Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program person listed in this section.

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

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department. Program Authority: Sections 14005 and 14006 of the ARRA (Pub. L. 111–5), as amended by section 1832(b) of Division B of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10), and the Department of Education Appropriations Act, 2012 (Title III of Division F of Pub. L. 112–74, the Consolidated Appropriations Act, 2012).

Dated: September 26, 2013.

Arne Duncan,

Secretary of Education.

[FR Doc. 2013–23908 Filed 9–30–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2388–002]

City of Holyoke Gas & Electric Department; Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, and Protests

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application to Accelerate License Expiration Date.

b. *Project No:* 2388–002.

c. *Date Filed:* September 9, 2013; Supplemented: September 24, 2013.

d. *Applicant:* City of Holyoke Gas & Electric Department.

e. *Name of Project:* Holyoke No. 3 Hydroelectric Project.

f. *Location:* The project is located on the Holyoke Canal in Hampden County, Massachusetts.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r (2012), and 18 CFR 5.4 (2013).

h. *Applicant Contact:* Mr. Paul S. Ducheney, Superintendent of Electric

Production, City of Holyoke Gas & Electric Department, 99 Suffolk Street, Holyoke, Massachusetts, 01040, 413–536–9340, *ducheney@hged.com*.

i. *FERC Contact:* Any questions on this notice should be addressed to Jennifer Polardino, (202) 502–6437, or email at *Jennifer.Polardino@ferc.gov*.

j. *Deadline for filing comments, motions to intervene, and protests:* 45 days from the issuance date of this notice by the Commission.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system 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,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–2388–002.

k. *Description of Request:* The licensee proposes to amend the license for the Holyoke No. 3 Hydroelectric Project to accelerate the license expiration date. The current expiration date is May 31, 2020. The licensee requests an expiration date of January 31, 2019. The licensee wants to accelerate the expiration date so it can coordinate relicensing the Holyoke No. 3 Project No. 2388 with the Holyoke No. 1 Project No. 2386 and the Holyoke No. 2 Project No. 2387. The current expiration date for the Holyoke No. 1 Hydroelectric Project is January 31, 2019, and Holyoke No. 2 Hydroelectric Project is August 31, 2018. The licensee holds the licenses for all three projects and all three are located on the Holyoke canal system.

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 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 (2013). In determining the appropriate action to take, the Commission will consider all timely filings, 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. All filings must (1) bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' or ''COMMENTS;'' (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 (2013). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application 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 4.34(b) and 385.2010.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23879 Filed 9–30–13; 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: ER13–2428–000.
Applicants: Kentucky Utilities Company.
Description: Municipal General Rate Case to be effective 11/23/2013.
Filed Date: 9/23/13.
Accession Number: 20130923–5131.
Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2429–000.
Applicants: PJM Interconnection, L.L.C.
Description: Queue Position Y2–018; Original Service Agreement No. 3644 to be effective 8/22/2013.
Filed Date: 9/23/13.
Accession Number: 20130923–5141.
Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2430–000.
Applicants: Southwest Power Pool, Inc.
Description: 1374R13 Kansas Power Pool and Westar Meter Agent Agreement to be effective 9/1/2013.
Filed Date: 9/24/13.
Accession Number: 20130924–5045.
Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2431–000.
Applicants: FC Landfill Energy, LLC.
Description: MBR tariff cancellation to be effective 9/25/2013.
Filed Date: 9/24/13.
Accession Number: 20130924–5066.
Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2432–000.
Applicants: BC Landfill Energy, LLC.
Description: MBR tariff cancellation to be effective 9/25/2013.
Filed Date: 9/24/13.
Accession Number: 20130924–5067.
Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2433–000.
Applicants: Southwest Power Pool, Inc.
Description: Notice of Cancellation of the Occidental Meter Agent Services Agreement of Southwest Power Pool, Inc.
Filed Date: 9/24/13.
Accession Number: 20130924–5068.
Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2434–000.

Applicants: SC Landfill Energy, LLC.

Description: MBR tariff cancellation to be effective 9/25/2013.

Filed Date: 9/24/13.

Accession Number: 20130924–5071.

Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2435–000.

Applicants: WC Landfill Energy, LLC.

Description: MBR tariff cancellation to be effective 9/25/2013.

Filed Date: 9/24/13.

Accession Number: 20130924–5072.

Comments Due: 5 p.m. ET 10/15/13.

Docket Numbers: ER13–2436–000.

Applicants: Platinum Energy, LLC.

Description: Platinum Energy, LLC Market Based Rate Tariff to be effective 10/15/2013.

Filed Date: 9/24/13.

Accession Number: 20130924–5079.

Comments Due: 5 p.m. ET 10/15/13.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR13–12–000.

Applicants: Western Electricity Coordinating Council.

Description: Documents concerning the formation of a company (Peak Reliability) of Western Electricity Coordinating Council.

Filed Date: 9/20/13.

Accession Number: 20130920–5144.

Comments Due: 5 p.m. ET 10/11/13.

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: September 24, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23883 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IN13–15–000]

BP America Inc., BP Corporation North America Inc., BP America Production Company, and BP Energy Company; Notice of Designation of Commission Staff as Non-Decisional

With respect to an order issued by the Commission on August 5, 2013 in the above-captioned docket, with the exceptions noted below, the staff of the Office of Enforcement are designated as non-decisional in deliberations by the Commission in this docket. Accordingly, pursuant to 18 CFR 385.2202 (2013), they will not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement. Likewise, as non-decisional staff, pursuant to 18 CFR 385.2201 (2013), they are prohibited from communicating with advisory staff concerning any deliberations in this docket.

Exceptions to this designation as non-decisional are:

Larry Gasteiger
James Owens
Justin Shellaway
Timothy Helwick
Eric Ciccoretti
Elitza Voeva-Kolev
Jill Davis
Brett Rudder

Dated: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23878 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–2436–000]

Platinum Energy, LLC; 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 Platinum Energy, LLC'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 October 15, 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: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23877 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6972–032]

Hollow Dam Power Company; Ampersand Hollow Dam Hydro, LLC; Notice of Application for Transfer of License, and Soliciting Comments and Motions To Intervene

On September 10, 2013, Hollow Dam Power Company (transferor) and Ampersand Hollow Dam Hydro, LLC (transferee) filed an application for transfer of license for the Hollow Dam Project, FERC No. 6972, located on the West Branch of the Oswegatchie River in St. Lawrence County, New York.

Applicants seek Commission approval to transfer the license for the Hollow Dam Project from transferor to transferee.

Applicants' Contact: Transferor: Mr. Peter Howe, Hollow Dam Power Company, c/o SilverStreet Hydro, 15 East Silver Street, Westfield, MA 01085, (413) 562–1266. Transferee: Mr. Lutz Loegters, Ampersand Hollow Dam Hydro, LLC, c/o Ampersand Hydro, LLC, 717 Atlantic Avenue, Suite 1A, Boston, MA 02111, (617) 933–7200.

FERC Contact: Patricia W. Gillis (202) 502–8735.

Deadline for filing comments and motions to intervene: 30 days from the issuance date of this notice by the Commission. Comments and motions to intervene may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1) and the instructions on the Commission's Web site under *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. If unable to be filed electronically, documents may be paper-filed. To paper-file, mail to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. More information about this project 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–6972) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Dated: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23881 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14549–000]

Mid-Atlantic Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On August 16, 2013, Mid-Atlantic Hydro, LLC 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 Francis E. Walter Hydroelectric Project (Francis Walter Project or project) to be located at the U.S. Army Corps of Engineers' (Corps) Francis E. Walter Dam on the Lehigh River in Luzerne County, Pennsylvania. 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 otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) An 11-foot-diameter steel penstock attached to the existing outlet; (2) a concrete powerhouse to be located on the right descending bank; (3) 6-megawatt (MW) and 3–MW generators for a total installed capacity of 9.0 MW; (4) a concrete tailrace to direct flow from the powerhouse back into the Lehigh River; (5) a proposed 0.5-mile-long, 12.4-kilovolt transmission line interconnecting with an existing Pennsylvania Power and Light transmission line; and (6) appurtenant facilities. The estimated annual generation of the project would be 26 gigawatt-hours.

Applicant Contact: Jennifer Mesirow, Mid-Atlantic Hydro, LLC, 5425 Wisconsin Avenue, Suite 600, Chevy Chase, MD 20815; phone: (301) 718–4826.

FERC Contact: Woohee Choi; phone: (202) 502–6336.

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.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system 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,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–14549–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14549) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23876 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Project No. 13599–001]

Green Power Development, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On September 3, 2013, Green Power Development, LLC (Green Power) 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 Lake 3160 Hydroelectric Project (project) to be located on Lake 3160 near Juneau in Juneau Borough, 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 otherwise enter upon lands

or waters owned by others without the owners' express permission. The project would occupy about 475 acres of lands within the Tongass National Forest managed by the U.S. Forest Service.

The proposed project would use the existing natural lake named Lake 3160 with a surface area of 451 acres, storage capacity of 19,710 acre-feet, and normal water surface elevation of 3,160 feet above mean sea level; and consist of the following new facilities: (1) A siphon intake, directional bore, or 20-foot-high concrete dam with either intakes at the exit of Lake 3160; (2) an above-ground 8,800-feet-long, 20- to 24-inch-diameter penstock; (3) a powerhouse containing one or two generating units with a total installed capacity of 4.995 megawatts; (4) an open-channel tailrace discharging flows to Evelyn Lake; (5) a 7.6-mile-long, 14.4/24.9-kilovolt overhead, underground, or submarine cable transmission line; and (6) appurtenant facilities. The average annual energy production would be 40 gigawatt-hours.

Applicant Contact: Mr. Joel D. Groves, PE, Green Power Development, LLC, 1503 W. 33rd Avenue, #310, Anchorage, Alaska 99503; phone: (907) 258–2420, extension 204.

FERC Contact: Dianne Rodman; phone: (202) 502–6077.

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.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system 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,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–13599–001.

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–13599) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23882 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14541–000]

Western Minnesota Municipal Power Authority; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On July 30, 2013, Western Minnesota Municipal Power Authority 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 Gregory County Pumped Storage Project to be located on Lake Francis Case on the Missouri River, near the township of Lucas, in Gregory, Charles Mix and Brule Counties, South Dakota. 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 otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A new earthen embankment (upper reservoir) having a total storage capacity of 47,000 acre-feet with an operating elevation level of between 2,045 feet msl and 2,080 feet msl; (2) a new 340-foot-long by 200-foot-wide by 100-foot-high concrete powerhouse containing eight new 100-megawatt (MW) turbine units for a total plant rating of 800 MW; (3) eight new 20-foot by 36-foot trashracks with 3.75-inch-wide open bar spacing; (4) two new 10,000-foot-long, 32-foot-diameter reinforced concrete penstocks with a steel lining; (5) two new 120-foot-high, 40-foot-diameter surge tanks connected to each penstock; (6) a new 320-foot-long by 120-foot-wide by 60-foot-high release-intake structure containing emergency closing gates for penstock maintenance; (7) the existing Lake Francis Case (lower reservoir) with a storage capacity of 5,494,000 acre-feet at normal maximum operation elevation of 1,355 feet msl; (8) a new 120-foot-long, 340-foot-wide tailrace from the powerhouse to Lake Francis Case; (9) a new substation on top of the powerhouse containing step-up transformers; (10) a new 21-mile-long, 230-kilovolt (kV) transmission line extending from the project substation to the existing Lake Platte substation (the point of interconnection); and (11) appurtenant facilities. The estimated annual generation of the Gregory County Pumped Storage Project would be 3,000 gigawatt-hours.

Applicant Contact: Mr. Raymond J. Wahle, Missouri River Energy Services, 3724 W. Avera Drive, P.O. Box 88920, Sioux Falls, SD 57109; phone: (605) 330–6963.

FERC Contact: Tyrone Williams; phone: (202) 502–6331.

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.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system 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,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–14541–000.

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–14541) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23875 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5865–015]

David E. Cereghino, Idaho County Light & Power Cooperative Association, Inc.; Notice of Transfer of Exemption

1. By letter filed March 25, 2011, David E. Cereghino and Idaho County Light & Power Cooperative Association, Inc. informed the Commission that the exemption from licensing for the Cereghino Hydro Project, FERC No. 5865, originally issued April 6, 1984,[1] has been transferred to Idaho County Light & Power Cooperative Association, Inc. The project is located on John Day Creek in Idaho County, Idaho. The transfer of an exemption does not require Commission approval.

2. Idaho County Light & Power Cooperative Association, Inc. is now the exemptee of the Cereghino Project, FERC No. 5865. Forward all mail to Mr. Jay G. Eimers, General Manager, Idaho County Light & Power Cooperative Association, Inc., P.O. Box 300, Grangeville, ID 83530.

Dated: September 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–23880 Filed 9–30–13; 8:45 am]

BILLING CODE 6717–01–P

[1] 27 FERC ¶ 61,052, Order Granting Exemption from Licensing of a Small Project of 5 MW or Less.

DEPARTMENT OF ENERGY

Western Area Power Administration

[DOE/EIS–0400]

Granby Pumping Plant Switchyard-Windy Gap Substation Transmission Line Rebuild, Grand County, Colorado

AGENCY: Western Area Power Administration, DOE.

ACTION: Record of decision.

SUMMARY: Western Area Power Administration (Western), a power marketing administration in the U.S. Department of Energy (DOE), owns and operates the 69-kilovolt (kV) Granby Pumping Plant Switchyard-Windy Gap Substation (Project) transmission line in Grand County, Colorado. The transmission line is 13.6 miles long. Western proposes to rebuild the single-circuit line as a double-circuit line, increase the voltage rating to 138-kV, and operate one circuit at 69-kV and the second at 138-kV. One circuit would replace Western's existing transmission line between the Windy Gap Substation and Stillwater Tap and provide a redundant feed from the tap to the Granby Pumping Plant to prepare for when the existing 69-kV cable located in the Alva B. Adams Tunnel is no longer operable. The second circuit was requested by Tri-State Generation and Transmission Association, Inc. (Tri-State) to improve reliability for their local customer, Mountain Parks Electric, Inc., and to minimize environmental effects by sharing a right-of-way (ROW).

The Notice of Availability (NOA) of the Final Environmental Impact Statement (EIS) was published in the **Federal Register** on July 5, 2013 (78 FR 40474). After considering the environmental impacts, Western has decided to construct, operate, and maintain the transmission line on the preferred alignment identified as Alternative D (Option 1), in the EIS.

FOR FURTHER INFORMATION CONTACT: For further information contact Mr. Jim Hartman, Corporate Services Office, Western Area Power Administration, A7400, P.O. Box 281213, Lakewood, CO 80228, telephone (720) 962–7255, or email: *gppwgp@wapa.gov.* For general information on DOE's National Environmental Policy Act of 1969 (NEPA) review process, please contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, GC–20, U.S. Department of Energy, Washington, DC 20585, telephone (202) 586–4600 or (800) 472–2756.

SUPPLEMENTARY INFORMATION: Western markets and transmits wholesale electrical power generated at federal hydropower facilities through an integrated 17,000-circuit mile, high-voltage transmission system across 15 western states. At the beginning of the project, Western determined an environmental assessment (EA) would be the appropriate level of review under NEPA. In 2005, Western began to prepare the EA. Scoping for the EA started with notification in local newspapers and mailing to over 250 landowners, government officials, and persons known to be interested in similar projects. One public meeting was held in July 2005 and a second in November 2006. After reviewing public comments and concerns about potential impacts, Western determined an EIS would be appropriate for this project.

The Notice of Intent (NOI) to prepare an EIS was published in the **Federal Register** on August 10, 2007 (72 FR 45040). Formal public scoping for the EIS began with the publication of the NOI and ended on September 17, 2007. One public scoping meeting was held on August 30, 2007.

The Forest Service and Bureau of Land Management were federal cooperating agencies on the EIS and Grand County was a local cooperating agency. The NOA for the Draft EIS was published in the **Federal Register** on March 30, 2012 (77 FR 19282). The NOA established a 60-day public comment period that ended May 29, 2012. A public meeting and hearing on the Draft EIS were held in Granby, Colorado on April 24, 2012. Notice of the meeting was provided through an advertisement in the local newspaper and direct mailing to approximately 1300 addressees. Six individuals provided oral comments during the public meeting and one individual provided an oral comment at the public hearing. Western received 43 comment letters, emails, or telephone comments on the Draft EIS during the comment period. Western received 135 unique comments from all comment sources.

The NOA for the Final EIS was published in the **Federal Register** on July 5, 2013 (78 FR 40474). Approximately 1200 notifications were sent to landowners in the Project area and other stakeholders, and notices were published in online and printed versions of the local newspaper from June 21 to 28, 2013. Copies of the Final EIS were available for review at three local reading rooms and were available for download from Western's Web site. A copy of the EIS was sent to those who requested one.

Proposed Project

Western needs to address electrical system deficiencies of their existing 70-year-old transmission line in the Granby, Colorado area. Western also needs to ensure reliable power to the Granby Pumping Plant (also known as the Farr Pumping Plant) if the Adams Tunnel cable fails. The Adams Tunnel cable has exceeded its expected life and cannot be economically replaced. The purposes of the Project are to address the deficiencies in the existing system, ensure a reliable and safe electrical supply, and decrease maintenance costs. Western's preferred alternative is to rebuild and upgrade the existing transmission line along Alternative D, (Option 1). This includes rebuilding and upgrading the existing single-circuit 69-kV transmission line between the Windy Gap Substation and Stillwater Tap, and between the Stillwater Tap and the Granby Pumping Plant. The transmission line was constructed in 1939 by the U.S. Bureau of Reclamation as part of the Colorado-Big Thompson Project. Much of the line has a 30-foot

wide ROW. To provide additional voltage support to address startup issues for the pumps at the Granby Pumping Plant, Western's circuit would be upgraded to 138-kV capacity but operated at 69-kV. At the request of Tri-State, Western would share the ROW so Tri-State could construct a redundant feed for the local electrical system owned by Mountain Parks Electric, Inc. Adding a second 138-kV circuit requires the use of double-circuit steel structures. Western needs to expand ROWs where they are inadequate to ensure public safety and to support the higher voltage and double-circuit conductor. The Granby Pumping Plant Switchyard would be expanded to accommodate a 138-kV yard and a breaker would be added to the Windy Gap Substation. The proposal includes reroutes to avoid existing developments and existing incompatible commercial uses that have been built near the line since it was constructed. The proposal consolidates utility ROWs and reduces visual impacts. The proposed Project is located on private and Federal land and would be about 12.6 miles long.

Western revised its preferred action alternative in the Final EIS to accommodate requests by landowners along County Road 64 to move the preferred alternative further to the west. Western met with the Forest Service on August 10, 2012, to discuss this request since the request would move the line closer to the Cutthroat Bay Campground. After this meeting, the alignment of the preferred alternative was moved further west of the residences to cross County Road 64 onto Forest Service lands. Based on the field review and discussions with the Forest Service, the route was modified to meet additional objectives and local constraints. Minor localized modifications to structure locations to protect resources and accommodate landowner requests will be considered during design as long as the modifications would not adversely affect adjacent landowners, increase environmental impacts, or appreciably increase costs or affect maintenance and operations.

Description of Alternatives

A range of reasonable alternatives for the proposed project was identified by evaluating routing opportunities and constraints, engineering design standards, public comments, and environmental resources. The objective was to identify alternatives that address public, environmental, and social concerns, and meet the project purpose and need and engineering criteria. Relevant issues identified during both the EA and EIS public scoping processes were used to refine the alternatives. The Arapaho and Roosevelt National Forest Plan goals and objectives and Grand County zoning and land use policies applicable to the project area were considered in the development of alternatives. Western relied on additional studies and public comments to refine transmission line alignments and to identify the proposed action and alternatives to analyze in the EIS.

Ultimately, five alternatives were identified for detailed analysis in the EIS: (1) Alternative A: keep the existing transmission line (no action); (2) Alternative B1: rebuild and upgrade the transmission line primarily on the existing transmission line ROW; (3) Alternative C1: reroute and upgrade the transmission line; (4) Alternative C2: reroute and upgrade the transmission line, with options to use existing utility ROWs; and (5) Alternative D (Options 1 and 2): rebuild and upgrade the transmission line primarily on existing utility ROWs. Alternative D (Option 1) was selected as the preferred alternative.

Both Option 1 and Option 2 of Alternative D follow the existing transmission line ROW and then interconnect with an existing water pipeline ROW. Option 1 follows the water pipeline ROW further than Option 2. Options 1 and 2 have the fewest residences within 100 feet of the proposed transmission line centerline. Both Options 1 and 2 reduce impacts to houses by removing the existing line and relocating the ROW further from existing development. The options also remove an existing line from a Forest Service campground and incorporate modification in the campground area that was requested by local residents. On the southwest end of the project area, key impacts and differences between alternatives surround issues of planned development and proximity to sage grouse leks.

Alternative D (Option 1) is the environmentally preferable alternative because it best balances impacts to existing and planned development, scenic values, and wildlife resources. Alternative D (Option 1) consolidates a pipeline and transmission line ROW through a proposed development on the southwest end of the project area, which reduces impacts to proposed development by avoiding areas planned for higher density development. It locates the line away from the northern boundary of the planned development to reduce impacts to the last known active sage grouse lek in eastern Grand County and avoids construction of new access and utility ROWs. Alternative D (Option 1) reduces potential visual impacts by placing the transmission line further away from the scenic byway near Scanloch Subdivision and Grand Elk Marina, removing an existing line and locating the rebuilt line out of the view toward Lake Granby from Scanloch Subdivision, and removing an existing line from the Cutthroat Bay Campground to improve views toward Lake Granby. Alternative D (Option 1) furthers the intent of the Grand County Three Lakes Design Review Area to preserve scenic values by using non-reflective conductors and consolidating two separate lines onto one ROW between Stillwater Tap and Granby Pumping Plant Switchyard, thereby avoiding the need for two separate, single-circuit transmission lines. Further, it would use non-reflective conductors. The proposal maximizes the use of Federal land and minimizes conflicts with existing development.

Western considered eleven additional alternatives that were eliminated from further evaluation based on technical or economic considerations. Western assessed the alternatives for their reasonable ability to achieve the stated purpose and need of the project, while reducing significant environmental effects. Among the alternatives eliminated were undergrounding, placing the transmission lines inside an existing underground water pipeline, rebuilding and upgrading the Adams Tunnel Cable, installing part of the line under Lake Granby, and other routing and system alternatives. These are described in the EIS.

The No Action Alternative did not meet the purpose and need for the project. This alternative would require continued actions to maintain the transmission line to ensure that it remained safe and provided reliable service. While this alternative would maintain the current level of service in the project area, it would not address the decreased system reliability if the Adams Tunnel cable failed. Additionally, Tri-State would still need to expand their transmission system to improve service reliability to their customers by building a line roughly parallel to Western's because of topographic and environmental constraints and the need to interconnect at the same substations. The No Action Alternative would not address the increasing costs associated with maintaining the 70-year old transmission line, it would not address the voltage fluctuations and other system operation issues described in the EIS, and it would not address the constraints to maintenance that have developed in some areas where the

ROW could not be expanded to ensure adequate clearances and access.

Mitigation Measures

Practicable methods to avoid or minimize environmental impacts from the selected alternative are adopted in this Record of Decision. Western's standard practices and project-specific protection measures, listed in the Final EIS, will be implemented. Many of the protection measures will be implemented through design and the project construction contract. A Mitigation Action Plan will be prepared that includes protective measures that will be implemented during design, construction, and routine maintenance or Forest Service agreements.

Comments on Final EIS

Western received two comment letters on the Final EIS. Colorado Parks and Wildlife submitted a letter reiterating their preference to keep the project on the existing ROW and further from the sage grouse lek, and requesting that Western ensure that wildlife resource protection measures be implemented. The Final EIS responded to these comments and described protective measures for wildlife. The Environmental Protection Agency commented that it was unclear whether new sources of power would be needed for the project. No new sources of power would be needed for the project. The resource mix would not be modified for the project. Other comments on the Final EIS included email comments stating a preference for undergrounding and requesting additional information on the construction schedule.

Decision

Western's decision is to construct the project along the preferred alternative described in the Final EIS.[1] This satisfies Western's statutory mission while minimizing harm to the environment. This decision is based on the information in the Final EIS. This Record of Decision was prepared according to the requirements of the Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1508) and DOE's procedures for implementing NEPA (10 CFR part 1021).

Dated: September 23, 2013.

Mark A. Gabriel,

Administrator.

[FR Doc. 2013–23988 Filed 9–30–13; 8:45 am]

BILLING CODE 6450–01–P

[1] On November 16, 2011, DOE's Acting General Counsel delegated to Western's Administrator all the authorities of the General Counsel respecting environmental impact statements.

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9901–57–OAR]

Alternative Method for Calculating Off-Cycle Credits for Mercedes-Benz Vehicles Under the Light-Duty Greenhouse Gas Emissions Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In the light-duty vehicle greenhouse gas rule for model year 2012 through 2016 vehicles, EPA established a program to allow automobile manufacturers to generate ''off-cycle'' carbon dioxide (CO_2) credits by employing technologies that achieve CO_2 reductions in the real world but are not appropriately captured on the test procedures used by manufacturers to demonstrate compliance with the CO_2 standards. Under one of the program options, a manufacturer may develop and submit to EPA for approval an alternative demonstration methodology justifying eligibility for off-cycle credits and their amount. The regulations concerning off-cycle credits require an opportunity for public comment as part of EPA's review of such an alternative methodology. EPA is requesting comment on an alternative methodology submitted by Mercedes-Benz for determining off-cycle credits for the following technologies: engine stop-start, high efficiency exterior lighting, infrared glazing, and active seat ventilation. The application is only for off-cycle credits for Mercedes-Benz vehicles for the 2012 through 2016 model years.

DATES: Comments must be received on or before October 31, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2013–0643, by one of the following methods:

- *On-Line at http://www.regulations.gov:* Follow the On-Line Instructions for Submitting Comments.
- *Email: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* Air and Radiation Docket, Docket ID No. EPA–HQ–OAR–2013–0643, U.S. Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

On-Line Instructions for Submitting Comments: Direct your comments to Docket ID No. EPA–HQ–OAR–2013–0643. 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 automatically be captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Materials relevant to this proceeding are contained in the Air and Radiation Docket and Information Center, maintained in Docket ID No. EPA–HQ–OAR–2013–0643. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open to the public on all federal government work days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566–1744. The Air and Radiation Docket and Information

Center's Web site is *http://www.epa.gov/oar/docket.html.* The electronic mail (email) address for the Air and Radiation Docket is: *a-and-r-docket@epa.gov,* the telephone number is (202) 566–1742, and the fax number is (202) 566–9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at *http://www.regulations.gov.* After opening the *http://www.regulations.gov* Web site, enter EPA–HQ–OAR–2013–0643 in the ''Enter Keyword or ID'' fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

EPA will keep the record open until October 31, 2013. All information will be available for inspection at the EPA Air Docket No. EPA–HQ–OAR–2013–0643. Persons with comments containing proprietary information must distinguish such information from other comments to the greatest extent possible and label it as ''Confidential Business Information'' (''CBI''). If a person making comments wants EPA to base its decision on a submission labeled as CBI, then a non-confidential version of the document that summarizes the key data or information should be submitted to the public docket. To ensure that proprietary information is not inadvertently placed in the public docket, submissions containing such information should be sent directly to the contact person listed below and not to the public docket. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed, and according to the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies the submission when EPA receives it, EPA will make it available to the public without further notice to the person making comments.

FOR FURTHER INFORMATION CONTACT:

Roberts French, Environmental Protection Specialist, Office of Transportation and Air Quality, Compliance Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105. Telephone: (734) 214–4380. Fax: (734) 214–4869. Email address: *french.roberts@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the model year (MY) 2012–2016 light-duty vehicle greenhouse gas (GHG) rule, EPA established an option for manufacturers to generate credits by employing technologies that achieve carbon dioxide (CO_2) reductions in the real world but are not captured on the 2-cycle test procedures used to determine compliance with the fleet average standards (i.e., ''off-cycle'' credits). EPA adopted the off-cycle credit option to encourage the introduction of these types of technologies, believing that off-cycle CO_2 reductions should be considered in determining a manufacturer's fleet average, and that a credit mechanism is an effective way to achieve this.

The MY 2012–2016 rule provided two ways for manufacturers to demonstrate the off-cycle emissions reduction capabilities of a technology and generate off-cycle credits, either through 5-cycle testing (which captures elements of real-world driving not captured by the 2-cycle compliance tests, including high speeds, rapid accelerations, and cold temperature operation) or an alternative demonstration methodology developed by the manufacturer and approved by EPA.[1] The MY 2017–2025 light-duty GHG rule streamlined the off-cycle credits program and provided a third pathway for credits, a pre-determined credits list that may be used beginning in MY 2014.[2]

The first pathway for a manufacturer to demonstrate off-cycle technology is to conduct 5-cycle emissions testing with and without the technology applied to the vehicle.[3] If the off-cycle emissions benefit of the technology is able to be adequately captured through 5-cycle testing, the manufacturer must conduct testing per the regulations, and submit the data to EPA.[4] This methodology was proposed in detail in the rulemakings, which included an opportunity for public comment, and therefore manufacturers' applications for credits using the 5-cycle process do not undergo additional public review.

The second pathway allows manufacturers to demonstrate off-cycle emissions reduction technology using an alternative methodology developed by the manufacturer in cases where the real world benefit of the technology cannot be adequately demonstrated using the 5-cycle test procedures.[5] The regulations regarding the alternative methodology, excerpted below, specify the data and information needed to support a manufacturer's off-cycle credit application.[6] The alternative methodology must be approved by EPA prior to the manufacturer generating credits. Also, as part of the EPA review, the alternative methodology must be made available for public comment.[7] EPA will consider public comments as part of its final decision to approve or deny the credit request.

The regulations for the alternative methodology provided at 40 CFR 86.1869–12(d)(1)(i)–(iv) specify that the alternative demonstration program must be approved in advance by the Administrator and should be based on modeling, on-road testing, on-road data collection, or other approved analytical or engineering methods, and should be robust, verifiable, and capable of demonstrating the real-world emissions benefit of the technology with strong statistical significance. Further, the alternative program should result in a demonstration of baseline and controlled emissions over a wide range of driving conditions and vehicles in order to minimize issues of data uncertainty. Additionally, the regulations at 40 CFR 86.1869–12(e)(1)(ii)–(iii) and (e)(2)(i)–(iv) provide specificity regarding the data and information that must be submitted to EPA as part of an application for credits using an alternative demonstration methodology.

As noted above, as part of the MY 2017–2025 rule, EPA adopted a list of pre-approved off-cycle technologies and credits that manufacturers can use beginning in MY 2014.[8] This third option was included in the MY 2017–2025 rule because certain types of off-cycle credits are amenable to quantification without further demonstration, and EPA's specification of these credits therefore significantly streamlines the off-cycle credits program and reduces the testing and data burden that the program otherwise entails. Manufacturers using the pre-approved list only need to provide EPA at the time of certification with information demonstrating that their technology meets applicable definitions and qualifies for credits. There are no testing or other requirements for demonstrating emissions reductions. Manufacturers may however use the 5-cycle or alternative methodology pathways in MY 2014 and later to demonstrate that their technology achieves greater off-cycle emissions reductions than are provided by the pre-defined list. Also, manufacturers would need to use the 5-cycle or alternative methodology pathways to demonstrate eligibility for credits for technologies

[1] 75 FR 25438–25440, May 7, 2010.

[2] 77 FR 62832–62839, October 15, 2012.

[3] 40 CFR 86.1869–12(c).

[4] 40 CFR 86.1869–12(c).

[5] 40 CFR 86.1869–12(d).

[6] 40 CFR 86.1869–12(d) and (e).

[7] 40 CFR 86.1869–12(d)(2).

[8] 40 CFR 86.1869–12(a).

that are not on the list, as well as the extent of the credits.

Mercedes-Benz is applying for credits for model years prior to MY 2014 and for credits in excess of the credits on the pre-approved list. The technologies cannot be adequately demonstrated over the 5-cycle test and therefore Mercedes-Benz has applied for credits under the alternative methodology approach discussed above.

II. Mercedes-Benz Off-Cycle Credit Application and Alternative Methodology

Mercedes-Benz has applied for off-cycle credits using the alternative demonstration methodology pathway for the following technologies: engine stop-start, high efficiency exterior lighting, infrared glazing, and active seat ventilation. The application covers MY 2012–2016 vehicles. EPA has reviewed the application for completeness and is now making the application available for public review and comment per the regulations.[9] The Mercedes-Benz off-cycle credit application with confidential business information redacted has been placed in docket EPA–HQ– OAR–2013–0643 and on EPA's Web site at *http://www.epa.gov/otaq/regs/ld-hwy/greenhouse/ld-ghg.htm*.

A summary of Mercedes' alternative methodology for each of the four technologies is provided below. For context and comparison, in summarizing the Mercedes-Benz alternative methodology, EPA provides some background on how the Mercedes-Benz methodology compares to that developed by EPA in the MY 2017–2025 light-duty GHG rulemaking for the pre-approved list of off-cycle credits, which is contained in the Joint Technical Support Document (TSD), Chapter 5.[10]

A. Engine Stop-Start

Mercedes-Benz is applying for engine idle stop-start credit covering all of their MY 2012–2016 U.S. model product range (e.g., small/mid-size/large cars and light-duty trucks) (See Section II–III of Mercedes-Benz Application). Mercedes-Benz is following a similar methodology to the one EPA described in the TSD for the MY2017–2025 rule, but with unique inputs for idle time and stop-start system effectiveness which includes parameters related to Mercedes' unique control strategy for its stop-start system.[11]

The basic methodology entails the following steps: estimate or measure the total idle fraction as a percentage of all vehicle operation in the real-world; estimate or measure the percentage of idle fraction that the stop-start system is enabled out of all the available idle time (i.e., eligible stop-start percentage or stop-start system effectiveness); determine the benefit of the stop-start system in grams per mile based on A–B testing (i.e., technology on and off); and multiply the eligible real world stop-start time (relative to the 2-cycle eligible time) by the stop-start system benefit to estimate the engine idle stop-start credit.

In lieu of the EPA default idle time derived from the MOVES model, Mercedes-Benz is proposing to apply a unique idle time specific to its vehicles. To estimate the total idle time as a percentage of all vehicle operation, Mercedes-Benz conducted a field study in calendar years 2010–2011 including 29 instrumented customer vehicles, randomly selected from the Mercedes-Benz customer base. The field study was performed for a period of 13 months in eight states: California, New York, New Jersey, Florida, Texas, Illinois, Virginia, and Arizona. These eight states represented about 65% of the Mercedes-Benz sales volume. The remaining 35% of the Mercedes-Benz sales fleet was distributed in the other 42 states not included in the idle fraction study. During the course of the study, the vehicles accumulated 311,118 miles. The 29 vehicle sample broadly represents the Mercedes-Benz models equipped with stop-start technology sold in the United States. Based on this study, Mercedes-Benz estimated that its vehicles have a 23.83% total idle fraction as a percentage of all vehicle operation.

To provide further support for its idle fraction estimate, Mercedes-Benz acquired an independent estimate of idle fraction for its vehicles from Progressive Insurance. Progressive Insurance has about 1.4 million vehicles in its ''Snapshot'' Program covering 44 states (excluding California, North Carolina, Tennessee, Indiana, Arkansas, and Hawaii), over a six month period.[12] In the Progressive data set, there are 17,484 Mercedes-Benz vehicles which are represented in proportion to current industry sales shares. Based on the Progressive data set, the Mercedes-Benz vehicles are estimated to have an idle fraction of 23.9%. This is almost exactly the same as the 23.83% idle fraction found in the Mercedes-Benz study discussed above and used by Mercedes-Benz in their analysis. Further, since the Progressive Insurance data covers 37 out of the other 42 states not included in the Mercedes-Benz idle fraction study, this data implies that the other 35% of the sales volume not represented by the Mercedes-Benz data has consistent idle fractions. Mercedes indicated that none of the other 42 states, except for Pennsylvania, have equivalent sales volumes to the states used in the idle fraction study. As such, Mercedes-Benz concludes that the idle fraction for the other 35% of the sales volume, if different, would not have significantly altered the idle fraction estimate.

To estimate the percentage of idle fraction during which the stop-start system is enabled, Mercedes-Benz used EPA's methodology in Chapter 5 of the Technical Support Document (TSD) for the MY2017–2025 rule, with inputs specific to Mercedes-Benz vehicles and control strategies.

The following background is provided to give some additional context on how EPA derived off-cycle credits for stop-start systems for the pre-approved menu in the MY 2017–2025 rulemaking. EPA constrained stop-start system effectiveness based on three operating temperature ranges: cold temperatures below 40 degrees Fahrenheit, mid-temperatures between 40 and 80 degrees Fahrenheit, and hot temperatures above 80 degrees. For the cold temperature range, EPA assumed that passenger demand for heat would reduce stop-start effectiveness unless the vehicle possesses an electric heater circulation pump, or equivalent system, that supplies sufficient heat during engine off operation. For the hot temperature range, EPA assumed that passenger demand for air conditioning (A/C) would render the stop-start system inoperable, unless the manufacturer has some supplemental system to support cabin cooling. For all the temperature ranges, EPA assumed that the stop-start system always defaults on when the vehicle is keyed on. EPA assumed the overall system effectiveness would be reduced to 87.75% due to these temperature effects.

Mercedes Benz's stop-start system has several design features that differ from those used by EPA for the pre-approved menu analysis. As described in Section III of the Mercedes-Benz application, Mercedes-Benz took these factors into account in analyzing its system performance. First, the Mercedes-Benz stop-start system includes an electric

[9] § 86.1869–12(e)(3).

[10] Joint Technical Support Document: Final Rulemaking for 2017–2025 Light-duty Vehicle Greenhouse Gas Emission Standards for Corporate Average Fuel Economy Standards, United States Environmental Protection Agency and National Highway Traffic Safety Administration, August 2012, EPA–420–R–12–901.

[11] MY2017–2025 Technical Support Document, Chapter 5, Section 5.2.8.1.

[12] Of these states, only California is a major market for Mercedes-Benz.

heater circulation pump that maintains cabin heating in cold temperatures, and thus enables stop-start capability when heat is demanded. Second, the Mercedes-Benz system has a supplemental 12 volt battery system that supplies power for all the electrical components and accessories. This allows the main battery to support restarting and also enables stop-start capability even when A/C is demanded. Mercedes-Benz also made an adjustment to account for OBD and stop-start interactions, which limits the availability of stop-start during the first 170 seconds of vehicle operation. These adjustments resulted in an estimated fraction of effectiveness (i.e., when the system is active) of about 91.32%, compared to EPA's generic estimate of 87.75%.

In addition, the Mercedes-Benz system includes an ''EcoButton'' that allows customers to disable the stop-start system. An estimate of the frequency of use of the EcoButton to disable the stop-start system is included in the Mercedes-Benz calculations. Finally, the Mercedes-Benz stop-start system has a maximum engine off duration of three minutes; therefore, the stop-start system would not be active after an idle period exceeds three minutes. Based on these features, Mercedes-Benz reduced its eligible idle time of 23.83% to a total eligible idle time of 21.22% using the 91.32% system effectiveness discussed above, and an additional discount of 2.5% for EcoButton usage and idles exceeding the Mercedes-Benz system's 3 minute engine off duration.

To determine the CO_2 emissions benefit of the stop-start system, Mercedes-Benz performed testing of Mercedes-Benz vehicles equipped with stop-start in different vehicle categories with the stop-start system on and off. Based on this testing, Mercedes-Benz measured a benefit of: 9.8 g/mi CO_2 for small size cars, 8.1 g/mi CO_2 for mid-size cars, 16.9 g/mi CO_2 for large size cars, and 15.2 g/mi CO_2 for light-duty trucks (e.g., SUVs). These g/mile GHG improvement values reflect the operational effectiveness of the Mercedes-Benz system during the 2-cycle testing. The effectiveness (i.e., the time the engine is off compared to the total idle time in the cycle) of the stop-start system over the 2-cycle test ranged from 67.3% to 80.4%.

Based on the eligible stop-start idle fraction of 21.22%, compared with 10% idle fraction over the 2-cycle tests, and the emissions benefits measured above, Mercedes-Benz calculated an engine stop-start credit of 11.0 g/mi CO_2 for small size cars; 9.1 g/mi CO_2 for mid-size cars; 19.0 g/mi CO_2 for large size cars; and 17.1 g/mi CO_2 for light-duty trucks (for example, for small cars, these credits were derived as: (9.8 g/mi CO_2 $\times$ 0.2122/0.10) $-$ 9.8 g/mi CO_2 = 11.0 g/mi CO_2).

High Efficiency Exterior Lighting

Mercedes-Benz is applying for off-cycle credits for high efficiency exterior lighting for their MY 2012–2016 U.S. model product range with the following lighting elements: low beam head lights, high beam head lights, parking/position, front turn signal, front side marker, tail lights, rear turn signal, and license plate (See Section IV of the Mercedes-Benz application). This list of lighting elements is consistent with that specified by EPA for the pre-approved list in the MY 2017–2025 rule.[13]

To calculate the high efficiency exterior lighting credits, Mercedes-Benz used the EPA methodology set forth in the TSD for the MY2017–2025 rule.[14] Specifically, Mercedes-Benz used the MY 2017–2025 rule baseline wattage values for each lighting element listed above and the time of day (e.g., day time, night time) usage rates from a study performed by Schoettle et al. [15] and inserted the wattage values from the Mercedes-Benz high efficiency exterior lighting to determine the wattage savings for each lighting element. In most cases, the Mercedes-Benz wattage savings for each lighting element exceeded the wattage savings projected in the MY 2017–2025 rule (exceptions: parking/position lights at 70% savings versus 78% in the MY 2017–2025 rule; license plate light at 86% versus 90% in the MY 2017–2025 rule).

For the final credit amounts, Mercedes-Benz multiplied the wattage savings times the usage rates and a constant of 0.032 g/mi CO_2/watt (based on data showing a 100 watt savings equates to 3.2 g/mi CO_2 savings) for a credit of 1.1 g/mi CO_2 total for all the high-efficiency exterior lighting elements used over the range of Mercedes-Benz models. In comparison, the default credit value for high efficiency exterior lighting in the MY2017–2025 rule is 1.0 g/mi CO_2.

Infrared Glazing

Mercedes-Benz is applying for off-cycle credits for infrared glazing for the MY 2012–2013 S-Class, ML-Class and GL-Class vehicles that utilize infrared glazing technology (See Section IV of Mercedes-Benz's application). The infrared glazing technology absorbs and/or reflects a percentage of the infrared solar energy emitted from the sun and reduces the amount of solar heat load transmitted into the cabin; this is termed ''total solar transmittance'' or ''Tts.'' The Tts is usually expressed as a percentage and defined as the amount of solar energy that passes through the glazing, including energy absorbed and subsequently re-radiated to the interior, to the amount of solar energy imparted on the surface of glazing.[16] The higher this number, the more solar energy is allowed to penetrate into the passenger cabin. Therefore, a lower Tts number is better since less solar energy will penetrate the passenger cabin and, consequently, the interior cabin temperature is reduced. Infrared glazing technologies improve passenger comfort, reducing the need for air conditioning (A/C) usage, which in turn, reduces vehicle fuel consumption. EPA's analysis relied on a study performed by the National Renewable Energy Laboratory (NREL) demonstrating that a one degree centigrade reduction in cabin air temperature results in a 2.2% reduction in CO_2 emissions resulting from a reduction in passenger compartment temperature and reduced A/C usage.[17]

To calculate the infrared glazing credits, Mercedes-Benz used the methods set forth in Chapter 5 of the TSD for the MY 2017–2025 rule.[18] This method utilizes the International Organization for Standardization's (ISO) standard #13837 for measuring the solar transmittance of infrared glazing [19] and a formula for estimating the effect of the solar performance of glazing technologies developed by EPA and California Air Resources Board with

[13] 40 CFR 86.1869–12(a)(ii).

[14] MY2017–2025 Technical Support Document, Chapter 5, Section 5.2.3.

[15] Schoettle, B., et al., ''LEDS and Power Consumption of Exterior Automotive Lighting: Implications for Gasoline and Electric Vehicles,'' University of Michigan Transportation Research Institute, October, 2008. For the MY2017–2025 Rule, the high efficiency exterior lighting wattage for one lighting element, low beam head lights, was revised based on manufacturer comment.

[16] Title 17 California Code of Regulations § 95600–95605: ''Cool Car Standards and Test Procedures—2012 and Subsequent Model-Year Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles.''; Air Resources Board; May 8, 2009 (see:*http://www.arb.ca.gov/regact/2009/coolcars09/coolcarsappa.pdf*).

[17] Rugh, J., Farrington, R. ''Vehicle Ancillary Load Reduction Project Close-Out Report,'' National Renewable Energy Laboratory Technical Report NREL/TP–540–42454, January, 2008.

[18] MY2017–2025 Technical Support Document, Chapter 5, Section 5.2.10.

[19] International Organization for Standardization's (ISO) 13837: ''Road vehicles—Safety glazing materials—Method for the determination of solar transmittance,'' April 15, 2008.

input from the National Renewable Energy Laboratory (NREL) and the Enhanced Performance Glass Automotive Association (EPGAA). Specifically, the contribution of each glass/glazing location to the overall interior temperature reduction is estimated using its measured Tts, relative to a baseline level, and the area of the glass/glazing location relative to the overall glass area. [20]

The infrared glazing used by Mercedes-Benz has the same Tts performance levels as the baseline Tts levels specified in the MY2017–2025 rule: 62% for all glazing locations, except for rooflites and rear side glazings of crossovers, SUVs, and minivans, which have a baseline Tts of 40%. Based on the Tts levels for Mercedes Benz's infrared glazing and the formula described above, Mercedes-Benz calculated a credit of 0.8 to 1.7 g/mi CO_2 for the infrared glazing used over the range of Mercedes-Benz models. In comparison, the default credit values for infrared glazing in the MY2017–2025 rule are scalable depending on such factors as the amount of glass in the vehicle and the performance of the glazing, up to a maximum of 2.9 g/mi CO_2 for cars and 3.9 g/mi CO_2 for trucks.

Active Seat Ventilation

Mercedes-Benz is applying for off-cycle credits for applicable vehicles that have active seat ventilation on both the front row' driver and passenger seats (See Section IV of Mercedes-Benz's application).[21] The Mercedes-Benz active seat ventilation technology has the capability to both pull air away from and push air to the seating surface.

To calculate the active seat ventilation credits, Mercedes-Benz used the methods set forth in Chapter 5 of the MY 2017–2025 TSD.[22] Based on the NREL study mentioned above, a 7.5% reduction in air conditioning (A/C) related emissions could be achieved by lowering the surface temperature of the vehicle seats.[23]

Based on the seat location criteria, capability, and the methodology described above, Mercedes-Benz estimated a credit of 1.0 g/mi CO_2 for cars and 1.3 g/mi CO_2 for trucks for the active seat ventilation technology used over the range of Mercedes-Benz models. These values are identical to the default values in the pre-approved off-cycle credit list in the MY 2017–2025 rule. Therefore, Mercedes-Benz concludes that its active seat ventilation system achieves equivalent performance to that assumed in the MY 2017–2025 rule. Mercedes-Benz could use the pre-approved list to claim these credits beginning in MY 2014, but since they are seeking credits to begin in MY 2012, and because these technologies are not measurable through the 5-cycle testing pathway, Mercedes-Benz is applying for these credits through this alternative technology pathway.

III. EPA Decision Process

EPA is providing a 30-day comment period on this application for an alternative methodology for off-cycle credits, as specified by the regulations. The manufacturer may submit a written rebuttal of comments for EPA's consideration, or may revise its application in response to comments; EPA would review a revised application as if it were a new application.[24] After reviewing any public comments and any rebuttal of comments submitted by Mercedes-Benz, EPA will make a final decision regarding the credit request. EPA will make its decision available to the public by placing a decision document in the docket as specified in the MY 2017–2025 rule.[25] and on EPA's Web site at *http://www.epa.gov/otaq/regs/ld-hwy/greenhouse/ld-ghg.htm*.

An EPA decision to approve Mercedes Benz's off-cycle credit request would only apply to the vehicles specified in the Mercedes-Benz application for MYs 2012–2016. Such decision would not apply to other Mercedes-Benz vehicles or vehicles from other manufacturers. While the broad methodology used by Mercedes-Benz could potentially be used for other vehicles and by other manufacturers, the vehicle specific data needed to demonstrate the off-cycle emissions reductions would likely be different. In such cases, a new application would be required, including an opportunity for public comment.

Dated: September 20, 2013.

Byron Bunker,

Director, Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation.

[FR Doc. 2013–23964 Filed 9–30–13; 8:45 am]

BILLING CODE 6560–50–P

[20] 40 CFR 86.1869–12(b)(1)(viii)(A).

[21] 40 CFR 86.1869–12(b)(4)(viii).

[22] MY2017–2025 Technical Support Document, Chapter 5, Section 5.2.11.

[23] Ibid 12.

[24] 40 CFR 86.1869–12(e)(3)(iii).

[25] 40 CFR 86.1869–12(e)(4)(iii).

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9901–55–OCFO]

Notice of Open Meeting of the Environmental Financial Advisory Board (EFAB)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The United States Environmental Protection Agency's (EPA) Environmental Financial Advisory Board (EFAB) will hold a full board meeting on October 22–23, 2013. EFAB is an EPA advisory committee chartered under the Federal Advisory Committee Act (FACA) to provide advice and recommendations on environmental financing issues. EFAB focuses its advice and recommendations on promoting sustainability by reducing environmental costs; increasing public and private investment; and building state, local, and tribal financial capacity.

The purpose of the meeting is to hear from informed speakers on environmental finance issues, review Agency challenges and priorities; discuss progress with EFAB work projects currently underway; review and consider requests for assistance from EPA offices as well as suggestions from EFAB members; and, to develop EFAB's FY 2014 Strategic Action Agenda.

Environmental Finance topics expected to be discussed include: Transit-Oriented Development in Sustainable Communities; Drinking Water Pricing and Infrastructure Investment; and Green Infrastructure.

The meeting is open to the public, however, seating is limited. All members of the public who wish to attend the meeting must register in advance, no later than Friday, October 11, 2013.

DATES: Full Board Meeting is scheduled for Tuesday, October 22, 2013 from 10:15 a.m. to 5:00 p.m. and Wednesday, October 23, 2013 from 8:30 a.m. to 3:00 p.m.

ADDRESSES: EPA Potomac Yards North Bldg., 2733 S. Crystal City Drive, Room 4120, Arlington, VA 22202.

Registration and Information Contact

To register for this meeting or get further information, please contact Sandra Williams, U.S. EPA, at (202) 564–4999 or *williams.sandra@epa.gov*. For information on access or services for individuals with disabilities, please contact Sandra Williams. To request accommodations of a disability, contact Sandra Williams, preferably at least 10

days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: September 18, 2013.

Joseph L. Dillon,

Director, Center for Environmental Finance.

[FR Doc. 2013–23784 Filed 9–30–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[(EPA–HQ–OA–2013–0124) FRL 9901–68–OA]

Good Neighbor Environmental Board; Cancellation Notice of Public Advisory Committee teleconference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Cancellation of the Good Neighbor Environmental Board Teleconference.

SUMMARY: EPA announced in the **Federal Register** on May 17, 2013 [FRL–9814–6] a Good Neighbor Environmental Board (GNEB) public teleconference. Pursuant to the Federal Advisory Committee Act, Public Law 92–463, EPA is giving notice of cancellation of that public meeting for the Good Neighbor Environmental Board. GNEB is a federal advisory committee chartered under the Federal Advisory Committee Act, PL 92463. GNEB provides advice and recommendations to the President and Congress on environmental and infrastructure issues along the U.S. border with Mexico.

DATES: The teleconference scheduled for Tuesday, October 1, 2013 has been cancelled because the meeting is not needed at this time. The meeting will be rescheduled at a later date.

FOR FURTHER INFORMATION CONTACT: Contact Mark Joyce, Acting Designated Federal Officer, *joyce.mark@epa.gov,* (202) 564–2130. General information about GNEB can be found on its Web site at *www.epa.gov/ofacmo/gneb.*

Dated: September 26, 2013.

Mark Joyce,

Acting Designated Federal Officer.

[FR Doc. 2013–24073 Filed 9–30–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9901–56–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is hereby given of a proposed consent decree to address a lawsuit filed by WildEarth Guardians in the United States District Court for the District of Colorado: *WildEarth Guardians* v. *McCarthy,* Civil Action No. 1:12–cv–03307. On December 19, 2012, Plaintiffs filed a complaint alleging that EPA failed to perform a mandatory duty under CAA section 110(k)(2) to take final action on three State Implementation Plan (SIP) revisions submitted to EPA by the State of Colorado on June 18, 2009. On May 2, 2013, Plaintiffs filed an amended complaint alleging that EPA failed to take final action on several other SIP submissions from the States of Colorado, North Dakota, South Dakota, and Utah. The proposed consent decree would establish deadlines for EPA to take action on these submissions.

DATES: Written comments on the proposed consent decree must be received by October 31, 2013.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2013–0702, online at *www.regulations.gov* (EPA's preferred method); by email to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Susmita Dubey, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–5577; fax number (202) 564–5603; email address: *dubey.susmita@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The proposed consent decree would resolve a lawsuit filed by WildEarth Guardians (''Plaintiffs'') seeking to compel the Administrator to take actions under CAA sections 110(k)(2) to take action on several SIP submissions from the States of Colorado, North Dakota, South Dakota, and Utah. These SIP revisions were submitted to EPA between June of 2009 and June of 2011. Section 110(k)(2) requires EPA to take action on SIP revisions within twelve months of the submission of a SIP revision that has been determined to be or deemed to be complete. EPA did not take action on the SIP revisions listed above within the statutory deadline and this is the basis for the Plaintiffs' mandatory duty lawsuit at issue in the proposed consent decree.

The proposed consent decree would require EPA to sign a notice of final action to approve, disapprove, approve in part and disapprove in part, or conditionally approve the above-listed SIP revisions by the specific dates identified in the proposed consent decree. The proposed consent decree would also require EPA, following signature of the notices of final action on the SIP revisions, to promptly submit such notices to the Office of the Federal Register for review and publication in the **Federal Register**. After EPA fulfills its obligations under the proposed consent decree, the consent decree would be terminated and the case dismissed. In addition, the proposed consent decree contains a provision addressing Plaintiffs' attorneys' fees, costs, and expenses incurred in this litigation.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the consent decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2013–0702) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: September 23, 2013.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2013–23785 Filed 9–30–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[GN Docket No. 12–268; DA 13–1954]

Media Bureau Seeks Comment on Catalog of Eligible Expenses and Other Issues Related to the Reimbursement of Broadcaster Channel Reassignment Costs Following the Incentive Auction

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on a Catalog of Eligible Expenses that includes costs broadcasters may incur as a result of channel reassignment following the Incentive Auction. In order to disburse money from the Fund within the limitations of the Spectrum Act, the Commission seeks comment on the types of expenses broadcasters might incur, the price of the equipment and services broadcasters will require, and how broadcasters and the Commission can mitigate costs. The record obtained in response to this Notice will help the Commission establish expense reimbursement provisions that govern disbursement from the Fund to broadcasters reassigned to a new channel following the Incentive Auction.

DATES: Comments are due on October 31, 2013. Reply Comments are due on November 14, 2013.

ADDRESSES: All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, or via email to *fcc@bcpiweb.com.*

FOR FURTHER INFORMATION CONTACT: Pamela Gallant, 202–418–0614, Mary Margaret Jackson, 202–418–3641 or Kim Matthews, 202–418–2154.

SUPPLEMENTARY INFORMATION:

Synopsis of the Public Notice

With the assistance of a third-party contractor, and based on the record to date, the Media Bureau has developed a Catalog of Eligible Expenses that lists specific types of expenses within cost categories that broadcasters might incur following channel relocation. The Catalog of Eligible Expenses includes both ''hard'' costs, such as new equipment, and ''soft'' costs, such as legal and engineering services. The Notice seeks comment not only on the types of expenses listed in the Catalog of Eligible Expenses, but also on the prices of the equipment and services. Because the Spectrum Act limits the Broadcaster Relocation Fund to $1.75 billion, the Commission also seeks comments on ways to mitigate costs. Specifically, the Notice seeks comment

on whether bulk purchasing or services agreements, competitive bidding and other methods designed to control costs could be employed to mitigate the overall cost of channel reassignment. The Notice also requests comment on the extent to which broadcasters could save costs by sharing facilities and reusing equipment purchased for interim use during the transition.

1. *Procedural Matters:* The proceeding will be treated as a ''permit-but-disclose'' proceeding subject to the ''permit-but-disclose'' requirements under § 1.1206(b) of the Commission's rules.[1] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[2] Additional rules pertaining to oral and written presentations are set forth in § 1.1206(b).

12. *Comment Information:* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

▪ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*

▪ For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet email. To get filing instructions, filers should send an email to *ecfs@fcc.gov,* and include the following words in the body of the message ''get form.'' A Sample form and directions will be sent in response.

▪ *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

▪ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

▪ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

▪ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

▪ *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2013–23926 Filed 9–30–13; 8:45 am]

BILLING CODE 6712–01–P

[1] 47 CFR 1.1206(b), as revised.

[2] *Id.* § 1.1206(b)(2).

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

Gator Source and Supply Company, Inc. dba Danmax Shipping (OFF), 12978 SW 132nd Avenue, Miami, FL 33186, Officers: Victor Rickard, President (QI), Application Type: New OFF License.

LTA Import & Export, Inc. (NVO & OFF), 14331 SW 120th Street, Suite 203, Miami, FL 33186, Officers: Annette Trimino, Vice President (QI), Lester Trimino, President, Application Type: QI Change.

Zhejiang Sunmarr International Transportation Co., Ltd. (NVO), 17890 Castleton Street, Suite 105, City of Industry, CA 91748, Officers: Ya Liu, Deputy General Manager (QI), Jian C. Feng, Director, Application Type: New NVO License,

By the Commission.

Dated: September 27, 2013.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2013–23935 Filed 9–30–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations and Terminations

The Commission gives notice that the following Ocean Transportation Intermediary licenses have been revoked or terminated for the reason shown pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101) effective on the date shown.

License No.: 13285N.

Name: Safari International Trading Corporation dba Safari Int'l Shipping & Trading Corp.

Address: 3876–3790 NW, 16th Street, Fort Lauderdale, FL 33311.

Date Revoked: August 30, 2013.

Reason: Failed to maintain a valid bond.

License No.: 16394N.

Name: First Express (Los Angeles), Inc.

Address: 5353 West Imperial Highway, Suite 900, Los Angeles, CA 90045.

Date Revoked: August 14, 2013.

Reason: Failed to maintain a valid bond.

License No.: 019002N.

Name: Glotrans International, Inc.

Address: 17625 South Central Avenue, Suite H, Carson, CA 90746.

Date Revoked: August 11, 2013.

Reason: Failed to maintain a valid bond.

License No.: 019343NF.

Name: Cali America Logistics, Inc.

Address: 161 West Victoria Street, Suite 220, Long Beach, CA 90805.

Date Revoked: August 11, 2013.

Reason: Failed to maintain valid bonds.

License No.: 020337N.

Name: WTG Logistics, Inc. dba WTG International.

Address: 140 Epping Road, Exeter, NH 03833.

Date Revoked: August 16, 2013.

Reason: Failed to maintain a valid bond.

License No.: 021966NF.

Name: Bekins A–1 Movers, Inc. dba Pinnacle Worldwide Relocations.

Address: 3 South 140 Barkley Avenue, Warrenville, IL 60555.

Date Revoked: August 12, 2013.

Reason: Failed to maintain valid bonds.

License No.: 023282N.

Name: Bcargo Logistics S.A. De C.V.

Address: Av. Alfonso Reyes #2615, Piso 10, Suite 1004, Col. Del Paseo Residencial, Nuevo Leon, Monterrey 64920, Mexico.

Date Revoked: August 24, 2013.

Reason: Failed to maintain a valid bond.

License No.: 023909N.

Name: E and M International Transport LLC.

Address: 4574 Swilcan Bridge Lane North, Jacksonville, FL 32224.

Dates Revoked: August 14, 2013.

Reason: Failed to maintain a valid bond.

License No.: 024003F.

Name: Concord Atlantic Inc. dba Concord Atlantic Shipping.

Address: 10095 Washington Blvd., North, Suite 211, Laurel, MD 20723.

Date Revoked: August 16, 2013.

Reason: Failed to maintain a valid bond.

James A. Nussbaumer,

Deputy Director, Bureau of Certification and Licensing.

[FR Doc. 2013–23889 Filed 9–30–13; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Guidance for Temporary Reassignment of State and Local Personnel During a Public Health Emergency

AGENCY: Department of Health and Human Services, Office of the Secretary.

ACTION: Notice of availability and request for comments.

SUMMARY: The Department of Health and Human Services (HHS) is accepting comments on proposed ''Guidance for Temporary Reassignment of State and Local Personnel during a Public Health Emergency.'' Section 201 of the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (PAHPRA), Public Law 113–5, amends section 319 of the Public Health Service (PHS) Act to provide the Secretary of HHS with discretion to authorize the temporary reassignment of state, tribal, and local personnel during a declared Federal public health emergency upon request by a state or tribal organization or their designee. This proposed guidance addresses that provision.

DATES: Public comments will be accepted for sixty days from the date this notice publishes in the **Federal Register**.

ADDRESSES: The guidance is available online at *www.phe.gov/section201*. Comments may be submitted via a form on that Web site. This document is also available in hard-copy for all those that request it from the point of contact listed in the ''Additional Information'' section below.

FOR FURTHER INFORMATION CONTACT: For additional information, please contact: Lisa Kaplowitz, MD, MSHA, Deputy Assistant Secretary, Office of Policy and Planning, Office of the Assistant Secretary for Preparedness and Response, 200 Independence Avenue SW., Washington, DC 20201, telephone number (202) 205–2882.

SUPPLEMENTARY INFORMATION: Section 201 of the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (PAHPRA), Public Law 113–5, amends section 319 of the PHS Act to provide the Secretary of HHS with discretion to authorize the temporary reassignment of state, tribal, and local personnel during a declared Federal public health emergency upon request by a state governor or tribal organization or their designee. PAHPRA requires that HHS issue proposed guidance on this provision, to be followed by a 60-day public comment period.

The temporary reassignment provision is applicable to state, tribal, and local public health department or agency personnel whose positions are funded, in full or part, under PHS programs. This authority terminates on September 30, 2018.

This new provision provides an important flexibility to state and local health departments and tribal organizations during an event requiring all the resources at their disposal. The temporary reassignment provision permits state, tribal, and local personnel to be voluntarily reassigned so they can immediately respond to the public health emergency in the affected jurisdiction.

Statutory Authority: Section 201 of the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (PAHPRA), Public Law 113–5

Dated: September 23, 2013.

Kathleen Sebelius,

Secretary.

[FR Doc. 2013–23834 Filed 9–30–13; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day–13–0870]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Monitoring and Reporting System for Chronic Disease Prevention and Control Programs (OMB No. 0920–0870, exp. 11/30/2013)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC requests OMB approval to continue the collection of information from tobacco control program awardees funded through cooperative agreement

DP09–901, Collaborative Chronic Disease, Health Promotion, and Surveillance Program Announcement: Healthy Communities, Tobacco Control, Diabetes Prevention and Control, and Behavioral Risk Factor Surveillance System. These cooperative agreements will end on March 28, 2014, and final reports on awardee activities are due to CDC approximately 90 days after the end of the funding period. OMB approval is requested for one year to allow submission of progress reports relating to the final year of funding under the current cooperative agreement.

Fifty-three awardees which consist of state departments of health in the 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands will continue to submit semi-annual progress reports through a Web-based management information system (MIS). There are no changes to the number of tobacco control program respondents, the content of the information collection, the frequency of information collection, or the estimated burden per response. However, the total estimated burden hours will decrease due to discontinuation of reporting requirements for three program components that were originally funded under the DP09–901 cooperative agreement: diabetes prevention and control, state BRFSS activities, and Healthy Communities. Due to organizational and funding changes within CDC, funding for these program components was discontinued under the DP09–901 cooperative agreement and semi-annual reports are no longer required.

CDC will continue to collect information about each awardee's tobacco control objectives, planning, activities, resources, partnerships, strategies, and progress toward meeting objectives. Awardees will use the information reported through the electronic MIS to manage and coordinate their activities and to improve their efforts. CDC will use the information reported through the MIS to document and monitor each awardee's progress and to make adjustments, as needed, in the type and level of technical assistance provided to them. The information collection allows CDC to oversee the use of federal funds, and identify and disseminate information about successful strategies implemented by awardees. CDC also uses the information to respond to Congressional and stakeholder inquiries about awardee activities, program implementation, and program impact.

Progress reporting through the MIS is required for cooperative agreement awardees. There are no costs to respondents other than their time. The total estimated burden hours are 636.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
State Tobacco Control Program	Management Information System	53	2	6

Kimberly S. Lane,

Deputy Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–23838 Filed 9–30–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Federally Assisted State Transmitted (FAST) Levy.

OMB No.: New Collection.

Description: State IV–D child support enforcement agencies are required to have procedures to secure assets in cases where there is a support arrearage to satisfy any current support obligation and the arrearage by attaching and seizing assets of the obligor held in financial institutions. To assist states in fulfilling this statutory requirement the federal Office of Child Support Enforcement (OCSE) is proposing a new information collection using the Federally Assisted State Transmitted Levy (FAST Levy) application. FAST Levy is a centralized, secure and automated method of collecting and disseminating electronic levy notices between child support enforcement agencies and multistate financial institutions to secure the assets in an obligor's account.

The anticipated impact of employing FAST Levy is the significant reduction in existing delays to execute a levy notice, thereby diminishing opportunity for an obligor to close accounts; increase collections of past-due payments to state agencies and families; cut the states' and multistate financial institutions' administrative and implementation costs of manually executing levy notices; and strengthen document security.

The proposed information collection using the FAST Levy application is authorized by: (1) 42 U.S.C. 652(a)(7), which requires OCSE to provide technical assistance to state child support agencies to help them establish effective systems for collecting child and spousal support; (2) 42 U.S.C. 666 (a)(2) and (c)(1)(G)(ii), which requires state child support agencies to have procedures to secure assets of an obligor to satisfy past due support orders; and (3) 45 CFR 303.7(a)(5), which requires state child support agencies to transmit requests for information and provide requested information electronically to the greatest extent possible.

Respondents: Multistate Financial Institutions and State Child Support Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
FAST-Levy Response Withhold Record Specifications: Multistate Financial Institutions	5	1	317.5	1,587.5

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
FAST-Levy Request Withhold Record Specifications: State Child Support Enforcement Agencies	7	1	317.5	2,222.5

Estimated Total Annual Burden Hours: 3,810.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2013–23884 Filed 9–30–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Final Notice To Announce the Implementation of Required Electronic Submission of State or Tribal Plans, and Program and Financial Reporting Forms for Mandatory Grant Programs

AGENCY: Office of Administration (OA), ACF, HHS.

ACTION: Final notice.

SUMMARY: The Administration for Children and Families (ACF), Office of Administration (OA) is issuing final notice of the implementation of required electronic submission of State or Tribal plans, and program and financial reporting forms for mandatory grant programs to ACF's Online Data Collection system (OLDC). This notice includes responses to comments received under the initial notice published in the **Federal Register** (78 FR 38989–38891, June 28, 2013). Public comment on the proposed procedures closed on August 27, 2013.

This notice also corrects the absence in the June 28 notice of a reference that required electronic application submission also applies to Tribal plans and reporting.

DATES: Effective October 1, 2013.

FOR FURTHER INFORMATION CONTACT: Karen Shields, Grants Policy Specialist, Department of Health and Human Services, Administration for Children and Families, Division of Grants Policy, 370 L'Enfant Promenade SW., Aerospace Building, 6th Floor East, Washington, DC 20447. Email address: *karen.shields@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: ACF has previously afforded recipients of mandatory grant programs the option of submitting State or Tribal plans, and programmatic and financial reporting forms, in both electronic and paper formats. On June 28, 2013, ACF announced that recipients of mandatory grant programs will be required to submit State plans, and programmatic and financial reporting forms electronically.

In response to the June notice, the ACF received several comments. The following information summarizes the comments received and the agency responses.

1. A commenter noted that all references to ''State'' should be changed to include plans and reporting submitted by Tribes, as well as those required of States, under mandatory grants.

We concur. ACF corrects and apologizes for the error in the original notice. All references to States in the earlier notice also apply to plans and reports required from Tribal grantees and applicants.

2. A commenter asked why required electronic submission would not include submission of reports under a discretionary grant program.

ACF responds that, at present, the requirement for electronic submission of reporting documents, implemented in this and the June 28 notices, applies only to reporting by mandatory grant programs. An announcement concerning requirements for electronic reporting by grantees under discretionary grant programs will be made in the **Federal Register** in the future. Required electronic submission of applications to discretionary grant programs through *www.Grants.gov* was announced by ACF in **Federal Register** notice 76 FR 66721, October 27, 2011.

3. One commenter asked where applicants can obtain a copy of the SF–424M for use by State or Tribal plans, and another commenter requested specific instructions for use of the form.

The form is available on the Grants.gov Web site at: *http://apply07.grants.gov/apply/forms/sample/SF424_Mandatory_1_2–V1.2.pdf.* ACF Program Offices will provide detailed instructions to grantees and applicants affected by the change to required electronic submission.

4. Two commenters suggested that ACF continue to accept paper submissions of plans and reporting documents when natural disasters, disruptions of mail service, unscheduled electrical or system outages, or other rare events occur that would prevent electronic submission of the documents.

We respond that ACF has the authority to extend the filing deadline in these situations, upon request from the grantee. No exemption request from the electronic filing requirement is required under these circumstances. ACF will allow a paper submission via fax, or as an email attachment, in situations where the use of mail, courier, or overnight delivery service may not be sufficient to meet a specific deadline.

5. Other commenters requested clarification of the electronic submission requirement by asking whether attachments to plans must also be submitted electronically to ACF's OLDC system.

ACF responds that supplemental attachments and documentation to any State or Tribal plan, or to programmatic or financial reporting forms, may be uploaded electronically to OLDC.

6. Another commenter that had been submitting plans and reports in paper format asked if new users of the OLDC

system will be given credentials to use OLDC. Upon request, ACF will provide credentials and access to use the OLDC system to all applicants and grantees. Individuals already authorized to use OLDC may need their authorization updated to include additional programs or documents, if applicable. Affected ACF Program Offices will send detailed instructions to grantees and applicants.

7. The same commenter also asked whether submitted State Plans could be viewed by the public through ACF's OLDC system.

ACF responds that the OLDC system does not have the capability to allow viewing of submitted plans or reports by the public. ACF Program Offices that provide public viewing of submitted plans on their Web sites will continue that practice. States and Tribes should follow their internal procedures in making the determination to provide plans and reports for public viewing.

8. A commenter objected to the requirement by some ACF Program Offices that a paper copy of a submitted plan be distributed to the relevant ACF Regional Office. The same commenter also recommended that, once a plan is electronically signed and submitted to OLDC, ACF should not allow subsequent changes to the data unless the grantee is submitting a revised report, according to the reporting instructions.

ACF responds that, with the implementation of this requirement, once a grantee submits its plan or reporting forms into OLDC, the submission of a second paper copy is no longer required. ACF's Regional Office staff will access plans and reports using OLDC, eliminating the requirement for distribution of additional copies. And, we note that once a submission is signed and submitted in OLDC, any revisions, changes, or updates must be made by entering a revised report in OLDC. We note that there is no limit to the number of revised reports a grantee may submit; however, some date restrictions by the cognizant Program Office may apply to submission of revisions.

Statutory Authority: Financial Assistance Management Improvement Act of 1999, Pub. L. 106–107.

Robert Noonan,

Deputy Assistant Secretary for Administration, Administration for Children and Families.

[FR Doc. 2013–23773 Filed 9–30–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1163]

Agency Information Collection Activities: Proposed Collection; Comment Request; Institutional Review Boards

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the recordkeeping requirements for institutional review boards (IRBs).

DATES: Submit either electronic or written comments on the collection of information by December 2, 2013.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane., Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) 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, including each proposed extension of an existing 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 comments 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 of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Institutional Review Boards—21 CFR Part 56.115 (OMB Control Number 0910–0130)—Extension

When reviewing clinical research studies regulated by FDA, IRBs are required to create and maintain records describing their operations, and make the records available for FDA inspection when requested. These records include: (1) Written procedures describing the structure and membership of the IRB and the methods that the IRB will use in performing its functions; (2) the research protocols, informed consent documents, progress reports, and reports of injuries to subjects submitted by investigators to the IRB; (3) minutes of meetings showing attendance, votes and decisions made by the IRB, the number of votes on each decision for, against, and abstaining, the basis for requiring changes in or disapproving research; (4) records of continuing review activities; copies of all correspondence between investigators and the IRB; (5) statement of significant new findings provided to subjects of the research; and (6) a list of IRB members by name, showing each member's earned degrees, representative capacity, and experience in sufficient detail to describe each member's contributions to the IRB's deliberations, and any employment relationship between each member and the IRB's institution. This information is used by FDA in conducting audit inspections of IRBs to determine whether IRBs and clinical investigators are providing adequate protections to human subjects participating in clinical research.

The recordkeeping requirement burden is based on the following: The burden for each of the paragraphs under 21 CFR 56.115 has been considered as one estimated burden. FDA estimates that there are approximately 2,500 IRBs. The IRBs meet on an average of 14.6 times annually. The Agency estimates that approximately 100 hours of person-time per meeting are required to meet the requirements of the regulation.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per record-keeping	Total hours
56.115	2,500	14.6	36,500	100	3,650,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: September 25, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–23864 Filed 9–30–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1164]

Agency Information Collection Activities; Proposed Collection; Comment Request; Testing Communications on Biological Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on communication studies involving biological products that are regulated by FDA.

DATES: Submit either electronic or written comments on the collection of information by December 2, 2013.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) 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, including each proposed extension of an existing 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 comments 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 of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Testing Communications on Biological Products—(OMB Control Number 0910–0687)—Extension

FDA is authorized by section 1003(d)(2)(D) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 393(d)(2)(D)) to conduct educational and public information programs relating to the safety of regulated biological products. FDA conducts needed research to help ensure that such programs have the highest likelihood of being effective. FDA expects that improving communications about biological products will involve many research methods, including individual in-depth interviews, mall-intercept interviews, focus groups, self-administered surveys, gatekeeper reviews, and omnibus telephone surveys. The information will be used to explore concepts of interest and assist in the development and modification of communication messages and campaigns to fulfill the Agency's mission to protect the public health.

The information collected will serve three major purposes. First, as formative research it will provide critical knowledge needed about target audiences to develop messages and campaigns about biological product use. Knowledge of consumer and healthcare professional decision-making processes will provide the better understanding of target audiences that FDA needs to design effective communication strategies, messages, and labels. These communications will aim to improve public understanding of the risks and benefits of using biological products by providing users with a better context in which to place risk information more completely.

Second, as initial testing, it will allow FDA to assess the potential effectiveness of messages and materials in reaching and successfully communicating with their intended audiences. Testing messages with a sample of the target audience will allow FDA to refine messages while still in the

developmental stage. Respondents will be asked to give their reaction to the messages in either individual or group settings.

Third, as evaluative research, it will allow FDA to ascertain the effectiveness of the messages and the distribution method of these messages in achieving the objectives of the message campaign. Evaluation of campaigns is a vital link in continuous improvement of communications at FDA.

FDA estimates the burden of this collection of information based on prior experience with the various types of data collection methods described above:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 U.S.C.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Section 393(d)(2)(D)	9,280	1	9,280	0.2935 (17 min.)	2,724

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: September 25, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–23791 Filed 9–30–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0008]

Agency Information Collection Activities: Proposed Collection; Comment Request; Guidance for Industry on Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection in the guidance on citizen petitions and petitions for stay of action subject to of the Federal Food, Drug, and Cosmetic Act (FD&C Act).

DATES: Submit either electronic or written comments on the collection of information by December 2, 2013.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) 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, including each proposed extension of an existing 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 comments 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 of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry on Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act—(OMB Control Number 0910–0679)—Extension

In the **Federal Register** of June 8, 2011(76 FR 33309), FDA announced the availability of a guidance for industry entitled ''Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act.'' The guidance provides information regarding FDA's current thinking on interpreting section 914 of Title IX of the Food and Drug Administration Amendments Act (FDAAA) (Pub. L. 110–85). Section 914 of FDAAA added new section 505(q) to the FD&C Act (21 U.S.C. 355(q)) and governs certain citizen petitions and petitions for stay of agency action that request that FDA take any form of action related to a pending application submitted under section 505(b)(2) or 505(j) (U.S.C. 355(b)(2) or U.S.C. 355(j)) of the FD&C Act. The guidance describes FDA's interpretation of section 505(q) of the FD&C Act regarding how the Agency will determine if: (1) The provisions of section 505(q) addressing the treatment of citizen petitions and petitions for stay of agency action (collectively, petitions) apply to a particular petition and (2) a petition would delay approval of a pending abbreviated new drug application (ANDA) or a section 505(b)(2) application. The guidance also describes how FDA will interpret the provisions of section 505(q) requiring that: (1) A petition includes a certification and (2) supplemental information or comments to a petition

include a verification. Finally, the guidance addresses the relationship between the review of petitions and pending ANDAs and section 505(b)(2) applications for which the Agency has not yet made a decision on approvability.

The Food and Drug Administration Safety and Innovation Act (FDASIA) was signed into law on July 9, 2012 (Pub. L. 112–144, 126 Stat. 993). Section 1135 of FDASIA amended section 505(q) of the FD&C Act in two ways. First, it shortened FDA's deadline from 180 days to 150 days for responding to petitions subject to section 505(q) of the FD&C Act. Second, it expanded the scope of section 505(q) of the FD&C Act to include certain petitions concerning applications submitted under section 351(k) of the Public Health Service Act (42 U.S.C. 262), the abbreviated pathway for the approval of biosimilar biological products. Accordingly, we are now including submissions pertaining to biosimilar biological product applications in the information collection burden estimates below.

Section 505(q)(1)(H) of the FD&C Act requires that citizen petitions and petitions for stay of agency action that are subject to section 505(q) include a certification to be considered for review by FDA. Section 505(q)(1)(I) of the FD&C Act requires that supplemental information or comments to such citizen petitions and petitions for stay of agency action include a verification to be accepted for review by FDA. The guidance sets forth the criteria the Agency will use in determining if the provisions of section 505(q) of the FD&C Act apply to a particular citizen petition or petition for stay of agency action. The guidance states that one of the criteria for a citizen petition or petition for stay of agency action to be subject to section 505(q) of the FD&C Act is that a related ANDA or section 505(b)(2) application is pending at the time the citizen petition or petition for stay is submitted. Because petitioners or commenters may not be aware of the existence of a pending ANDA or section 505(b)(2) application, the guidance recommends that all petitioners challenging the approvability of a possible ANDA or section 505(b)(2) application include the certification required in section 505(q)(1)(H) of the FD&C Act and that petitioners and commenters submitting supplements or comments, respectively, to a citizen petition or petition for stay of action challenging the approvability of a possible ANDA or section 505(b)(2) application include the verification required in section 505(q)(1)(I) of the FD&C Act. The guidance also recommends that if a petitioner submits a citizen petition or petition for stay of agency action that is missing the required certification but is otherwise within the scope of section 505(q) of the FD&C Act and the petitioner would like FDA to review the citizen petition or petition for stay of agency action, the petitioner should submit a letter withdrawing the deficient petition and submit a new petition that contains the required certification.

FDA currently has OMB approval for the collection of information entitled ''General Administrative Procedures: Citizen Petitions; Petition for Reconsideration or Stay of Action; Advisory Opinions'' (OMB control number 0910–0183). This collection of information includes, among other things: (1) The format and procedures by which an interested person may submit to FDA, in accordance with § 10.20 (21 CFR 10.20), a citizen petition requesting the Commissioner of Food and Drugs (Commissioner) to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action (§ 10.30(b) (21 CFR 10.30(b))); (2) the submission of written comments on a filed citizen petition (§ 10.30(d)); (3) the submission of a supplement or amendment to or a letter to withdraw a filed citizen petition (§ 10.30(g)); (4) the format and procedures by which an interested person may request, in accordance with § 10.20, the Commissioner to stay the effective date of any administrative action (§ 10.35(b) (21 CFR 10.35(b))); and (5) the submission of written comments on a filed petition for administrative stay of action (§ 10.35(c)). This information collection includes citizen petitions, petitions for administrative stay of action, comments to petitions, supplements to citizen petitions, and letters to withdraw a citizen petition, as described previously in this document, which are subject to section 505(q) of the FD&C Act and described in the guidance.

We are requesting OMB approval for the following collection of information submitted to FDA under section 505(q) of the FD&C Act and the guidance:

1. The certification required under section 505(q)(1)(H) of the FD&C Act for citizen petitions that are subject to section 505(q) and/or that are challenging the approvability of a possible ANDA, section 505(b)(2) application, or biosimilar biological product application. Although the submission of a certification for citizen petitions is approved under OMB control number 0910–0183, the certification would be broadened under section 505(q) of the FD&C Act and the guidance.

2. The certification required under section 505(q)(1)(H) of the FD&C Act for petitions for stay of agency action that are subject to section 505(q) and/or that are challenging the approvability of a possible ANDA, section 505(b)(2) application, or biosimilar biological product application.

3. The verification required under section 505(q)(1)(I) of the FD&C Act for comments to citizen petitions.

4. The verification required under section 505(q)(1)(I) of the FD&C Act for comments to petitions for stay of agency action.

5. The verification required under section 505(q)(1)(I) of the FD&C Act for supplements to citizen petitions.

6. Supplements to petitions for stay of agency action.

7. The verification required under section 505(q)(1)(I) of the FD&C Act for supplements to petitions for stay of agency action.

8. The letter submitted by a petitioner withdrawing a deficient petition for stay of agency action that is missing the required certification but is otherwise within the scope of section 505(q) of the FD&C Act.

Section 505(q)(1)(B) and (C) of the FD&C Act and the guidance state that if FDA determines that a delay in approval of an ANDA, section 505(b)(2) application, or biosimilar biological product application is necessary based on a petition subject to section 505(q), the applicant may submit to the petition docket clarifications or additional data to allow FDA to review the petition promptly. This information collection is not included in this analysis because it is approved under OMB control number 0910–0001.

Based on FDA's knowledge of citizen petitions and petitions for stay of agency action subject to section 505(q) of the FD&C Act that have been submitted to FDA, as well as the Agency's familiarity with the time needed to prepare a supplement, a certification, and a verification, FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Certification for citizen petitions (505(q)(1)(H))	26	1.15	32	0.5 (30 min.)	16
Certification for petitions for stay of agency action (505(q)(1)(H)).	1	1	1	0.5 (30 min.)	.5
Verification for comments to citizen petitions (505(q)(1)(I)).	9	1.33	12	0.5 (30 min.)	6.0
Verification for comments to petitions for stay of agency action (505(q)(1)(I)).	1	1	1	0.5 (30 min.)	.5
Verification for supplements to citizen petitions (505(q)(1)(I)).	7	1.43	10	0.5 (30 min.)	5.0
Supplements to petitions for stay of agency action	1	1	1	6	6
Verification for supplements to petitions for stay of agency action (505(q)(1)(I)).	1	1	1	0.5 (30 min.)	0.5
Letter withdrawing a petition for stay of agency action	1	1	1	0.5 (30 min.)	0.5
Total Hours					35

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: September 26, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–23886 Filed 9–30–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0271]

Availability of Masked and De-identified Non-Summary Safety and Efficacy Data; Reopening of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the comment period for the notice entitled ''Availability of Masked and De-identified Non-Summary Safety and Efficacy Data; Request for Comments,'' which appeared in the **Federal Register** of June 4, 2013 (78 FR 33421). The Agency is reopening the comment period in response to requests for additional time and to allow interested persons more time to submit comments.

DATES: Submit either electronic or written comments by October 31, 2013

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets at the heading of this document.

FOR FURTHER INFORMATION CONTACT: Nancy B. Sager, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., HILL–3110, Silver Spring, MD 20993, 301–796–3603, FAX: 301–431–6351, *Nancy.sager@fda.hhs.gov;* Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210; or Aaliyah Eaves-Leanos, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5435, 301–796–2948, FAX: 301–847–8510, *Aaliyah.Eaves-Leanos@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 4, 2013 (78 FR 33421), FDA published a request for public comments from interested persons on the proposed availability of de-identified and masked data derived from medical product applications. In that notice, FDA requested comments by August 5, 2013, on the following topics: (1) What factors should be considered in masking study data (e.g., data fields from regulatory submissions to remove or modify, number of different products to pool within a product class); (2) what limitations, if any, should there be on the Agency's ability to make available the masked data as described previously; (3) are there any additional factors FDA should consider in de-identifying data in addition to FDA's requirement to remove any names and other information (e.g., birth date, death date, local geographic information, contact information) that would identify patients or research subjects before disclosing information; (4) would regulatory changes facilitate implementation of such a proposal, and if so, what changes would be most useful; and (5) which situations do you believe disclosing masked data would be most useful to advance public health?

The comment period was 60 days, but the Agency has received requests for an additional 30 days for submitting comments. Each request conveyed concern that the 60-day comment period did not allow sufficient time to develop a meaningful or thoughtful response.

FDA has considered the requests and will reopen the comment period for an additional 30 days, thus extending the comment period to October 31, 2013. The Agency believes that an additional 30 days allows adequate time for interested persons to submit comments without significantly delaying the Agency's consideration of these important issues.

II. How To Submit 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.*

Dated: September 25, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–23794 Filed 9–30–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0787]

Investigational Device Exemptions for Early Feasibility Medical Device Clinical Studies, Including Certain First in Human Studies; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Investigational Device Exemptions (IDEs) for Early Feasibility Medical Device Clinical Studies, Including Certain First in Human (FIH) Studies.'' Through the approaches announced in this guidance, FDA intends to facilitate early feasibility studies of medical devices, using appropriate risk mitigation strategies, under the IDE regulations. Early feasibility studies allow for limited early clinical evaluations of devices to provide proof of principle and initial clinical safety data, often before the device design is finalized. This guidance addresses the information that should be provided to FDA in support of an early feasibility study IDE application and explains the requirements applicable to modifications to the device design or clinical study protocol during the early feasibility study.

DATES: Submit either electronic or written comments on this guidance at any time. General comments on Agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled ''Investigational Device Exemptions (IDEs) for Early Feasibility Medical Device Clinical Studies, Including Certain First in Human (FIH) Studies'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health (CDRH), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4613, Silver Spring, MD 20993–0002 or Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), 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 request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the 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. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Dorothy Abel, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1204, Silver Spring, MD 20993–0002, 301–796–6366; or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

This guidance is intended to provide assistance to FDA staff, clinicians, medical device innovators, and industry on the development and review of IDE applications (21 CFR 812.20) for early feasibility studies of significant risk devices. Early feasibility studies allow for early clinical evaluation of devices to provide proof of principle and initial clinical safety data in a limited number of subjects. During these studies, iterative device modifications are likely to be made based on clinical experience. Early feasibility studies may be appropriate early in device development when clinical experience is necessary because nonclinical testing methods are not available or adequate to provide the information needed to advance the developmental process. As with all clinical studies, initiation of an early feasibility study must be justified by an appropriate benefit/risk analysis and adequate human subject protection measures.

This guidance discusses the key principles unique to the justification for, and design of, early feasibility studies, and outlines the general principles for preparing and reviewing early feasibility study IDE applications. This guidance is not intended to address all required elements of an IDE application or to provide a comprehensive tutorial on best clinical practices for investigational medical device studies.

Concurrent with the publication of this guidance in draft, November 10, 2011 (76 FR 70150), FDA initiated a pilot program for early feasibility study IDE applications (November 10, 2011, 76 FR 70152) to solicit nominations from sponsors of innovative device technologies. In addition to making clarifications within the final guidance in response to comments from the public on the draft guidance, FDA has incorporated changes based on information learned and experiences gained from the pilot program.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). This guidance represents the Agency's current thinking on IDEs for Early Feasibility Medical Device Clinical Studies. 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 statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. Guidance documents are also available at *http://www.regulations.gov* or from CBER at *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm*. To receive ''Investigational Device Exemptions (IDEs) for Early Feasibility Medical Device Clinical Studies, Including Certain First in Human (FIH) Studies,'' you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1782 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This 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 21 CFR part 812 have been approved under OMB control number 0910–0078;

and the collections of information in 21 CFR 56.115 have been approved under OMB control number 0910–0130.

V. 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*.

Dated: September 25, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–23795 Filed 9–30–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–1120]

Draft Guidance for Industry on Abbreviated New Drug Application Submissions—Refuse-to-Receive Standards; 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 ''ANDA Submissions—Refuse-to-Receive Standards.'' This guidance is intended to assist applicants preparing to submit to FDA abbreviated new drug applications (ANDAs) and related submissions (i.e., prior approval supplements (PASs) for new strengths). The guidance contains details on what should be included in these submissions and highlights serious deficiencies that may cause FDA to *refuse to receive* the submission.

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 October 31, 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: Johnny Young, Center for Drug Evaluation and Research (HFD–613), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240–276–8677.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''ANDA Submissions—Refuse-to-Receive Standards.'' This guidance is intended to assist applicants preparing to submit to FDA ANDAs and PASs to ANDAs for which the applicant is seeking approval of a new strength of the drug product. The guidance contains details on what should be included in an ANDA and highlights serious deficiencies that may cause FDA to refuse to receive an ANDA. A refuse-to-receive decision indicates that FDA has determined that an ANDA is incomplete on its face, usually because of omissions.

With the enactment of the Generic Drug User Fee Act on July 9, 2012 (Pub. L. 112–144, Title III), FDA's Office of Generic Drugs (OGD) was tasked with a number of activities, including developing enhanced refusal to receive standards for ANDAs and related submissions. Recent data underscore the need for improvement in the quality of original ANDA submissions. Between 2009 and 2012, OGD refused to receive 497 ANDAs, primarily because the submissions contained serious deficiencies. FDA evaluates each incoming ANDA individually to determine whether its format and content meet threshold criteria to permit a substantive review and can thus be received by FDA. The Agency cannot receive an ANDA unless it contains the information required under section 505(j) of the Federal Food, Drug, and Cosmetic Act and related regulations (e.g., 21 CFR 314.101(b)(1)). This guidance explains in some detail the kind of omissions that can lead to a refuse-to-receive determination. The guidance is intended to assist applicants preparing ANDAs and related submissions to help improve the quality of those submissions and ensure that their format and content meet the threshold criteria for FDA receipt and review.

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 refusing to receive ANDAs and related submissions. 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. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information 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 collection of information in 21 CFR part 314 for ANDA and related submissions has been approved under OMB control number 0910–0001.

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: September 25, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–23793 Filed 9–30–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request; Application for the Postdoctoral Research Associate Program

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on July 23, 2013, pages 44135–44136, and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institute of General Medical Sciences (NIGMS), National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: NIH Desk Officer.

DATES: *Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments or request more information on the proposed project contact: Ms. Tammy Dean-Maxwell, NIGMS, NIH, Natcher Building, Room 3AN–44, 45 Center Drive, MSC 6200, Bethesda, MD 20892–6200, or call non-toll-free number 301–594–2755 or Email your request, including your address to *deanmat@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

Proposed Collection: The Postdoctoral Research Associate Program is an Extension for the currently approved collection, OMB No. 0925–0378, National Institute of General Medical Sciences (NIGMS), National Institutes of Health (NIH).

Need and Use of Information Collection: The Postdoctoral Research Associate (PRAT) Program will use the applicant and referee information to award opportunities for training and experience in laboratory or clinical investigation to individuals with a Ph.D. degree in an NIGMS designated emerging area of research or a related science, M.D., or other professional degree through appointments as PRAT Fellows at the National Institutes of Health or the Food and Drug Administration. The goal of the program is to develop leaders in designated emerging areas of research for key positions in academic, industrial, and Federal research laboratories.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 331.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hour
PRAT Primary Application (NIH 2721–1)	Applicants	25	1	8	200
PRAT Request for Evaluation Form (NIH 2721–2)	Referee	75	1	105/60	131

Dated: September 24, 2013.

Sally Lee,

Executive Officer, National Institute of General Medical Sciences, National Institutes of Health.

[FR Doc. 2013–23918 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Stem Cell Approaches for Neurodegenerative Disorders.

Date: October 10, 2013.

Time: 10:30 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Seetha Bhagavan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, (301) 237–9838, *bhagavas@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 25, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23852 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Time-Sensitive Obesity Research.

Date: October 28, 2013.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 25, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23843 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed 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 Allergy and Infectious Diseases Special Emphasis Panel; Genomic Centers for Infectious Diseases.

Date: October 23–24, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Eleazar Cohen, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health, NIAID, 6700 B Rockledge Drive, Room 3129, Bethesda, MD 20892, 301–435–3564, *ec17w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 25, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23853 Filed 9–30–13; 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 Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Children's Study Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Please visit the National Children's Study Advisory Committee Web site for additional meeting information at *http://www.nationalchildrensstudy.gov/about/organization/advisorycommittee/Pages/default.aspx.* For additional information about the Federal Advisory Committee, please email at *ContactNCS@nih.gov.* Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Children's Study Advisory Committee.

Date: October 28, 2013.

Time: 9:00 a.m. to 4:30 p.m.

Agenda: The Committee will receive an update on the current status of Vanguard Study and will discuss general data collection methods and retention strategy and methods.

Place: National Institutes of Health, Natcher Conference Center, Room E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Leslie Cooke, Program Analyst, National Children's Study, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 3A01, Bethesda, MD 20892, (301) 594–1302. *contactncs@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. For additional information about the Federal Advisory Committee meeting, please contact *contactncs@nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: September 25, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23849 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neural Injury.

Date: October 8, 2013.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Seetha Bhagavan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, (301) 237–9838, *bhagavas@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neurological Disorders: Autism, Stroke, Brain Tumors, and Traumatic Brain Injury.

Date: October 9, 2013.

Time: 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Samuel C. Edwards, Ph.D., IRG CHIEF, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Molecular Targets for Cancer Interventions.

Date: October 21, 2013.

Time: 7:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Long Beach and Executive Center, 701 West Ocean Boulevard, Long Beach, CA 90831.

Contact Person: Careen K. Tang-Toth, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301)435–3504, *tothct@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Pregnancy and Neonatology Study Section.

Date: October 22, 2013.

Time: 7:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Bethesda, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: Michael Knecht, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892, (301) 435–1046, *knechtm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Pulmonary Disease.

Date: October 22–23, 2013.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: George M. Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: The Molecular Immunology of Host Response.

Date: October 22, 2013.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: David B. Winter, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, 301–435–1152, *dwinter@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Language and Cognition.

Date: October 22, 2013.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Dana Jeffrey Plude, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Gastroenterology, Kidney, Urology and Toxicology.

Date: October 22, 2013.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mushtaq A. Khan, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2176, MSC 7818, Bethesda, MD 20892, 301–435–1778, *khanm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Community-Level Health Promotion: Prevention and Intervention.

Date: October 22, 2013.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jacinta Bronte-Tinkew, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3164, MSC 7770, Bethesda, MD 20892, (301) 806–0009, *brontetinkewjm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–13–080: Accelerating the Pace of Drug Abuse Research Using Existing.

Date: October 22, 2013.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: George Vogler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, MSC 7770, Bethesda, MD 20892, (301) 237–2693, *voglergp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Obesity, Asthma and Reproductive Epidemiology.

Date: October 22, 2013.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *ryansj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Eye Diseases #5.

Date: October 22, 2013.

Time: 12:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: James P. Harwood, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5168, MSC 7840, Bethesda, MD 20892, 301–435–1256, *harwoodj@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Integrative and Clinical Endocrinology and Reproduction Study Section.

Date: October 23, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Silver Spring Hotel, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, 301–435–1154, *dianne.hardy@nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Social Sciences and Population Studies B Study Section.

Date: October 23, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Baltimore Downtown, 222 St. Paul Place, Baltimore, MD 21202.

Contact Person: Valerie Durrant, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, (301) 827–6390, *durrantv@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Auditory and Chemosensory Mechanisms.

Date: October 23–24, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Bacterial Pathogenesis and Antimicrobial Resistance.

Date: October 23–24, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Tera Bounds, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892, 301–435–2306, *boundst@csr.nih.gov*.

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Neurological, Aging and Musculoskeletal Epidemiology Study Section.

Date: October 23, 2013.

Time: 8:30 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza DC, 1475 Massachusetts Avenue and 14th Street, Washington, DC 20005.

Contact Person: Heidi B. Friedman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1012A, MSC 7770, Bethesda, MD 20892, 301–435–1721, *hfriedman@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: High Throughput Screening Assays for Probe Discovery.

Date: October 23, 2013.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Kee Hyang Pyon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7806, Bethesda, MD 20892, *pyonkh2@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Clinical and Translational Imaging Applications.

Date: October 23, 2013.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Eileen W Bradley, DSC, Chief, SBIB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5100, MSC 7854, Bethesda, MD 20892, (301) 435–1179, *bradleye@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 25, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23844 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Tobacco Control Regulatory Research.

Date: October 16–17, 2013.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20038.

Contact Person: Mark P. Rubert, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1775, *rubertm@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Respiratory Integrative Biology and Translational Research Study Section.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Chicago Downtown/River North, Garden Avenue, 30 East Hubbard, Chicago, IL 60611.

Contact Person: Bradley Nuss, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7814, Bethesda, MD 20892, 301–451–8754, *nussb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–13–203: Methods Development for Obtaining Comprehensive Genomic Information from Human Specimens that are Easy to Collect and Store.

Date: October 24, 2013.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: David R. Filpula, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301–435–2902, *filpuladr@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Integrative Physiology of Obesity and Diabetes Study Section.

Date: October 24, 2013.

Time: 5:00 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Avenue Hotel Chicago, 160 E. Huron Street, Chicago, IL 60611.

Contact Person: Robert Garofalo, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 6156, MSC 7892, Bethesda, MD 20892, 301–435–1043, *garofalors@csr.nih.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Urologic and Genitourinary Physiology and Pathology.

Date: October 25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Ryan G. Morris, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4205, MSC 7814, Bethesda, MD 20892, 301–435–1501, *morrisr@csr.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Prokaryotic Cell and Molecular Biology Study Section.

Date: October 25, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Avenue Hotel Chicago, 160 E. Huron Street, Chicago, IL 60611.

Contact Person: Dominique Lorang-Leins, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Room 5108, MSC 7766, Bethesda, MD 20892, 301–326–9721, *Lorangd@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Eye Diseases #6.

Date: October 25, 2013.

Time: 9:00 a.m. to 11:00 a.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: James P. Harwood Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5168, MSC 7840, Bethesda, MD 20892, 301–435–1256, *harwoodj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–11–100: Alzheimer's Disease Pilot Clinical Trials.

Date: October 25, 2013.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Mark Lindner, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3182, MSC 7770, Bethesda, MD 20892, 301–435–0913, *mark.lindner@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Oncological Sciences.

Date: October 28–29, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Inese Z. Beitins, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6152, MSC 7892, Bethesda, MD 20892, 301–435–1034, *beitins@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Clinical Neurophysiology, Devices, Neuroprosthetics, and Biosensors.

Date: October 28–29, 2013.

Time: 8:00 a.m. and 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Cristina Backman, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211 MSC 7846, Bethesda, MD 20892, *cbackman@mail.nih.gov.*

Name of Committee: Oncology 1-Basic Translational Integrated Review Group; Cancer Molecular Pathobiology Study Section.

Date: October 28–29, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Hotel, 1150 22nd Street NW., Washington, DC 20037.

Contact Person: Manzoor Zarger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, 6208, MSC 7804, Bethesda, MD 20892, (301) 435–2477, *zargerma@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurodifferentiation, Plasticity, Regeneration and Rhythmicity Study Section.

Date: October 28–29, 2013.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Joanne T. Fujii, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4184, MSC 7850, Bethesda, MD, 20892, (301) 435–1178, *fujiij@csr.nih.gov.*

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Radiation Therapeutics and Biology Study Section.

Date: October 28–29, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Riverwalk Marriott, 207 N. St. Mary's Street, San Antonio, TX 78205.

Contact Person: Bo Hong, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–996–6208, *hongb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Behavioral Neuroscience.

Date: October 28–29, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz Carlton Washington DC, 1150 22nd Street NW., Washington, DC 20037.

Contact Person: Kristin Kramer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5205, MSC 7846, Bethesda, MD 20892, (301) 437–0911, *kramerkm@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

September 25, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23850 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Alcohol and Glucose Homeostasis.

Date: October 16, 2013.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *selmanom@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neural Oxidative Metabolism and Death Study Section.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco, 2 North Charles Street, Baltimore, MD 21201.

Contact Person: Carol Hamelink, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213–9887, *hamelinc@csr.nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Musculoskeletal Rehabilitation Sciences Study Section.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Jo Pelham, BA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892, (301) 435–1786, *pelhamj@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive

Sciences Integrated Review Group; Integrative Physiology of Obesity and Diabetes Study Section.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Avenue Hotel Chicago, 160 E. Huron Street, Chicago, IL 60611.

Contact Person: Reed A. Graves, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6166, MSC 7892, Bethesda, MD 20892, (301) 402–6297, *gravesr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Neurodevelopment, Synaptic Plasticity and Neurodegeneration.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mary Schueler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7846, Bethesda, MD 20892, 301–451–0996, *marygs@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Medical Imaging.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Leonid V. Tsap, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7854, Bethesda, MD 20892, (301) 435–2507, *tsapl@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Diseases and Pathophysiology of the Visual System Study Section.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance M Street Hotel, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Nataliya Gordiyenko, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5202, MSC 7846, Bethesda, MD 20892, 301.435.1265, *gordiyenkon@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Review of Neuroscience AREA Grant Applications.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: Richard D. Crosland, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4158, MSC 7850, Bethesda, MD 20892, 301–435–1220, *rc218u@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Sensory Technologies.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites DC Convention Center, 900 10 Street NW., Washington, DC 20001.

Contact Person: Paek-Gyu Lee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, (301) 613–2064, *leepg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Psycho/Neuropathology, Lifespan Development, and Science Education.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Seattle Hotel, 515 Madison Street, Seattle, WA 98104.

Contact Person: John H Newman, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3222, MSC 7808, Bethesda, MD 20892, (301)267–9270, *newmanjh@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Immunology.

Date: October 24, 2013.

Time: 8:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Jin Huang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4199, MSC 7812, Bethesda, MD 20892, 301–435–1230, *jh377p@nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Developmental Brain Disorders Study Section.

Date: October 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Avenue NW., Washington, DC 20037.

Contact Person: Pat Manos, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, 301–408–9866, *manospa@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Immunity and Host Defense Study Section.

Date: October 24–25, 2013.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Patrick K Lai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2215, MSC 7812, Bethesda, MD 20892, 301–435–1052, *laip@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Vaccines Against Microbial Diseases Study Section.

Date: October 24–25, 2013.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Jian Wang, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4218, MSC 7812, Bethesda, MD 20892, (301) 435–2778, *wangjia@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 13–109: Mechanistic Insights from Birth Cohorts.

Date: October 24, 2013.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Julia Krushkal, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, 301–435–1782, *krushkalj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Surgical Sciences and Bioengineering.

Date: October 24, 2013.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Firrell, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, 301–435–2598, *firrellj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; AREA: Immunology.

Date: October 24, 2013.

Time: 4:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Jin Huang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4095G, MSC 7812, Bethesda, MD 20892, 301–435–1230, *jh377p@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine;

93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 25, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23845 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, NHLBI Program Project for Atherosclerosis.

Date: October 29, 2013.

Time: 8:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Melissa E. Nagelin, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7202, Bethesda, MD 20892, 301–435–0297, *nagelinmh2@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 25, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23846 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Mentored Career Development: K08, K01.

Date: October 24, 2013.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Keith A. Mintzer, Ph.D., Scientific Review Officer, Office of Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7186, Bethesda, MD 20892–7924, 301–594–7947, *mintzerk@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 25, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23847 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; Clinical Trials Review Committee.

Date: October 28–29, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Keary A. Cope, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892–7924, 301–435–2222, *copeka@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 25, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–23848 Filed 9–30–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0027; OMB No. 1660–0119]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA Preparedness Grants: Operation Stonegarden (OPSG)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e.,

the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before October 31, 2013.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: FEMA Preparedness Grants: Operation Stonegarden (OPSG).

OMB Number: 1660–0119.

Type of Information Collection: Extension, without change, of a currently approved information collection.

FEMA Forms: FEMA Form 089–16, OPSG Operations Order Report; FEMA Form 089–20, Operations Order Prioritization.

Abstract: The Operation Stonegarden grant is an important tool among a comprehensive set of measures to help strengthen the Nation against risks associated with potential terrorist attacks. FEMA uses the information to evaluate applicants' familiarity with the national preparedness architecture and identify how elements of this architecture have been incorporated into regional/state/local planning, operations, and investments. The grant provides funding to designated localities to enhance cooperation and coordination between Federal, State, local, and tribal law enforcement agencies in a joint mission to secure the U.S. borders along routes of ingress from International borders to include travel corridors in States bordering Mexico and Canada, as well as States and territories with international water borders.

Affected Public: State, Local or Tribal Government.

Estimated Number of Respondents: 39.

Estimated Total Annual Burden Hours: 25,038 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $946,436.40. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $388,618.70.

Dated: September 20, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–23851 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–19–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0026; OMB No. 1660–0117]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA's Grants Reporting Tool (GRT)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before October 31, 2013.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: FEMA's Grants Reporting Tool (GRT).

OMB Number: 1660–0117.

Type of information collection: Extension, without change, of a currently approved information collection.

Form Titles and Numbers: None.

Abstract: The Grants Reporting Tool (GRT) is a web-based reporting system designed to help State Administrative Agencies (SAAs) meet all reporting requirements as identified in the grant guidance of FEMA's portfolio of preparedness grants sponsored by FEMA's Grant Programs Directorate (GPD). The information enables FEMA to evaluate applications and make award decisions, monitor ongoing performance and manage the flow of federal funds, and to appropriately close out grants or cooperative agreements. GRT supports the information collection needs of each grant program processed in the system.

Affected Public: State, Local, or Tribal Government.

Estimated Number of Respondents: 56.

Estimated Total Annual Burden Hours: 2,156 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $69,423.20. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $2,062,582.02.

Dated: September 20, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–23842 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–19–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2013–0041; OMB No. 1660–0118]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the data collection activity required to prepare the Homeland Security Exercise and Evaluation Program (HSEEP) After Action Report (AAR) Improvement Plan (IP).

DATES: Comments must be submitted on or before December 2, 2013.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2013–0041. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street SW., Room 8NE, Washington, DC 20472–3100.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel St. Pierre, Exercise Program Specialist, National Exercise Division (NED), 202–802–2796. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or email address: *FEMA-Information-Collections-Management@dhs.gov*.

SUPPLEMENTARY INFORMATION: Presidential Policy Directive 8 (PPD–8: National Preparedness) issued on March 30, 2011, establishes a National Preparedness Goal (NPG) that identifies the core capabilities necessary for preparedness and a National Preparedness System (NPS) to guide activities that will enable the Nation to achieve the goal. The system will allow the Nation to track the progress of our ability to build and improve the capabilities necessary to prevent, protect against, mitigate the effects of, respond to, and recover from those threats that pose the greatest risk to the security of the Nation.

A fully developed National Preparedness System will provide an integrated approach to preparedness that can be implemented and measured at all levels of government. The system should provide an all-of-Nation and whole community approach to preparedness, from neighborhood organizations to civic groups and private businesses. It should contain a methodical approach integrated across the preparedness cycle and link together programs and requirements into a comprehensive system, driving rational decision-making and allowing for a direct and defensible assessment of progress against clearly defined objectives.

A fully implemented National Preparedness System will be based on a consistent methodology for assessing the threats and hazards facing a given jurisdiction. The findings of the assessment should then drive planning factors and all other components of the preparedness cycle including resource requirements, existing capabilities and capability gaps, driving investments to close those gaps, making and validating improvements in capabilities through training and exercising, and continually assessing progress.

Section 648(b)(1) of the Post-Katrina Emergency Management Reform Act of 2006 (6 U.S.C. 748(b)(1)) also provides for these exercises and states the Administrator ''shall carry out a national exercise program to test and evaluate the national preparedness goal, National Incident Management System, National Response Plan, and other related plans and strategies.'' The Homeland Security Exercise and Evaluation Program (HSEEP) provides the program structure, multi-year planning system, tools, and guidance necessary for entities to build and sustain exercise programs that enhance homeland security capabilities and, ultimately, preparedness. The Homeland Security Exercise and Evaluation (HSEEP) After Action Report (AAR) Improvement Plan (IP) provides a standardized method for reporting the results of preparedness exercises and identifying, correcting and sharing as appropriate strengths and areas for improvement. Thus, the HSEEP AAR/IP—in line with the NPG and the NPS—supports efforts across the whole community that improve our national capacity to build, sustain, and deliver core capabilities.

Collection of Information

Title: Homeland Security Exercise and Evaluation Program (HSEEP) After Action Report (AAR) Improvement Plan (IP)

Type of Information Collection: Revision of a currently approved information collection.

FEMA Forms: FEMA Form 091–0, Homeland Security Exercise and Evaluation Program (HSEEP) After Action Report (AAR) Improvement Plan (IP).

Abstract: The Homeland Security Exercise and Evaluation Program (HSEEP) After Action Report (AAR) Improvement Plan (IP) collection provides reporting on the results of preparedness exercises and provides assessments of the respondent's capabilities so that strengths and areas for improvement are identified, corrected, and shared as appropriate prior to a real incident. This information is also required to be submitted as part of certain FEMA grant programs.

Affected Public: State, Local or Tribal Government; Federal Government.

Number of Respondents: 175.

Number of Responses: 511.

Estimated Total Annual Burden Hours: 20,440 hours.

Estimated Cost: There are no recordkeeping, capital, start-up or maintenance costs associated with this information collection.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Dated: September 20, 2013.

Charlene D. Myrthil,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2013–23841 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–46–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4145–DR; Docket ID FEMA–2013–0001]

Colorado; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Colorado (FEMA–4145–DR), dated September 14, 2013, and related determinations.

DATES: *Effective:* September 24, 2013.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Colorado is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 14, 2013.

Boulder and Larimer Counties for Public Assistance [Categories C–G] (already designated for Individual Assistance and debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance Program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2013–23854 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4145–DR; Docket ID FEMA–2013–0001]

Colorado; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Colorado (FEMA–4145–DR), dated September 14, 2013, and related determinations.

DATES: *Effective:* September 20, 2013.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Colorado is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 14, 2013.

Arapahoe and Logan Counties for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2013–23855 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2007–0008]

National Advisory Council

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Federal Emergency Management Agency (FEMA) National Advisory Council (NAC) will meet in person on October 16, 2013 in Philadelphia, PA. The meeting will be open to the public.

DATES: The NAC will meet on Wednesday, October 16, 2013, from 8:30 a.m. to 5:00 p.m. Eastern Daylight Time (EDT). Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held at the FEMA Region III Office located at 615 Chestnut Street, Philadelphia, PA 19106. All visitors to the FEMA Region III Office will have to register with FEMA to be admitted to the building. Photo identification is required to access the building. Please provide your name, telephone number, email address, title, and organization by close of business on October 11, 2013, to the contact person listed in **FOR FURTHER INFORMATION CONTACT** below.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the person listed in **FOR FURTHER INFORMATION CONTACT** below as soon as possible.

To facilitate public participation, members of the public are invited to provide written comments on the issues to be considered by the NAC (see ''Agenda''). Written comments must be submitted and received by October 10, 2013, identified by Docket ID FEMA–2007–0008, and submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: FEMA-NAC@fema.dhs.gov.* Include the docket number in the subject line of the message.

- *Fax:* (540) 504–2331.
- *Mail:* Regulatory Affairs Division, Office of Chief Counsel, FEMA, 500 C Street SW., Washington, DC 20472–3100.

Instructions: All submissions received must include the words ''Federal Emergency Management Agency'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read comments received by the NAC, go to *http://www.regulations.gov,* and search for the Docket ID listed above.

A public comment period will be held during the meeting from 3:00 p.m. to 3:30 p.m. EDT, and speakers are requested to limit their comments to 3 minutes. Contact the individual listed below to register as a speaker by October 11, 2013. Please note that the public comment period may end before the time indicated, following the last call for comments.

FOR FURTHER INFORMATION CONTACT: Alexandra Woodruff, Alternate Designated Federal Officer, Office of the National Advisory Council, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472–3100, telephone (202) 646–2700, fax (540) 504–2331, and email *FEMA–NAC@fema.dhs.gov.* The NAC Web site is: *http://www.fema.gov/national-advisory-council.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463).

The NAC advises the FEMA Administrator on all aspects of emergency management. The NAC incorporates State, local, and tribal governments, nonprofit, and private sector input in the development and revision of FEMA plans and strategies.

Agenda: In addition to swearing in new members, the NAC will engage in open discussion with the FEMA Administrator and Deputy Administrator. The NAC will receive report outs from its subcommittees on the following topics: Review and update of the National Incident Management System (NIMS); Public Assistance Pilot Programs of Debris Removal and Permanent Work; National Mass Care Strategy; and the Biggert-Waters Flood Insurance Reform Act of 2012. The NAC will review the information presented on each topic, deliberate on any recommendations presented in the subcommittees' reports, and formulate recommendations for FEMA's consideration.

The NAC will also receive briefings from FEMA Executive Staff on the following topics: Implementation of the National Preparedness System; the Preparedness Campaign; the National Preparedness Grant Program; the FEMA Strategic Plan; and the Integrated Public Alert and Warning System. The full agenda and any related committee documents will be posted on the NAC Web site at *http://www.fema.gov/national-advisory-council.*

Dated: September 23, 2013.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2013–23840 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–48–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–NEW]

Agency Information Collection Activities: Online Survey of Web Services Employers; New Information Collection

ACTION: 30-Day Notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on July 16, 2013, at 78 FR 42537, allowing for a 60-day public comment period. USCIS received one comment for this information collection. A discussion of the comments and USCIS' responses are addressed in item 8 of the supporting statement that can be viewed at: *http://www.regulations.gov.*

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until October 31, 2013. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to DHS, and to the OMB USCIS Desk Officer. Comments may be submitted to: DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140. Comments may also be submitted to DHS via email at *uscisfrcomment@dhs.gov*, to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via email at *oira_submission@omb.eop.gov* and via the Federal eRulemaking Portal Web site at *http://www.Regulations.gov* under e-Docket ID number USCIS–2013–0003. When submitting comments by email, please make sure to add [Insert OMB Control Number 1615–NEW] in the subject box.

All submissions received must include the agency name, OMB Control Number and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* New information collection.

(2) *Title of the Form/Collection:* Online Survey of Web Services Employers.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Agency Form Number; File OMB–70. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or private sector. It is necessary that USCIS obtains data on the E-Verify Program Web Services. Gaining an understanding of the Web Services process should enable USCIS to identify programmatic improvements to better meet the goals of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the legislation on which the E-Verify evaluations are based.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 569 respondents averaging 30 minutes (.50) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 285 annual burden hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140; Telephone 202–272–8377.

Dated: September 26, 2013.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2013–23992 Filed 9–30–13; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[Docket No. ONRR–2012–0003; DS63600000 DR2PS0000.PX8000 134D0102R2]

U.S. Extractive Industries Transparency Initiative Multi-Stakeholder Group (USEITI MSG) Advisory Committee

AGENCY: Policy, Management and Budget, Interior.

ACTION: Meeting.

SUMMARY: This notice announces the meeting date change of the United States Extractive Industries Transparency Initiative (USEITI) Multi-Stakeholder Group (MSG) Advisory October 1–2, 2013, Washington, DC.

Dates and Times: The October 1–2 meeting has been moved to November 5–6, 2013, and will occur in-person from 9:30 a.m. to 5:00 p.m. Eastern Time each day, unless otherwise indicated at *www.doi.gov/eiti/faca,* where agendas, meeting logistics, and meeting materials will be posted.

ADDRESSES: The November 5–6, 2013, meeting will be held in Room 5160 of the Main Interior Building, 1849 C Street NW., Washington, DC 20240. Members of the public may attend in person, or view documents and presentations under discussion via WebEx at *http://bit.ly/ZQ9aQP* and listen to the proceedings at telephone number 1–866–707–0640 (passcode: 1500538).

FOR FURTHER INFORMATION CONTACT: Rosita Compton Christian, USEITI Secretariat; 1849 C Street NW., MS–4211, Washington, DC 20240. You may also contact the USEITI Secretariat via email at *useiti@ios.doi.gov,* by phone at 202–208–0272, or by fax at 202–513–0682.

SUPPLEMENTARY INFORMATION: The U.S. Department of the Interior established the USEITI Advisory Committee (Committee) on July 26, 2012, to serve as the initial USEITI multi-stakeholder group. More information about the Committee, including its charter, can be found at *www.doi.gov/eiti/faca.* The agenda for the November 5–6 in-person meeting will include continued review of the U.S. draft candidacy application for EITI, guidance from EITI experts, and a discussion of next steps toward attaining candidacy.

The final agendas and materials for the meeting will be posted on the USEITI MSG Web site at *www.doi.gov/eiti/faca.* All Committee meetings are open to the public.

If you require special assistance (such as an interpreter for the hearing impaired), please notify Interior staff in advance of the meeting at 202–208–0272 or via email at *useiti@ios.doi.gov.* Anyone wishing to provide comments during the public comment period must submit written statements to *useiti@doi.gov* by November 1, 2013. In addition, individuals or groups wishing to make comments in person or via the teleconference line may do so during the designated time on the agenda, as time permits.

The minutes from these proceedings will be posted on our internet site at *http://www.doi.gov/eiti/faca* and will also be available for public inspection and copying at our office in the Main Interior Building in Washington, DC, by contacting Interior staff at *useiti@ios.doi.gov* or by telephone at 202–208–0272. For more information on USEITI, visit *http://www.doi.gov/eiti.*

Dated: September 26, 2013.

Karen Senhadji,

Senior Advisor—Policy, Management and Budget, Department of the Interior.

[FR Doc. 2013–24043 Filed 9–30–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–BHC–2013–N227; FXMB123309 00000–123–FF09M13100]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Electronic Duck Stamp Program

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: You must submit comments on or before October 31, 2013.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB—OIRA at (202) 395—5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to the Service Information

Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 2042–PDM, 4401 North Fairfax Drive, Arlington, VA 22203 (mail), or *hope_grey@fws.gov* (email). Please include ''1018—0135'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey at *hope_grey@fws.gov* (email) or 703–358–2482 (telephone). You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018–0135.

Title: Electronic Duck Stamp Program.

Service Form Number: 3–2341.

Type of Request: Reinstatement with change of a previously approved collection.

Description of Respondents: State fish and wildlife agencies.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time for applications and weekly for fulfillment reports.

Activity	Number of respondents	Number of responses	Completion time per response (hours)	Total annual burden hours
Application	10	10	40	400
Fulfillment Report	13	676	1	676
Totals	23	686		1,076

Abstract: On March 16, 1934, President Roosevelt signed the Migratory Bird Hunting Stamp Act (16 U.S.C. 718a et seq.) requiring all migratory waterfowl hunters 16 years of age or older to buy a Federal migratory bird hunting and conservation stamp (Federal Duck Stamp) annually. The stamps are a vital tool for wetland conservation. Ninety-eight cents out of every dollar generated by the sale of Federal Duck Stamps goes directly to purchase or lease wetland habitat for protection in the National Wildlife Refuge System. The Federal Duck Stamp is one of the most successful conservation programs ever initiated and is a highly effective way to conserve America's natural resources. Besides serving as a hunting license and a conservation tool, a current year's Federal Duck Stamp also serves as an entrance pass for national wildlife refuges where admission is charged. Duck Stamps and products that bear stamp images are also popular collector items.

The Electronic Duck Stamp Act of 2005 (Pub. L. 109–266) required the Secretary of the Interior to conduct a 3-year pilot program under which States could issue electronic Federal Duck Stamps. The electronic stamp is valid for 45 days from the date of purchase and can be used immediately while customers wait to receive the actual stamp in the mail. After 45 days, customers must carry the actual Federal Duck Stamp while hunting or to gain free access to national wildlife refuges. Eight States participated in the pilot. At the end of the pilot, we provided a report to Congress outlining the successes of the program. The program improved public participation by increasing the ability of the public to obtain required Federal Duck Stamps.

Under our authorities in 16 U.S.C. 718b(a)(2), we have continued the Electronic Duck Stamp Program in the eight States that participated in the pilot. We plan to expand the program by inviting all State fish and wildlife agencies to participate. Anyone, regardless of State residence, may purchase an electronic Duck Stamp through any State that participates in the program. Interested States must submit an application (FWS Form 3–2341). We will use the information provided in the application to determine a State's eligibility to participate in the program. Information includes, but is not limited to:

- Information verifying the current systems the State uses to sell hunting, fishing, and other associated licenses and products.
- Applicable State laws, regulations, or policies that authorize the use of electronic systems to issue licenses.
- Example and explanation of the codes the State proposes to use to create and endorse the unique identifier for the individual to whom each stamp is issued.
- Mockup copy of the printed version of the State's proposed electronic stamp, including a description of the format and identifying features of the licensee to be specified on the stamp.
- Description of any fee the State will charge for issuance of an electronic stamp.
- Description of the process the State will use to account for and transfer the amounts collected by the State that are required to be transferred under the program.
- Manner by which the State will transmit electronic stamp customer data.

Each State approved to participate in the program must provide the following information on a weekly basis:

- First name, last name, and complete mailing address of each individual that purchases an electronic stamp from the State.
- Face value amount of each electronic stamp sold by the State.
- Amount of the Federal portion of any fee required by the agreement for each stamp sold.

Comments: On February 13, 2013, we published in the **Federal Register** (78 FR 10201) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on April 15, 2013. We received one comment. The commenter objected to the Duck Stamp Program, but did not address the information collection requirements. We did not make any changes based on this comment.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- 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.

Comments that you submit in response to this notice are a matter of public record. 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 OMB in your comment to

withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: September 25, 2013.

Tina A. Campbell,

Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.

[FR Doc. 2013–23810 Filed 9–30–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–R–2012–N120; FXRS1265030000–134–FF03R06000]

Big Muddy National Fish and Wildlife Refuge, Authorized Within the Twenty Counties That Lie Along the Missouri River From Kansas City to St. Louis, MO; Draft Environmental Assessment and Comprehensive Conservation Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a draft environmental assessment (EA) and comprehensive conservation plan (CCP) for Big Muddy National Fish and Wildlife Refuge (Refuge, NFWR) for public review and comment. In this draft EA/CCP we describe how we propose to manage the refuge for the next 15 years.

DATES: To ensure consideration, we must receive your written comments by October 31, 2013. We will hold several open house–style meetings during the comment period to receive comments and provide information on the draft plan. In addition, we will use special mailings, newspaper articles, internet postings, and other media announcements to inform people of opportunities for input.

ADDRESSES: Send your comments or requests for more information by any one of the following methods:

- *Email: r3planning@fws.gov.* Include ''Big Muddy Draft EA/CCP'' in the subject line of the message.
- *Fax:* Attention: Refuge Manager, 573–876–1839.
- *U.S. Mail:* Attention: Refuge Manager Tom Bell, Big Muddy National Fish and Wildlife Refuge, 4200 New Haven Road, Columbia, MO 65201.
- *In-Person Drop Off:* You may drop off comments during regular business hours at the above address.

You will find the draft EA/CCP, as well as information about the planning process and a summary of the CCP, on the planning Web site: *http://www.fws.gov/midwest/planning/bigmuddyccp/index.html.*

FOR FURTHER INFORMATION CONTACT: Tom Bell, 573–876–1826.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for Big Muddy National Fish and Wildlife Refuge, which we began by publishing a notice of intent in the **Federal Register** (72 FR 27587) on May 16, 2007. For more about the initial process and the history of this refuge, see that notice.

Background

The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Administration Act), requires us to develop a CCP for each national wildlife refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS mission, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Additional Information

The draft EA/CCP, which includes detailed information about the planning process, refuge, issues, and management alternatives considered and proposed, may be found at *http://www.fws.gov/midwest/planning/bigmuddyccp/index.html.*

Public Involvement

We will give the public an opportunity to provide input at a public meeting. You can obtain the schedule from the address or Web site listed in this notice (see **ADDRESSES**). You may also submit comments anytime during the comment period.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Thomas O. Melius,

Regional Director, Midwest Region, U.S. Fish and Wildlife Service.

[FR Doc. 2013–23733 Filed 9–30–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–FAC–2013–N220; FXFR133609ANS09–FF09F14000–134]

Aquatic Nuisance Species Task Force Meeting

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a public meeting of the Aquatic Nuisance Species (ANS) Task Force. The ANS Task Force's purpose is to develop and implement a program for U.S. waters to prevent introduction and dispersal of aquatic invasive species (AIS); to monitor, control, and study such species; and to disseminate related information.

DATES: The ANS Task Force will meet from 8 a.m. to 4:30 p.m. on Wednesday, November 6, through Thursday, November 7, 2013. For security purposes, registration for the meeting is required. For deadlines to register for this meeting, please see ''Public Input'' under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The ANS Task Force meeting will take place at the National Oceanic and Atmospheric

Administration, Building 3 (SSMC3), Room 4527, 1315 East-West Highway, Silver Spring, MD 20910 (301–713–0174).

FOR FURTHER INFORMATION CONTACT: Susan Mangin, Executive Secretary, ANS Task Force, at (703) 358–2466, or by email at *Susan_Mangin@fws.gov.* If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., we announce that the ANS Task Force will hold a meeting.

Background

The ANS Task Force was established by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (Act) (Pub. L. 106–580, as amended) and is composed of 13 Federal and 13 ex-officio members and co-chaired by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. The ANS Task Force provides advice on AIS infesting waters of the United States and other nations, among other duties as specified in the Act.

Meeting Agenda

- Federally managed water bodies and AIS issues.
- Asian Carp Surveillance Plan Outside of the Great Lakes.
- Draft Snakehead and Lionfish Management Plans.
- Biocontrol Programs.
- National Invasive Species Awareness Week.
- Environmental DNA.
- Arkansas ANS Management Plan.
- Technical Center for Aquatic Nuisance Species.
- Harvesting AIS.

The final agenda and other related meeting information will be posted on the ANS Task Force Web site at: *http://anstaskforce.gov.*

Public Input

If you wish to:	You must contact the ANS Task Force Executive Secretary (see **FOR FURTHER INFORMATION CONTACT**) no later than:
Register for the meeting.	October 31, 2013.

Meeting Minutes

Summary minutes of the meeting will be maintained by the Executive Secretary (see **FOR FURTHER INFORMATION CONTACT**). The minutes will be available for public inspection within 60 days after the meeting and will be posted on the ANS Task Force Web site at *http://anstaskforce.gov.*

Dated: September 15, 2013.

David Hoskins,

Co-Chair, Aquatic Nuisance Species Task Force, Assistant Director—Fish and Aquatic Conservation.

[FR Doc. 2013–23907 Filed 9–30–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2013–N205; FXES11150400000F4–123–FF04E00000]

Spring Pygmy Sunfish Candidate Conservation Agreement With Assurances; Receipt of Applications for Enhancement of Survival Permits; Beaverdam Springs, Limestone County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the Fish and Wildlife Service (Service), have received applications from Mr. Albert C. McDonald of Greenbriar Enterprises LLC (applicant McDonald Farm) and Ms. Katherine H. Garrett of Greenbrier Enterprises LLC (applicant Horton Farm) (collectively, applicants) for enhancement of survival permits (permit or permits) under the Endangered Species Act of 1973, as amended (Act). Each permit application includes a proposed candidate conservation agreement with assurances (CCAA) between the applicant and the Service as parties and the Land Trust of North Alabama as a cooperator for the conservation of the spring pygmy sunfish. Each Applicant is a limited liability company, created and existing under the laws of the State of Alabama. The CCAAs would be implemented at the Beaverdam Spring Complex within Limestone County, Alabama.

We have made a preliminary determination that each permit application, including the proposed CCAA, is eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA). The basis for this preliminary determination is contained in the draft environmental action statement (EAS) prepared by the Service on each application. We are accepting comments on each permit application and the associated proposed CCAA, as well as on the draft EAS.

DATES: We must receive comments no later than October 31, 2013.

ADDRESSES: Persons wishing to review either or both applications, including the draft CCAA, and the draft EAS may obtain copies upon request to Daniel Drennen, Mississippi Field Office, by phone at 601–321–1127, or via mail or email (see below). The applications and related documents will also be available for public inspection, by appointment only, during normal business hours (8 a.m. to 4:30 p.m.) at the Jackson, Mississippi, Field Office (address listed below) or on our Web site at *http://www.fws.gov/mississippiES/endsp.html.*

Comments concerning either or both applications, proposed CCAAs, and draft EASs should be submitted in writing, by one of the following methods:

Email: daniel_drennen@fws.gov.

Fax: 601–965–4340.

U.S. mail: Daniel Drennen, Mississippi Field Office, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Jackson, MS 39213.

When submitting comments, please specify the application or applications on which you are commenting. Please refer to Permit number TE–155500B–0 when commenting on the McDonald Farm application, and to Permit number TE–15501B–0 for comments on the Horton Farm application.

FOR FURTHER INFORMATION CONTACT: Daniel Drennen, Fish and Wildlife Biologist, Mississippi Field Office, 601–321–1127. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: We furnish this notice to provide the public, other State and Federal agencies, and interested Tribes an opportunity to review and comment on the permit applications, including the draft CCAAs, and the associated EASs. We specifically request information, views, and opinions from the public on the proposed Federal actions of issuing each permit. Further, we solicit information regarding the adequacy of each permit application, including the proposed CCAA, as measured against our permit issuance criteria found in the Code of Federal Regulations (CFR) at 50 CFR 17.22(d) and 17.32(d).

Background

Private and other non-Federal property owners are encouraged to enter into CCAAs, in which they voluntarily undertake management activities and conservation efforts on their properties to enhance, restore, or maintain habitat

benefiting species that are proposed for listing under the Act, candidates for listing, or species that may become candidates or proposed for listing. Via the CCAAs and their associated permits, the Service provides assurances to property owners that they will not be subjected to increased land use restrictions if the covered species becomes listed under the Act in the future, provided certain conditions are met. The property owners also are assured that, provided certain conditions are met, the Service would not require additional conservation measures or commitment of additional land, water, or resource use restrictions beyond the level obligated in their CCAAs agreement, without the property owner's consent. Application requirements and issuance criteria for permits through CCAAs are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22(d) and 17.32(d). See also our policy on CCAAs (64 FR 32726; June 17, 1999).

The conservation of the spring pygmy sunfish is of concern to the Service, other biologists, and the property owners whose lands contain the species. The spring pygmy sunfish is a spring-associated fish, endemic to the Tennessee River drainage of Lauderdale and Limestone Counties in northern Alabama. The species historically occurred in three distinct spring complexes (Cave Springs, Lauderdale County; Beaverdam Springs and Pryor Springs, Limestone County). The single remaining population of the species occupies 5.9 river miles (mi) (9.5 river kilometers) and 1,435 acres (580.6 hectares) within four spring pools (Moss, Beaverdam, Thorsen, and Horton Springs) associated with the upper Beaverdam Springs complex in Limestone County, Alabama.

The preferred habitat for the spring pygmy sunfish is clear and colorless to slightly stained spring water, spring runs, and associated spring-fed wetlands (Warren 2004). The species is highly localized within these spring pools and is found in association with patches of dense, filamentous submergent vegetation. Spring pygmy sunfish abundance is correlated with specific water quantity and quality parameters (i.e., water flow velocity, turbidity, and water temperatures) and certain associated species such as amphipods, isopods, spring salamanders, crayfish, and snails (Sandel, pers. comm., 2007).

On April 1, 2011, the Service published a 90-day finding on a petition to list the spring pygmy sunfish as endangered under the Act (76 FR 18138). The Service found that the petition presented substantial scientific or commercial information indicating that listing of the species may be warranted, and announced the initiation of a formal status review. On October 2, 2012, the Service published a 12-month finding/proposed rule to list the species as threatened and to designate critical habitat (77 FR 60180) and opened a 60-day comment period that ended on December 2, 2012. On April 29, 2013, the Service re-opened the comment period for 30 days to allow public comment on the draft economic analysis (DEA) and any other aspect of the proposed rule. The Service is currently in the process of making its final listing/critical habitat determination, and anticipates publication of a decision in October 2013.

The areas to be covered under the proposed CCAAs total approximately 272 acres on the McDonald Farm and approximately 440 acres on the Horton Farm within the Beaverdam Springs complex in Limestone County, Alabama. Each proposed CCAA represents a significant milestone in the cooperative conservation efforts for the spring pygmy sunfish, and is consistent with section 2(a)(5) of the Act, which encourages creative partnerships among public, private, and government entities to conserve imperiled species and their habitats.

Each applicant would agree in its CCAA to implement conservation measures to address known threats to the spring pygmy sunfish. These measures will help protect the species in the near term and also minimize any incidental take of the species that might occur as a result of conducting specified covered activities if the species were listed under the Act in the future. Conservation measures to be implemented by the applicants include: (1) Maintaining up to a 100-foot vegetated buffer zone around Beaverdam Creek; (2) limiting cattle access to Beaverdam Creek and the buffer zone; (3) limiting surface and groundwater extraction; and (4) refraining from any deforestation, land clearing, industrial development, residential development, aquaculture, temporary or permanent ground water removal installations, stocked farm ponds, pesticide and herbicide use, and impervious surface installation without prior consultation with the Service.

The Land Trust of North Alabama, as a cooperator to each CCAA, would agree: (1) To be responsible for all reporting requirements, including any changes to the monitoring when necessary for adaptive management; (2) to ensure that annual habitat analyses and site samplings are performed as specified by the CCAA; and (3) to provide resources for reporting and monitoring activities.

The Service would agree to authorize each applicant to engage in incidental take of the spring pygmy sunfish consistent with its proposed CCAA and to provide technical assistance, including management advice.

The term of each proposed CCAA and associated enhancement of survival permit is 25 years.

When determining whether to issue the permits, we will consider a number of factors and information sources, including the administrative record on each application, any public comments we receive, and the application requirements and issuance criteria for CCAAs set forth in 50 CFR 17.22(d) and 17.32(d). We will also evaluate whether issuance of each permit complies with section 7 of the Act by conducting an intra-Service consultation. Our decision to issue a permit will be based on the results of this consultation, as well as on the above findings, our regulations, and public comments.

We will evaluate each permit application, proposed CCAA, EAS, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a)(1) of the Act, our regulations, and NEPA regulations at 40 CFR 1506.6. If we determine that the requirements are met as to an application, we will enter into the CCAA and issue the permit to the applicant for take of the spring pygmy sunfish in accordance with the terms of its CCAA. We will not make a final decision on either matter until after the end of the 30-day comment period, and we will fully consider all comments received during the comment period.

Authority

We provide this notice under both section 10(c) of the Act and its implementing regulations (50 CFR 17.22 and 17.32) and the National Environmental Policy Act (42 U.S.C 4371 *et seq.*) and its implementing regulations (40 CFR 1506.6).

Public Availability of Comments

All comments we receive become part of our administrative record in this matter. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, Privacy Act, NEPA, and Service and Department of the Interior policies and procedures. 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

personal identifying information—may be made available to the public at any time. While you may ask us to withhold your personal identifying information from public disclosure, we cannot guarantee that we will be able to do so.

Dated: September 25, 2013.

Stephen M. Ricks,

Field Supervisor, Jackson, Mississippi, Field Office, Southeast Region.

[FR Doc. 2013–23871 Filed 9–30–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK910000–L13100000.PP0000–LXSIARAC0000]

Notice of Public Meeting, BLM-Alaska Resource Advisory Council

AGENCY: Bureau of Land Management, Alaska State Office, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Alaska Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held October 29–30, 2013 at the Office of Aviation Services located at 4405 Lear Court, Anchorage, Alaska 99502–1032. The meeting starts at 9 a.m. each day in training room #109. The council will accept comments from the public on Tuesday, October 29 from 3–4 p.m.

FOR FURTHER INFORMATION CONTACT: Thom Jennings, RAC Coordinator, BLM-Alaska State Office, 222 W. 7th Avenue #13, Anchorage, AK 99513. Telephone 907–271–3335 or 907–271–3322 or email *tjenning@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, seven 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 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Alaska. At this meeting, topics planned for discussion include:

- Land Use Planning.
- Integrated Arctic Management and Scenario Planning.
- New Placer Mining Policies.
- Update on Land Transfer Program.
- Update on the National Petroleum Reserve in Alaska.
- Other topics of interest to the RAC.

All meetings are open to the public. During the public comment period, depending on the number of people wishing to comment and time available, time for individual oral comments may be limited. Please be prepared to submit written comments if necessary. 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. Individuals who plan to attend and need special assistance, such as sign language interpretation, transportation, or other reasonable accommodations, should contact the BLM RAC Coordinator listed above.

Dated: September 24, 2013.

Ted A. Murphy,

Acting State Director.

[FR Doc. 2013–23917 Filed 9–30–13; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–IMR–ROMO–13765; PS.SROMO0001.01.1]

Minor Boundary Revision at Rocky Mountain National Park

AGENCY: National Park Service, Interior.

ACTION: Notification of Boundary Revision.

SUMMARY: The boundary of Rocky Mountain National Park is modified to include 31.94 acres of land donated to the United States. The land is located in Larimer County, Colorado, immediately adjacent to the current eastern boundary of Rocky Mountain National Park.

DATES: The effective date of this boundary revision is October 1, 2013.

ADDRESSES: The map depicting this boundary revision is available for inspection at the following locations: National Park Service, Land Resources Program Center, Intermountain Region, 12795 West Alameda Parkway, Denver, Colorado 80228, and National Park Service, Department of the Interior, 1849 C Street NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Chief Realty Officer Glenna Vigil, National Park Service, Land Resources Program Center, Intermountain Region, 12795 West Alameda Parkway, Denver, Colorado 80228, telephone (303) 969–2610.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 16 U.S.C. 460*l*-9(c)(1), the boundary of Rocky Mountain National Park is modified to include 31.94 acres of donated land identified as Tract 02–171, tax parcel number 35224–39–901. The land is located in Larimer County, Colorado, immediately adjacent to the current eastern boundary of Rocky Mountain National Park. The boundary revision is depicted on Map No. 121/108,929B dated May 2013.

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 of this land donated by Rocky Mountain National Park Associates, Inc., a nonprofit organization that supports land protection projects at the park, will contribute to the preservation and protection of park and trail resources.

Dated: August 22, 2013.

John Wessels,

Regional Director, Intermountain Region.

[FR Doc. 2013–23924 Filed 9–30–13; 8:45 am]

BILLING CODE 4312–CB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–PWRO–13663; PPPWSEKIO0/PX.DSEKI1303.00.1]

Draft Environmental Impact Statement for the Restoration of Native Species in High Elevation Aquatic Ecosystems Plan, Sequoia and Kings Canyon National Parks, California

AGENCY: National Park Service, Interior.

ACTION: Notice of availability.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969 and consistent with the National Historic Preservation Act of 1966, the National Park Service (NPS) announces the availability of a Draft Environmental Impact Statement for the Restoration of Native Species in High Elevation

Aquatic Ecosystems Plan (Restoration Plan/DEIS), Sequoia and Kings Canyon National Parks (SEKI or parks), California. The Restoration Plan is needed to provide long-term management direction to restore and conserve high elevation aquatic species and ecosystems in the parks. The NPS is considering expanding the current high elevation aquatic ecosystem restoration program within SEKI to encompass additional sites and incorporate alternative treatment methods.

The Restoration Plan/DEIS identifies and evaluates the environmental impacts of four alternatives: the no action alternative; and three action alternatives including a preferred alternative. The Final Restoration Plan/Final EIS would be implemented over a period of 25 to 35 years, with an internal evaluation of management effectiveness scheduled every 5 to 10 years. The NPS is inviting public review of the document to solicit feedback on the proposed alternatives and to hear ideas and concerns for consideration in the Final EIS.

DATES: All written comments must be postmarked or transmitted not later than 60 days from the date of publication in the **Federal Register** of the Environmental Protection Agency's notice of filing and release of the Draft EIS. Upon confirmation of this date, SEKI will notify all entities on the project mailing list, and announcements about the public review period will be provided on the project Web site *http://parkplanning.nps.gov/seki* and distributed via local and regional press media.

ADDRESSES: The Restoration Plan/DEIS is available in electronic format online at *http://parkplanning.nps.gov/seki* and written comments may be submitted directly to this Web site. Written comments may also be submitted by mail, hand delivered, or faxed to: Superintendent, Sequoia and Kings Canyon National Parks, Attn: Aquatic Ecosystems Plan, 47050 Generals Highway, Three Rivers, CA 93271, Fax: 559–565–4202. Email comments will not be accepted.

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 would be able to do so. All submissions from organizations and businesses, and individuals identifying themselves as representatives or officials of organizations or businesses, are made available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: Please contact the SEKI Office of Environmental Compliance and Planning at (559) 565–3102 to speak with an individual.

SUPPLEMENTARY INFORMATION: The purpose of this Restoration Plan/DEIS is to guide management actions by the NPS to restore and conserve native species diversity and ecological function to selected high elevation aquatic ecosystems that have been adversely impacted by human activities, and to increase the resistance and resilience of these species and ecosystems to human induced environmental modifications such as nonnative fish, disease, and unprecedented climate change. The overall goal of the Restoration Plan/DEIS is to restore clusters of water bodies to a fishless state in strategic locations across SEKI to create high elevation ecosystems having more favorable habitat conditions for the persistency of native species and ecosystem processes.

Action is needed at this time: (1) Because nonnative fish have severely reduced native biological diversity and disrupted ecological function; (2) to prevent the extinction of two species of mountain yellow-legged frogs (*Rana muscosa* and *Rana sierrae;* MYLF) and to restore MYLF populations to many locations in the parks where they have gone extinct; (3) to enable the NPS to fulfill its mission and policy directives to conserve native animals, plants and processes found in SEKI's aquatic ecosystems; (4) because large scale restoration of more complex habitat (areas containing large lakes or clusters of many lakes with many and/or large connecting stream sections) is critical for native species and ecosystem recovery; (5) to increase the resistance and resilience of native high elevation aquatic species and ecosystems to human induced environmental change; and, (6) to restore and protect the natural qualities of wilderness character.

The Restoration Plan/DEIS identifies and analyzes four alternatives: the no action (Alternative A); Prescription Treatment (Physical and Piscicide) Preceding Restoration (Alternative B, agency-preferred alternative); Physical Treatment Preceding Restoration (Alternative C); and Piscicide Treatment Preceding Restoration (Alternative D).

Alternative A (no action): This alternative describes current management of high elevation aquatic ecosystems in SEKI and provides a baseline for comparison against the action alternatives. Under Alternative A, the existing high elevation aquatic ecosystem restoration effort for 26 water bodies would be completed (anticipated to conclude in 2016), maintained and monitored, but no new fish eradication activities would be initiated. After all treatments are completed, self-sustaining nonnative trout populations would continue to exist in 549 water bodies and hundreds of miles of stream.

Alternatives B, C, and D (action alternatives) describe a range of reasonable and feasible approaches that either partially or fully meet the purpose and need for action and achieve the plan objectives. In addition, there are a number of activities described as common to all actions. These include development of criteria for the selection of basins for restoration; the development of criteria for selection of crew camp locations; ecosystem restoration and management, including protection and rebuilding extant population of MYLFs where opportunities still exist and reintroducing MYLFs to locations where populations have recently gone extinct; monitoring restoration work and ecosystem responses; continuing research; and fish disposal methods. The ''minimum tools'' necessary for accomplishing treatments in Wilderness are also identified.

Under Alternative B, a prescription (detailed plan of action) for restoration would be developed for each proposed restoration area. Physical treatment (gill netting, electrofishing, disturbing redds and/or temporarily covering redds with boulders) would be utilized. Piscicide treatment methods would be considered for water bodies determined infeasible for physical treatment. Based on current knowledge of the proposed fish eradication sites, physical treatment would be applied in 49 water bodies and 14 miles of streams in 15 basins, and piscicide treatment would be applied in 38 water bodies and 27 miles of streams in 11 basins. After all treatments are completed, self-sustaining nonnative trout populations would continue to exist in 462 water bodies and hundreds of miles of stream.

Under alternative C, only physical treatment methods would be used to eradicate nonnative fish by gill netting, electrofishing, disturbing and/or covering redds. Also, blasting rock to create vertical fish barriers in stream locations where natural barriers are inadequate to prevent fish movement

may be considered. Physical treatment methods would be applied in 49 water bodies and 14 miles of streams. After all treatments are completed, self-sustaining nonnative trout populations would continue to exist in 500 water bodies and hundreds of miles of stream.

Alternative D emphasizes speed in recovering habitat because MYLF populations are declining rapidly. To achieve this, only piscicide treatment would be used for nonnative fish eradication. Properly applied, piscicides can eliminate fish from targeted water bodies in 1 to 2 years, in contrast to physical treatment methods which can take up to 6 years for lakes and up to 10 years for streams. Based on current knowledge of the proposed fish eradication sites, piscicide treatment would be used for 87 water bodies, approximately 41 miles of streams, and connecting fish-containing habitat as necessary. After all treatments are completed, self-sustaining nonnative trout populations would continue to exist in 462 water bodies and hundreds of miles of stream.

Decision Process: All comments received on the Restoration Plan/DEIS will be duly considered in preparing the Final EIS. The Final EIS is expected to be available in late spring 2014. A Record of Decision would be prepared no sooner than 30 days after release of the Final EIS. Because this is a delegated EIS, the official responsible for approving the final Restoration Plan is the Regional Director, Pacific West Region, National Park Service; subsequently the official responsible for implementation of the approved Restoration Plan is the Superintendent, Sequoia and Kings Canyon National Parks.

Dated: July 31, 2013.

Christine S. Lehnertz,

Regional Director, Pacific West Region.

[FR Doc. 2013–23642 Filed 9–30–13; 8:45 am]

BILLING CODE 4312–FF–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1131, 1132, and 1134 (Review)]

Polyethylene Terephthalate Film, Sheet, and Strip From Brazil, China, and the United Arab Emirates; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the antidumping duty order on polyethylene terephthalate (''PET'') film, sheet, and strip from Brazil, China, and the United Arab Emirates would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is October 31, 2013. Comments on the adequacy of responses may be filed with the Commission by December 16, 2013. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* October 1, 2013.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On November 10, 2008, the Department of Commerce issued antidumping duty orders on imports of PET film from Brazil, China, and the United Arab Emirates (73 FR 66595). The Commission is conducting reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce (''Commerce'').

(2) The *Subject Countries* in these reviews are Brazil, China, and the United Arab Emirates.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined a single *Domestic Like Product* coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined a single *Domestic Industry* consisting of all U.S. producers of the *Domestic Like Product,* except U.S. producer Terphane. The Commission determined in the original investigations that appropriate circumstances existed to exclude Terphane from the domestic industry as a related party.

(5) The *Order Date* is the date that the antidumping duty orders under review became effective. In these reviews, the *Order Date* is November 10, 2008.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 13–5–296, expiration date June 30, 2014. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation. The Commission's designated agency ethics official has advised that a five-year review is not considered the ''same particular matter'' as the corresponding underlying original investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 73 FR 24609 (May 5, 2008). This advice was developed in consultation with the Office of Government Ethics. Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is October 31, 2013. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is December 16, 2013. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. Regarding electronic filing requirements under the Commission's rules, see also the Commission's Handbook on E-Filing, available on the Commission's Web site at *http://edis.usitc.gov.* Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or

the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2012, except as noted (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2012 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2012 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: September 26, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–23900 Filed 9–30–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–451 and 731–TA–1126 and 1127 (Review)]

Certain Lightweight Thermal Paper From China and Germany; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the countervailing duty order on certain lightweight thermal paper from China and revocation of the antidumping duty orders on certain lightweight thermal paper from China and Germany would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 13–5–297,

Continued

be assured of consideration, the deadline for responses is October 31, 2013. Comments on the adequacy of responses may be filed with the Commission by December 16, 2013. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* October 1, 2013.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On November 24, 2008, the Department of Commerce issued a countervailing duty order on imports of certain lightweight thermal paper from China and antidumping duty orders on imports of certain lightweight thermal paper from China and Germany (73 FR 70958). The Commission is conducting reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The *Subject Countries* in these reviews are China and Germany.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined a single *Domestic Like Product* to encompass lightweight thermal paper coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined a single *Domestic Industry* encompassing all U.S. converters and coaters of lightweight thermal paper.

(5) The *Order Date* is the date that the antidumping and countervailing duty orders under review became effective. In these reviews, the *Order Date* is November 24, 2008.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**.The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation. The Commission's designated agency ethics official has advised that a five-year review is not considered the ''same particular matter'' as the corresponding underlying original investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 73 FR 24609 (May 5, 2008). This advice was developed in consultation with the Office of Government Ethics. Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. § 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is October 31, 2013. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing

expiration date June 30, 2014. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

such comments is December 16, 2013. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. Regarding electronic filing requirements under the Commission's rules, see also the Commission's Handbook on E-Filing, available on the Commission's Web site at *http://edis.usitc.gov.* Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to Be Provided In Response to this Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2012, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2012 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject*

Merchandise in the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2012 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: September 26, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–23896 Filed 9–30–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–417 and 731–TA–953, 957–959, and 961–962 (Second Review)]

Carbon and Certain Alloy Steel Wire Rod From Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Notice of Commission Determination To Conduct Full Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the countervailing duty order on carbon and certain alloy steel wire rod from Brazil and antidumping duty orders on carbon and certain alloy steel wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: Effective September 6, 2013.

FOR FURTHER INFORMATION CONTACT: Joanna Lo (202–205–1888), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On September 6, 2013, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found both that the domestic interested party group response to its notice of institution (78 FR 33103, June 3, 2013) was adequate and that the respondent interested party group responses with respect to subject imports from Mexico was adequate, and decided to conduct full reviews of the antidumping duty order on carbon and certain alloy steel wire rod from Mexico. The Commission found that the respondent interested party group responses with respect to subject imports from Brazil, Indonesia, Moldova, Trinidad & Tobago, and Ukraine were inadequate. However, the Commission determined to conduct full reviews concerning the orders on carbon and certain alloy steel wire rod from to Brazil, Indonesia, Moldova, Trinidad & Tobago, and Ukraine to promote administrative efficiency in light of its decision to conduct full reviews with respect to the order on subject imports from Mexico. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: September 26, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–23927 Filed 9–30–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0056]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Special Agent Medical Preplacement

ACTION: 60-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until December 2, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Danielle Murray, Human Resources Operations Division, 99 New York Ave. NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Special Agent Medical Preplacement.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 2300.10. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None.

Need for Collection

The form is used by a special agent who is applying for a position that has specific medical standards. The information collected is used to determine medical suitability to qualify for a position that has specific medical standards and physical requirements. The information will also be used to make a recommendation on either hiring or not hiring an applicant.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 240 respondents will complete a 45 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 180 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: September 25, 2013.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2013–23789 Filed 9–30–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Office of the Secretary of Labor

Notice of Updates to the Department of Labor's List of Goods Produced by Child Labor or Forced Labor Required by the Trafficking Victims Protection Reauthorization Act of 2005

AGENCY: Bureau of International Labor Affairs, Labor.

ACTION: Notice of Updates.

SUMMARY: This notice removes 3 items from the ''List of Goods Produced by Child Labor or Forced Labor'' (List), produced in accordance with the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005. These updates amend the fourth edition of the List, published on September 26, 2012. With these updates, the List includes 134 goods from 73 countries, and total of 342 line items. The primary purposes of the List are to raise public awareness about the incidence of child labor and forced labor in the production of goods in the countries listed and to promote efforts to eliminate such practices.

FOR FURTHER INFORMATION CONTACT: Director, Office of Child Labor, Forced Labor, and Human Trafficking, Bureau of International Labor Affairs, U.S. Department of Labor at (202) 693–4843 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Updates to the List of Goods

The Bureau of International Labor Affairs (ILAB) hereby announces the removal of tobacco from Kazakhstan, charcoal from Namibia, and diamonds from Zimbabwe from the List, produced in accordance with the TVPRA of 2005. These updates amend the fourth edition of the List, published on September 26, 2012. With these updates, the List includes 134 goods from 73 countries, and total of 342 line items.

Section 105(b) of the TVPRA of 2005 mandated that ILAB develop and publish a list of goods from countries that ILAB ''has reason to believe are produced with child labor or forced labor in violation of international standards.'' (22 U.S.C. 7112(b)(2).) ILAB's Office of Child Labor, Forced Labor, and Human Trafficking carries out this mandate. ILAB published the initial List on September 10, 2009, and has since published annual updates. Until this year, the annual updates have taken the form of a full report which includes a discussion of the List's context, scope, methodology, and limitations. In 2013, ILAB has chosen to publish a limited number of updates via this notice. This is in accordance with amendments made to the TVPRA by the Violence Against Women Reauthorization Act of 2013, which mandated that ILAB publish the List every two years beginning no later than December 1, 2014. (Public Law 113–4.) ILAB will publish a full, updated TVPRA report in 2014.

The primary purposes of the List are to raise public awareness about the incidence of child labor and forced labor in the production of goods in the

countries listed and to promote efforts to eliminate such practices. Further information about the List, including the updated List, past years' TVPRA reports, Frequently Asked Questions, and a bibliography of sources, are available on the ILAB Web site at: *http://www.dol.gov/ilab/programs/ocft/tvpra.htm.*

II. Methodology for Removal of Goods From the List

Foreign governments, industry groups, individual companies and other stakeholders frequently inquire about the process for removing a good from the List. According to ILAB's ''Procedural Guidelines for the Development and Maintenance of the List of Goods From Countries Produced by Child Labor or Forced Labor'' (Procedural Guidelines), published in the **Federal Register** on December 27, 2007, ILAB must have reason to believe that a problem of child or forced labor is ''significantly reduc[ed] if not eliminate[ed]'' from the production of the particular good in the country in question for it to be removed. (72 FR 73374, 73377.) The guidelines indicate that a forced or child labor problem at ''a single company or facility'' or in ''an isolated incident'' ''will not weigh in favor of a finding that a good is produced in violation of international standards.'' (Id.) Similarly, when ILAB has reason to believe that a child or forced labor problem with respect to a listed good has been eliminated or reduced to a single company or facility or to an isolated incident, the threshold for removal would be met.

The Procedural Guidelines also provide a process by which the public may submit comments relating to any good on the List. ILAB has received over 100 such comments, or submissions, available on the Internet at: *http://www.dol.gov/ilab/programs/ocft/tvprasubmissions.htm.* Many submissions have contended that a good should be removed from the List but have not provided sufficient evidence that the problem of child or forced labor has been significantly reduced or eliminated.

In the 2012–2013 research period, ILAB staff reviewed four items currently on the List to determine whether there was a reason to believe that there had been a significant reduction or elimination of a problem of child labor and/or forced labor. These items were: tobacco from Kazakhstan, diamonds from Zimbabwe, charcoal from Namibia, and salt from Cambodia. ILAB reached a determination on three of these items, as discussed below, and continues to conduct research on the fourth item, salt from Cambodia.

ILAB's research included desk research, in-person and telephone interviews with key informants, and when possible, travel to the relevant countries to conduct in-person interviews and site visits. In some cases, research was carried out in coordination with U.S. Government colleagues from other agencies, grantees and/or contractors. These three cases are discussed more fully below.

Due to limited resources, ILAB was not able to research in depth all the goods currently on the List that presented a possible case for removal from the List, but we continue to research potential removals on an ongoing basis. In identifying the particular cases on which to focus ILAB research, we prioritize those for which a credible argument for removal has been brought to our attention by foreign governments, industry groups or U.S. Government colleagues from other agencies, or other stakeholders.

III. Discussion of Goods and Countries Removed

A. Research on Child Labor and Forced Labor in Tobacco Production in Kazakhstan

In 2009, ILAB placed tobacco from Kazakhstan on the TVPRA List based on sources dating from 2003–2008. These sources indicated that children—both Kazakh children and children of migrant families—worked in a variety of tobacco-related activities, including performing strenuous, labor-intensive tasks. The sources also indicated that adult migrant laborers faced passport confiscation, coercive recruitment, induced indebtedness, and other forced labor-related practices. That same year, Philip Morris Kazakhstan (PMK), the sole buyer of tobacco in Kazakhstan, began to roll out its Agricultural Labor Practices program, developed in consultation with the non-governmental organization (NGO) Verité and the International Labor Organization. The program includes comprehensive monitoring of labor practices on all tobacco farms in Kazakhstan, including child labor and forced labor. Along with this monitoring, PMK and its local NGO partners have carried out efforts to educate agricultural workers and families about their rights, available grievance mechanisms, and alternatives to child labor; and the Government of Kazakhstan has carried out enforcement actions in areas where child labor is suspected. At the same time as these efforts have taken place, the size of the tobacco sector has declined steeply. In 2011, ILAB began to receive reports that child and forced labor were no longer present in the country's relatively few remaining tobacco farms.

Following up on these reports, ILAB carried out research in 2012 and 2013 to understand current labor conditions in the sector, analyze efforts on the part of various stakeholders to combat child labor and forced labor, and determine whether child labor and/or forced labor remain significant problems in the sector. ILAB carried out a qualitative assessment that included a desk review, field research to Kazakhstan for key informant interviews, and follow-up interviews with other key informants. In all, 6 documents were analyzed and 17 interviews were conducted.

Informants confirmed that the size of the industry had decreased from over 300 farms in 2010 to 74 farms in 2013. With the reduction in the number of farms and land used for tobacco production, the use of migrant labor has also declined. During the 2012 peak season, only 140 migrants worked on tobacco farms in Kazakhstan. Informants—including government officials and NGO representatives–confirmed that the PMK monitoring system is comprehensive and credible, and that NGO efforts have been highly effective in educating agricultural workers about their rights, available grievance mechanisms, and educational opportunities as alternatives to child labor. Since its inception in 2009, the comprehensive monitoring system has not identified any cases of forced labor, and informants confirmed that previous forced labor-related practices have been abolished. A minority of ILAB's informants stated that child labor may still occur in rare cases, but fewer than 200 children (native Kazakh and migrant) currently live on tobacco farms, and the comprehensive monitoring system in place in the sector identified only one child working in 2012.

ILAB has concluded that child labor in Kazakhstan's tobacco sector has been significantly reduced. In addition, there has been no evidence of forced labor in Kazakhstan's tobacco sector in recent years, and ILAB's research suggests the practice has been virtually eliminated. If a case of child labor or forced labor were found in the sector, there are mechanisms in place to address the situation in an appropriate manner. As a result, ILAB is removing tobacco from Kazakhstan from the List.

B. Research on Child Labor in Charcoal Production in Namibia

In response to a U.S. Embassy request to research whether or not child labor in

the production of charcoal existed in more than an isolated incident, in early 2013 ILAB staff conducted follow-up qualitative research to determine the current situation of child labor in the Namibian charcoal industry. The research included a desk review of documentation and in-country field research, which included key informant interviews and site visits.

The key informant interviews in Namibia consisted of interviews with a total of 30 informants, interviewed individually and in groups, including government officials at the national and regional levels, charcoal producers, former chairmen of the Namibian Charcoal Producers' Association, workers and employers' associations, international organizations, and NGOs. In total, 14 organizations were interviewed. Site visits were conducted to two charcoal producing farms in Otjozondjupa Region, one in Grootfontein and the other in Otjiwarango. The interviews and site visits conducted by ILAB staff in Namibia validated that there is ''no significant incidence of child labor or forced labor'' in the production of charcoal, and, after considering the factors in the Procedural Guidelines, ILAB determined that it no longer has ''reason to believe'' that the use of child labor in charcoal production in Namibia is more than isolated. Thus, ILAB is removing Namibian charcoal from the List.

C. Research on Child Labor in Diamond Production in Zimbabwe

In 2006, diamonds were discovered in the Marange region of southeastern Zimbabwe, precipitating a rush to the area by artisanal miners. Based on sources documenting worst forms of child labor in artisanal mining from 2006–2008—including working long hours, carrying heavy loads, and deprivation of food and water—ILAB added diamonds from Zimbabwe to the List.

However, beginning in October 2008, the Government of Zimbabwe cracked down on artisanal mining, and in 2010 began awarding concessions to private companies to mine diamonds. According to reports from 2011 onward, the little artisanal mining that remained was carried out mostly by informal mining syndicates involving the government's security forces and private security guards, and did not involve children.

Following up on these reports, ILAB carried out research in 2012 and 2013 to understand the current labor conditions in Zimbabwe's diamond sector, analyze the factors that may have affected changes in the sector, and determine whether child labor had been significantly reduced or eliminated. ILAB carried out a qualitative assessment that included a desk review, field research to Zimbabwe for key informant interviews, and follow-up interviews with other key informants. In all, 17 documents were analyzed and 24 interviews were conducted. Interviewees included government officials, workers' associations, international organizations, NGOs, and members of the Kimberley Process, a joint government, industry and civil society initiative to stem worldwide flows of rough diamonds used by rebel movements to finance wars against legitimate governments. Informants reported that artisanal mining was virtually non-existent in Marange. In the concessioned areas, Kimberley Process monitors who had visited the mines had seen no child labor, and other informants felt that child labor was extremely unlikely, in part due to the more formal hiring processes in place in the privately-run mines.

ILAB concluded that the change in the diamond industry from informal artisanal mining to tightly-controlled concessioned mines has caused a significant reduction in child labor. Accordingly, ILAB is now removing diamonds from Zimbabwe from the List. This determination was based solely on ILAB's criteria for removal from the List, which do not include consideration of other human rights abuses in Zimbabwe's diamond sector that have been reported by other U.S. Government agencies, such as murder, torture, and other cruel, inhuman, or degrading treatment or punishment.

Signed at Washington, DC, this 17th day of September, 2013.

Carol Pier,

Acting Deputy Undersecretary, Bureau of International Labor Affairs.

[FR Doc. 2013–23223 Filed 9–30–13; 8:45 am]

BILLING CODE 4510–28–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

NATIONAL NANOTECHNOLOGY COORDINATION OFFICE

Request for Information: NNI Nanotechnology for Sensors and Sensors for Nanotechnology Signature Initiative

ACTION: Notice of request for information.

SUMMARY: The purpose of this Request for Information (RFI) is to enhance the value of the National Nanotechnology Initiative (NNI) and of the Nanotechnology Signature Initiative (NSI) entitled Nanotechnology for Sensors and Sensors for Nanotechnology in particular, by reaching out to the nanotechnology stakeholder community for input regarding specific needs for the accelerated development and commercialization of nanosensors. This RFI is intended to inform planning for a public workshop organized under the auspices of the sensors NSI.

DATES: Responses to this RFI will be accepted through 11:59 p.m. Eastern Time on November 15, 2013.

ADDRESSES: Responses to this RFI may be submitted electronically in the body of or as an attachment to an email sent to *NNISensorsRFI@nnco.nano.gov.* Questions and responses may also be sent by mail (please allow additional time for processing) to the address: National Nanotechnology Coordination Office, ATTN: NNI Sensors RFI, 4201 Wilson Blvd., Stafford II, Suite 405, Arlington, VA 22230.

FOR FURTHER INFORMATION CONTACT: Any questions about the content of this RFI should be sent to *NNISensorsRFI@nnco.nano.gov.* Additional information regarding this RFI can be found at *nano.gov* or by calling (703) 292–8626.

SUPPLEMENTARY INFORMATION: The National Nanotechnology Coordination Office is interested in responses that address one or more of the following Questions below that are broadly categorized under Standards, Testing, Manufacturing, Commercialization, and Regulation. When submitting your response, please indicate the question(s) you are answering. Please be specific and concise.

Background Information

The National Nanotechnology Initiative (NNI) is a U.S. Government research and development (R&D) initiative of 20 Federal departments, independent agencies, and independent commissions (hereafter referred to as 'agencies') working together toward the common challenging vision of a future in which the ability to understand and control matter at the nanoscale leads to a revolution in technology and industry that benefits society. The combined, coordinated efforts of these agencies have accelerated discovery, development, and deployment of nanotechnology towards agency missions and the broader national interest. Established in 2001, the NNI involves nanotechnology-related activities by the 20 member agencies.

The NNI is managed within the framework of the National Science and Technology Council (NSTC), the Cabinet-level council by which the President coordinates science and technology across the Federal Government and interfaces with other sectors. The Nanoscale Science, Engineering, and Technology (NSET) Subcommittee of the NSTC coordinates planning, budgeting, program implementation, and review of the NNI. The NSET Subcommittee is composed of senior representatives from agencies participating in the NNI (*http://www.nano.gov*).

The Federal agencies participating in the NNI have identified focused areas of national importance that may be more rapidly advanced through enhanced coordination and collaboration of agency research and development efforts. These Nanotechnology Signature Initiatives (NSIs) provide a spotlight on critical areas and define the shared vision of the participating agencies for accelerating the advancement of nanoscale science and technology to address needs and exploit opportunities from research through commercialization.

The Nanotechnology Signature Initiative 'Nanotechnology for Sensors and Sensors for Nanotechnology: Improving and Protecting Health, Safety, and the Environment' was launched in July of 2012 and includes activities from the following collaborating agencies: Consumer Product Safety Commission; Department of Agriculture (National Institute of Food and Agriculture); Department of Commerce (National Institute of Standards and Technology); Department of Defense (Defense Threat Reduction Agency); Department of Health and Human Services (Food and Drug Administration, National Institutes of Health, and National Institute for Occupational Safety and Health); Environmental Protection Agency; National Aeronautics and Space Administration; and National Science Foundation.

The Sensors NSI addresses both the opportunity of using nanotechnology to advance sensor development and the challenges of developing sensors to keep pace with the increasingly widespread use of engineered nanomaterials. This signature initiative builds upon existing NNI member agency efforts to support research on nanomaterial properties and development of supporting technologies that enable next-generation sensing of biological, chemical, and nanoscale materials. This interagency effort coordinates and stimulates creation of the knowledge, tools, and methods necessary to develop and test nanosensors and to track the fate of engineered nanomaterials in the body, consumer products, the workplace, and the environment. The Sensors NSI will accomplish these objectives by means of two major thrusts to:

1. Develop and promote adoption of new technologies that employ nanoscale materials and features and the size-dependent properties of engineered nanomaterials to overcome technical barriers associated with conventional sensors, focusing on three goals:

1.1. Support research on nanomaterials and nanoscale device components to enable the next generation of sensors, including tunable, label-free, and enzymatic sensors

1.2. Support development of integrated and portable sensor devices, including information systems support for collection, analysis, and transfer of large amounts of sensor data

1.3. Accelerate commercialization and expand the application base of existing nanosensor technologies

2. Develop methods and devices to detect and identify engineered nanomaterials across their life-cycles in order to assess their potential impact on health, safety, and the environment, focusing on three goals:

2.1. Identify and quantify unique magnetic, optical, and electronic signatures of nanomaterials in specific matrices with minimal sample preparation

2.2. Identify ''surrogate'' indicators of nanomaterial presence

2.3. Design and develop ''tags'' for nanomaterials that will enable their detection and measurement if released into the environment

Questions

The National Nanotechnology Coordination Office seeks public comments in response to the following questions:

A. Standards

A1. What existing standards have helped to improve or illustrate sensor performance in meeting desired specifications?

A2. What existing standards have helped to improve the manufacturing of sensors (statistical process control)?

A3. What standards need to be developed (for performance or manufacturing) to meet industry/consumer expectations for emerging sensor technologies?

B. Testing

B1. How are you evaluating sensor performance?

B2. What facilities for standardized testing (e.g., testbeds) have you used to develop nanosensors?

B3. How did the testbed (formal or informal) help to improve sensor performance or manufacturability?

B4. What additional testing facilities would aid the sensor development community?

B5. What capabilities would be highest priority if new sensor testing facilities were to be developed?

B6. What sample types have you utilized to develop convincing demonstrations of sensor performance (e.g., real clinical samples, environmental samples/sites) and how were these samples obtained?

C. Manufacturing

C1. What are the largest technical challenges in scale up and manufacturing facing sensor development (e.g., integration, reliability)?

C2. What are the new tools for integration/engineering (e.g., Wi-Fi, programmable logic, signal processing software, etc.) that will have the greatest impact on sensor commercialization?

C3. What, if any, unique workforce issues might be expected for sensor manufacturing (e.g., cross-trained integrators/engineers, etc.)?

D. Commercialization

D1. What are the commercial applications where nanosensors will likely have the most immediate impact?

D2. What are the primary contributing factors to the existence of a ''valley of death'' for sensor development and commercialization (e.g., reliability, potential market size, investment capital, etc.)?

E. Regulation

E1. How can regulatory requirements be best shared with the sensors community?

Responses to this notice are not offers and cannot be accepted by the Government to form a binding contract or issue a grant. Information obtained as a result of this RFI may be used by the government for program planning on a non-attribution basis. Please do not include any information that might be considered proprietary, confidential, or personally identifying (such as home address or social security number).

Ted Wackler,

Deputy Chief of Staff and Assistant Director.

[FR Doc. 2013–23916 Filed 9–30–13; 8:45 am]

BILLING CODE 3720–F3–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by October 31, 2013. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Division of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Adrian Dahood, ACA Permit Officer, at the above address or *ACApermits@nsf.gov* or (703) 292–7149.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

Application Details

1. Applicant

Andrew Klein, Department of Geography, Texas A&M University, College Station, Texas.

Permit Application: 2014–021.

Activity for Which Permit is Requested: ASPA; Due to change in scope of the research, Andrew Klein has withdrawn his application for ACA permit 2014–012 and replaced it with this application which better describes his field work.

This permit would allow entry to a number of ASPAs in the vicinities of McMurdo Station and Palmer Station for the purpose of collecting soil and marine sediment samples. The samples would be taken as part of the ongoing effort to monitor the spatial scale of human impacts in Antarctica. Samples taken near Palmer Station will be compared with those taken during the *Bahia Pariso* spill, which occurred near Palmer Station in 1989. Sampling sites would be situated to avoid disturbing native birds and mammals.

The applicants request entry to the Barwick and Balham Valleys (ASPA 123) to collect surface soil samples for geochemical analysis. This effort would support the ASPA's values to be protected by providing baseline measurements on the level and extent of human contamination in areas of known human disturbance. This baseline is critical for future scientific work in the Dry Valleys which may use the site for comparisons to other Dry Valley sites which are more routinely used for scientific research. Without accurate baseline data such future studies could incorrectly assume the area is pristine. The work falls within what is allowed by the current management plan as ''Essential management activities, including monitoring and inspection'' as described in section 7(iii) of the ASPA's management plan.

Location: ASPA 113 Litchfield Island; ASPA 116 New College Valley; ASPA 123 Barwick and Balham Valleys ASPA 124 Cape Crozier; ASPA 131 Canada Glacier; ASPA 138 Linnaeus Terrace ASPA 139 Biscoe Point; ASPA 155 Cape Evans; ASPA 157 Backdoor Bay; ASPA 158 Hut Point; ASPA 172 Lower Taylor Glacier and Blood Falls; ASMA 2 McMurdo Dry Valleys; ASMA 7 Southwest Anvers Island and Palmer Basin.

Dates: November 12, 2013 to April 30, 2017.

Nadene G. Kennedy,

Polar Coordination Specialist, Division of Polar Programs.

[FR Doc. 2013–23892 Filed 9–30–13; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

SES Performance Review Board

AGENCY: National Transportation Safety Board.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the National Transportation Safety Board, Performance Review Board (PRB).

FOR FURTHER INFORMATION CONTACT: Emily T. Carroll, Chief, Human Resources Division, Office of Administration, National Transportation Safety Board, 490 L'Enfant Plaza SW., Washington, DC 20594–0001, (202)314–6233.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, United States Code requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES Performance Review Boards. The board reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor and considers recommendations to the appointing authority regarding the performance of the senior executive.

The following have been designated as members of the Performance Review Board of the National Transportation Safety Board:

The Honorable Christopher A. Hart, Member, National Transportation Safety Board; PRB Chair.

The Honorable Robert L. Sumwalt, III; Member, National Transportation Safety Board.

David K. Tochen, General Counsel, National Transportation Safety Board.

Florence A. Carr, Deputy Managing Director, Federal Maritime Commission.

Jerold Gidner, Deputy Director, Office of Strategic Employee and Organizational Development, Department of the Interior.

David L. Mayer, Managing Director, National Transportation Safety Board (substitute only for Mr. Tochen's rating review).

Anthony P. Scardino, Chief Financial Officer, U.S. Patent and Trademark Office (Alternate).

Dated: September 25, 2013.

Candi R. Bing,

Federal Register Coordinator.

[FR Doc. 2013–23807 Filed 9–30–13; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[NRC–2013–0224]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory

Commission (the NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from September 5, 2013 to September 18, 2013. The last biweekly notice was published on September 17, 2013 (78 FR 57180).

ADDRESSES: You may submit comment by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0224. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN–06–A44MP, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0224 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0224.

• *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.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2013–0224 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in section 50.92 of Title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license or combined license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, 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 or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

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. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) the name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) 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 identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

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 bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and 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 petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include 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 amendment under consideration. The contention must be one which, 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.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

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 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 the 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 agency'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 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 1–866 672–7640. 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.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the following three factors in 10 CFR 2.309(c)(1)(i)–(iii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*

Luminant Generation Company LLC, Docket Nos. 50–445, and 50–446, Comanche Peak Nuclear Power Plant, Units 1 and 2, Somervell County, Texas

Date of amendment request: August 29, 2013.

Brief description of amendments: The amendment would revise Technical Specification (TS) 3.4.17, ''Steam Generator (SG) Tube Integrity,'' TS 5.5.9, ''Unit 1 Model D76 and Unit 2 Model D5 Steam Generator (SG) Program'', and TS 5.6.9, ''Unit 1 Model D76 and Unit 2 Model D5 Steam Generator Tube Inspection Report.'' The proposed changes address implementation issues associated with inspection periods, and address other administrative changes and clarifications. The proposed amendment is consistent with NRC-approved Technical Specifications Task Force (TSTF) change traveler TSTF–510, Revision 2, ''Revision to Steam Generator Program Inspection Frequencies and Tube Sample Selection.'' The availability of this improvement was announced in the **Federal Register** on October 27, 2011 (76 FR 66763), as part of the consolidated line item improvement process.

Luminant Generation Company LLC has proposed minor non-technical variations from the TS changes proposed in TSTF–510, Revision 2. Comanche Peak Nuclear Power Plant (CPNPP), Units 1 and 2, TSs utilize different numbering and titles than the Standard Technical Specifications on which TSTF–510 is based, since SGs for CPNPP, Units 1 and 2, are of different models. These differences are administrative in nature and do not affect the applicability of TSTF–510 to the CPNPP, Units 1 and 2, TSs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises the Steam Generator (SG) Program to modify the frequency of verification of SG tube integrity and SG tube sample selection. A steam generator tube rupture (SGTR) event is one of the design basis accidents that are analyzed as part of a plant's licensing basis. The proposed SG tube inspection frequency and sample selection criteria will continue to ensure that the SG tubes are inspected such that the probability of a SGTR is not increased. The consequences of a SGTR are bounded by the conservative assumptions in the design basis accident analysis. The proposed change will not cause the consequences of a SGTR to exceed those assumptions.

Therefore, it is concluded that the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the Steam Generator Program will not introduce any adverse changes to the plant design basis or postulated accidents resulting from potential tube degradation. The proposed change does not affect the design of the SGs or their method of operation. In addition, the proposed change does not impact any other plant system or component.

Therefore, the proposed change does not create the possibility of a new or different type of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The SG tubes in pressurized water reactors are an integral part of the reactor coolant pressure boundary and, as such, are relied upon to maintain the primary system's pressure and inventory. As part of the reactor coolant pressure boundary, the SG tubes are unique in that they are also relied upon as a heat transfer surface between the primary

and secondary systems such that residual heat can be removed from the primary system. In addition, the SG tubes also isolate the radioactive fission products in the primary coolant from the secondary system. In summary, the safety function of a SG is maintained by ensuring the integrity of its tubes. Steam generator tube integrity is a function of the design, environment, and the physical condition of the tube. The proposed change does not affect tube design or operating environment. The proposed change will continue to require monitoring of the physical condition of the SG tubes such that there will not be a reduction in the margin of safety compared to the current requirements.

Therefore, it is concluded that the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Timothy P. Matthews, Esq., Morgan, Lewis and Bockius, 1111 Pennsylvania Avenue NW., Washington, DC 20004.

NRC Branch Chief: Michael T. Markley.

South Carolina Electric and Gas Docket Nos. 52–027, and 52–028, Virgil C. Summer Nuclear Station (VCSNS), Units 2 and 3, Fairfield County, South Carolina

Date of amendment request: July 2, 2013.

Description of amendment request: The proposed change would amend Combined License Nos. NPF–93 and NPF–94 for the VCSNS, Units 2 and 3 by departing from the Combined License Appendix C information. The changes correct editorial errors and promote consistency with the Updated Final Safety Analysis Report Tier 2 information.

Because, this proposed change requires a departure from Tier 1 information in the Westinghouse Advanced Passive 1000 DCD, the licensee also requested an exemption from the requirements of the Generic DCD Tier 1 in accordance with 52.63(b)(1).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed editorial and consistency plant-specific Tier 1 [sic, Appendix C] update does not involve a technical change, e.g., there is no design parameter or requirement, calculation, analysis, function, or qualification change. No structure, system, component (SSC) design or function would be affected. No design or safety analysis would be affected. The proposed changes do not affect any accident initiating event or component failure, thus the probabilities of the accidents previously evaluated are not affected. No function used to mitigate a radioactive material release and no radioactive material release source term is involved, thus the radiological releases in the accident analyses are not affected.

Therefore, the proposed amendment does not involve an increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed editorial and consistency plant-specific Tier 1 [sic, Appendix C] update would not affect the design or function of any SSC, but will instead provide consistency between the SSC designs and functions currently presented in the UFSAR and the Tier 1 [sic, Appendix C] information. The proposed (non-technical) changes would not introduce a new failure mode, fault, or sequence of events that could result in a radioactive material release.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed editorial and consistency plant-specific Tier 1 [sic, Appendix C] update is nontechnical, thus would not affect any design parameter, function, or analysis. There would be no change to an existing design basis, design function, regulatory criterion, or analysis. No safety analysis or design basis acceptance limit/criterion is involved.

Therefore, the proposed amendment does not reduce the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Kathryn M. Sutton, Morgan, Lewis & Bockius LLC, 1111 Pennsylvania Avenue NW., Washington, DC 20004–2514.

NRC Branch Chief: Lawrence Burkhart.

South Carolina Electric and Gas Docket Nos. 52–027, and 52–028, Virgil C. Summer Nuclear Station (VCSNS), Units 2 and 3, Fairfield County, South Carolina

Date of amendment request: July 17, 2013.

Description of amendment request: The proposed change would amend Combined License Nos. NPF–93 and NPF–94 for the VCSNS, Units 2 and 3 by departing from Tier 2 and Tier 2* material related to fire area boundaries and contained within the updated final safety analysis report (UFSAR). The proposed changes would alter the layout of the Annex Building and Turbine Building, change Turbine Building Stairwell S08, and clarify a UFSAR figure of the Annex Building heating, ventilation, and air conditioning shafts.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed Annex Building and Turbine Building layout changes, Turbine Building stairwell changes to support egress functions, and an Annex Building ventilation shaft Updated Final Safety Analysis Report (UFSAR) figure clarification would not affect any safety-related equipment or function. The modified configurations would continue to maintain the associated fire protection (i.e., barrier) functions. The safe shutdown fire analysis is not affected, and the fire protection analysis results remain acceptable. The affected rooms and equipment do not contain or interface with safety-related equipment. The proposed changes do not involve any accident initiating event, thus the probabilities of the accidents previously evaluated are not affected. The affected rooms do not represent a radioactive material barrier, and this activity does not involve the containment of radioactive material. The radioactive material source terms and release paths used in the safety analyses are unchanged, thus the radiological releases in the accident analyses are not affected. Therefore, the consequences of an accident previously evaluated are not affected.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed Annex Building and Turbine Building layout changes, Turbine Building stairwell changes to support egress functions,

and an Annex Building ventilation shaft UFSAR figure clarification would not change the performance of the fire barriers. Fire zone loadings and associated fire analyses remain within their acceptance limits. The affected rooms do not contain equipment whose failure could initiate an accident. The fire boundary changes do not create a new failure or sequence of events that could initiate a new or different kind of accident.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed Annex Building and Turbine Building layout changes, Turbine Building stairwell changes to support egress functions, and an Annex Building ventilation shaft UFSAR figure clarification would not change the fire protection performance of any fire barrier. No safety or fire requirement acceptance criterion would be exceeded or challenged. The safe shutdown fire analysis is not affected. No safety-related equipment, area, or function is involved. The amounts of combustible material loadings in the affected fire zones remain within their applicable limits. The proposed fire boundary changes comply with existing design codes and regulatory criteria, and do not affect any safety analysis.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Kathryn M. Sutton, Morgan, Lewis & Bockius LLC, 1111 Pennsylvania Avenue NW., Washington, DC 20004–2514.

NRC Branch Chief: Lawrence Burkhart.

South Carolina Electric and Gas Docket Nos. 52–027, and 52–028, Virgil C. Summer Nuclear Station (VCSNS), Units 2 and 3, Fairfield County, South Carolina

Date of amendment request: August 7, 2013.

Description of amendment request: The proposed change would amend Combined License Nos. NPF–93 and NPF–94 for the VCSNS, Units 2 and 3 by departing from the Combined License Appendix C information and the plant-specific Design Control Document (DCD) Tier 2 and Tier 2* material by changing the Turbine Building structures and layout by: (1) Changing the door location on the motor-driven fire pump room in the Turbine Building, (2) clarifying the column line designations for the southwest and southeast walls of the Turbine Building first bay, (3) changing the floor to ceiling heights at three different elevations in the Turbine Building main area, and (4) increasing elevations and wall thickness in certain walls of the Turbine Building first Bay.

Because, this proposed change requires a departure from Tier 1 information in the Westinghouse Advanced Passive 1000 DCD, the licensee also requested an exemption from the requirements of the Generic DCD Tier 1 in accordance with 52.63(b)(1).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes to the Turbine Building configuration do not alter the assumed initiators to any analyzed event. Changing the door location does not affect the operation of any systems or equipment inside or outside the Turbine Building that could initiate an analyzed accident. Clarifying the column line designations does not affect the operation of any systems or equipment inside or outside the Turbine Building that could initiate an analyzed accident. The changes in elevation and wall thickness do not affect the operation of any systems or equipment inside or outside the Turbine Building that could initiate an analyzed accident. In preparing this license amendment, it was considered if the changes to the Turbine Building door location, column line designations, wall thickness, and floor elevations would have an adverse impact on the ability of the Turbine Building structure to perform its design function to protect the systems, equipment, and components within this building. It was concluded that there was no adverse impact, because design of this structure, including the redesigned first bay wall heights and thicknesses, will continue to be in accordance with the same codes and standards as stated in the VCSNS, Units 2 and 3 Updated Final Safety Analysis Report (UFSAR). The Turbine Building first bay continues to maintain its seismic Category II rating. Based on the above, the probability of an accident previously evaluated will not be increased by these proposed changes. The proposed Turbine Building configuration changes will not affect radiological dose consequence analysis. The affected portions of the Turbine Building are unrelated to radiological analyses. Therefore, no accident source term parameter or fission product barrier is impacted by these changes. Structures, systems, and components (SSCs) required for mitigation of analyzed accidents are not affected by these changes, and the function of the Turbine Building to provide weather protection for SSCs inside the building is not adversely affected by these changes. Mitigation of a high energy line break (HELB) in the Turbine Building first bay is not adversely affected by this change, because additional vent area will be added to the south wall of the first bay above the Auxiliary Building roof. This additional vent area will exceed the vent area that is blocked by the change to the Turbine Building main area elevations. Consequently, this activity will not increase the consequences of any analyzed accident, including the main steam line limiting break.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed Turbine Building configuration changes to the location of a door leading to the Motor-Driven Fire Pump room, column line designations, floor elevations in the main area, and wall heights and thicknesses in the first bay do not change the design function of the Turbine Building or any of the systems or equipment in the Turbine Building or in any other Nuclear Island structures. In assessing the proposed changes, it was considered if they would lead to a different type of possible accident than those previously evaluated. The proposed changes do not adversely affect any system design functions or methods of operation. The proposed changes do not introduce any new equipment or components or change the operation of any existing systems or equipment in a manner that would result in a new failure mode, malfunction, or sequence of events that could affect safety-related or nonsafety-relate equipment. This activity will not create a new sequence of events that would result in significant fuel cladding failures. With the implementation of these changes to the design of this structure, including the redesigned first bay wall heights and thicknesses, the structure will continue to be in accordance with the same codes and standards as stated in the VCSNS, Units 2 and 3 UFSAR. The Turbine Building First Bay continues to maintain its seismic Category II rating. Based on the above, it was concluded that the proposed changes would not lead to a different type of possible accident than those previously considered.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The margin of safety for the design of the Turbine Building, including the seismic Category II Turbine Building first bay, is determined by the use of the current codes and standards and adherence to the assumptions used in the analyses of this structure and the events associated with this structure. The relocated door to the motor-driven fire pump room will continue to meet the current 3-hour fire rating requirements.

The revised column line designations do not represent a physical plant modification, and have no adverse impact on plant construction or operation. The design of the Turbine Building, including the increased elevations in the main area and the increased height and thickness of the redesigned first bay walls, will continue to be in accordance with the same codes and standards as stated in the UFSAR. The increased elevation of the first bay roof to allow the installation of blow-out panels will provide additional gross vent area for the first bay, which more than compensates for the current vent area that will be blocked by the change in the Turbine Building main area elevations. Consequently, this activity will not adversely affect the first bay's ability to relieve pressure in the event of the limiting main steam line break, and consequently this activity will not reduce the current margin of safety associated with this event to the design pressure limits for Wall 11 of the Nuclear Island and the walls of the first bay. The first bay will continue to maintain a seismic Category II rating. Adhering to the same codes and standards for the Turbine Building structural design and maintaining a seismic Category II rating for the Turbine Building first bay preserves the current structural safety margins.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Kathryn M. Sutton, Morgan, Lewis & Bockius LLC, 1111 Pennsylvania Avenue NW., Washington, DC 20004–2514.

NRC Branch Chief: Lawrence Burkhart.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Florida Power and Light Company, Docket No. 50–250, Turkey Point Nuclear Generating, Unit 3, Miami-Dade County, Florida

Date of application for amendment: March 8, 2013, as supplemented by letter dated July 12, 2013.

Brief description of amendment: The amendment allows a one-time (temporary) 2-month extension of Technical Specifications (TSs) Surveillance Requirement 4.5.1.1.d involving an operability demonstration of emergency core cooling system accumulator check valves.

Date of issuance: September 10, 2013.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 258.

Renewed Facility Operating License No. DPR–31: Amendment revised the license and the TSs.

*Date of initial notice in **Federal Register***: May 28, 2013 (78 FR 31982). The supplement dated July 12, 2013, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 10, 2013.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: February 12, 2013.

Brief description of amendment: The amendment modified the Cooper Nuclear Station license condition 2.E to require incorporation of the commitments listed in appendix A of NUREG–1944 in the updated safety analysis report to be managed in accordance with 10 CFR 50.59.

Date of issuance: September 12, 2013.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: 247.

Renewed Facility Operating License No. DPR–46: Amendment revised the Facility Operating License.

*Date of initial notice in **Federal Register**:* July 5, 2013 (78 FR 40519).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 12, 2013.

No significant hazards consideration comments received: No.

NextEra Energy Duane Arnold, LLC, Docket No. 50–331, Duane Arnold Energy Center, Linn County, Iowa

Date of application for amendment: August 5, 2011, as supplemented by letters dated October 14, 2011, April 23, 2012, May 23, 2012, July 9, 2012, October 15, 2012, January 11, 2013, February 12, 2013, March 6, 2013, May 1, 2013, May 29, 2013, two supplements dated July 2, 2013, and August 5, 2013, and August 28, 2013.

Brief description of amendment: The proposed amendment would transition the DAEC fire protection program to a new risk-informed, performance-based alternative per 10 CFR 50.48(c) which incorporates by reference the National Fire Protection Association (NFPA) Standard 805 (NFPA 805), ''Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants—2001.''

Date of issuance: September 10, 2013.

Effective date: As of the date of issuance and shall be implemented within 180 days from the date of issuance.

Amendment No.: 286.

Renewed Facility Operating License No. DPR–49: Amendments revise the Renewed Facility Operating License.

*Date of initial notice in **Federal Register**:* October 2, 2012 (77 FR 60151). The supplemental information dated October 14, 2011, April 23, 2012, May 23, 2012, July 9, 2012, October 15, 2012, January 11, 2013, February 12, 2013, March 6, 2013, May 1, 2013, May 29, 2013, two supplements dated July 2, 2013, and August 5, 2013, and August 28, 2013, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 10, 2013.

No significant hazards consideration comments received: No.

Northern States Power Company—Minnesota, Docket No. 50–306, Prairie Island Nuclear Generating Plant, Unit 2, Goodhue County, Minnesota

Date of application for amendment: July 25, 2012, as supplemented by letter dated July 25, 2013.

Brief description of amendment: The amendment revised technical specification TS 5.5.14 to except the licensee from the requirement to perform an appendix J Type A test, containment integrated leakage rate test (ILRT), following modifications to the containment pressure boundary resulting from the replacement of the Prairie Island Nuclear Generating Plant, Unit 2 steam generators, scheduled for fall 2013.

Date of issuance: September 11, 2013.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 297.

Renewed Facility Operating License No. DPR–60: Amendment revises the Renewed Facility Operating License and Technical Specifications.

*Date of initial notice in **Federal Register**:* September 14, 2012 (77 FR 56880).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated September 11, 2013.

No significant hazards consideration comments received: No.

Pacific Gas and Electric Company, Docket Nos. 50–275, and 50–323, Diablo Canyon Nuclear Power Plant, Units 1 and 2, San Luis Obispo County, California

Date of application for amendments: September 12, 2012.

Brief description of amendments: The amendments revised Technical Specification (TS) 5.5.7, ''Reactor Coolant Pump Flywheel Inspection Program,'' to extend the reactor coolant pump (RCP) motor flywheel examination frequency from the currently approved 10-year examination frequency to an interval not to exceed 20 years, in accordance with NRC-approved Technical Specifications Task Force (TSTF) change traveler TSTF–421–A, Revision 0, ''Revision to RCP Flywheel Inspection Program (WCAP–15666),'' that has been approved generically for the Westinghouse Standard Technical Specifications (STS), NUREG–1431.

A notice announcing the availability of this proposed TS change using the Consolidated Line Item Improvement Process was published in the **Federal Register** on October 22, 2003 (68 FR 60422). The TSTF–421 model safety evaluation, model no significant hazards consideration determination, and model license amendment request were published in the **Federal Register** on June 24, 2003 (68 FR 37590).

Date of issuance: September 5, 2013.

Effective date: As of its date of issuance and shall be implemented within 120 days from the date of issuance.

Amendment Nos.: Unit 1—216; Unit 2—218.

Facility Operating License Nos. DPR–80 and DPR–82: The amendments revised the Facility Operating Licenses and Technical Specifications.

*Date of initial notice in **Federal Register**:* November 27, 2012 (77 FR 70841).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated September 5, 2013.

No significant hazards consideration comments received: No.

STP Nuclear Operating Company, Docket Nos. 50–498, and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: April 25, 2013.

Brief description of amendment: The existing Technical Specification (TS) 5.1, ''Site,'' Figures 5.1–1 through 5.1–4 for South Texas Project (STP), Units 1 and 2, identifies a Visitor's Center; however, the Visitor's Center has been demolished. In addition, Figures 5.1–1, 5.1–3, and 5.1–4 identify the Emergency Operations Facility (EOF) within the Nuclear Training Facility; however, the EOF was relocated to Center of Energy Development building located in Bay City, Texas, approximately 12.5 air miles from the plant site in 2009. The amendments revise Figures 5.1–1 through 5.1–4 to remove references to the Visitor's Center and EOF and is administrative in nature.

Date of issuance: September 9, 2013.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment Nos.: Unit 1—201; Unit 2—189.

Facility Operating License Nos. NPF–76 and NPF–80: The amendments revised the Facility Operating Licenses and Technical Specifications.

*Date of initial notice in **Federal Register**:* June 25, 2013 (78 FR 38085).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated September 9, 2013.

No significant hazards consideration comments received: No.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual notice of consideration of issuance of amendment, proposed no significant hazards consideration determination, and opportunity for a hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local

media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the application for amendment, (2) the amendment to Facility Operating License or Combined License, as applicable, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license or combined license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, and electronically on the Internet at the NRC's Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If there are problems in accessing the document, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* If a request for a hearing or petition for leave to intervene is filed by the above date, 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 or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

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. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) the name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) 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 identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

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 bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include 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 amendment under consideration. The contention must be one which, if proven, would entitle the 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.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

All documents filed in the 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's 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 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 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 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 the 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 NRCs' 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 agency'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 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 1–866–672–7640. 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.

Tennessee Valley Authority (TVA), Docket No. 50–259, Browns Ferry Nuclear Plant, Unit 1, Limestone County, Alabama

Date of amendment request: August 14, 2013, as supplemented by letters dated August 21 and September 6, 2013.

Brief description of amendment request: The amendment changes Technical Specification (TS) 3.4.9, ''RCS [Reactor Coolant System] Pressure and Temperature (P/T) Limits,'' to delete the Notes that cover the RCS P/T limit curves on Figure 3.4.9–1, ''Pressure/Temperature Limits for Mechanical Heatup, Cooldown Following Shutdown, and Reactor Critical Operation,'' and Figure 3.4.9–2, ''Pressure/Temperature Limits for Reactor In-Service Leak and Hydraulic Testing,'' that are valid for 16 effective full-power years (EFPY) of operation and allows the usage of the figures up

to 16 EFPY. The current notes state, ''Do Not Use This Figure. This curve applies to operations > [greater than] 12 EFPY. For current operation, use previous curve, which is valid up to 12 EFPY.'' TVA requested this change under exigent circumstances, which required an NRC expedited review of the requested change to support approval by September 19, 2013. The supplemental letters dated August 21 and September 6, 2013, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration (NSHC) determination as published in the **Federal Register**.

Date of issuance: September 13, 2013.

Effective date: The license amendment is effective as of its date of issuance.

Amendment No.: 284.

Facility Operating License No. DPR–33: Amendment revised the TSs.

Public comments requested as to proposed no significant hazards consideration: Yes, a notice was published on August 23, 2013 (78 FR 52571). The notice provided an opportunity to submit comments on the Commission's proposed NSHC determination. No comments have been received. The notice also provided an opportunity to request a hearing by October 22, 2013, but indicated that if the Commission makes a final NSHC determination, any such hearing would take place after issuance of the amendment.

The Commission's related evaluation of the amendment, finding of exigent circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated September 13, 2013.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

NRC Acting Branch Chief: Douglas A. Broaddus.

Dated at Rockville, Maryland, this 23rd day of September 2013.

For the Nuclear Regulatory Commission.

John D. Monninger,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–23609 Filed 9–30–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0001]

Sunshine Act Meeting

DATES: Weeks of September 30, October 7, 14, 21, 28, November 4, 2013.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of September 30, 2013

There are no meetings scheduled for the week of September 30, 2013.

Week of October 7, 2013—Tentative

There are no meetings scheduled for the week of October 7, 2013.

Week of October 14, 2013—Tentative

Wednesday, October 16, 2013

1:00 p.m. Briefing on Flooding and Other Extreme Weather Events (Public Meeting); (Contact: George Wilson, 301–415–1711).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/*.

Friday, October 18, 2013

9:00 a.m. Meeting with the Advisory Committee on the Medical Uses of Isotopes (Public Meeting); (Contact: Sophie Holiday, 301–415–7865).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/*.

1:00 p.m. Briefing on Proposed Rulemaking Concerning the Medical Use of Byproduct Material (Public Meeting); (Contact: Ashley Cockerham, 240–888–7129).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/*.

Week of October 21, 2013—Tentative

There are no meetings scheduled for the week of October 21, 2013.

Week of October 28, 2013—Tentative

Thursday, October 31, 2013

10:00 a.m. NRC All Employees Meeting (Public Meeting), Marriott Bethesda North Hotel, 5701 Marinelli Road, Rockville, MD 20852.

Week of November 4, 2013—Tentative

There are no meetings scheduled for the week of November 4, 2013.

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The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0727, or by email at *Kimberly.Meyer-Chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *Darlene.Wright@nrc.gov.*

Dated: September 26, 2013.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2013–24051 Filed 9–27–13; 4:15 pm]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Privacy Act of 1974: System of Records

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice of amendment to system of records.

SUMMARY: OPM has amended an existing system of records subject to the Privacy Act of 1974. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of systems of records maintained by the agency.

DATES: The changes will be effective 30 days after the publication of this notice. Comments will be accepted until October 31, 2013.

ADDRESSES: Written comments must be sent to the U.S. Office of Personnel Management, Merit System Accountability and Compliance, ATTN: Robert D. Hendler (OPM\Govt-9), 1900 E Street NW., Room 6484, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Robert D. Hendler, (215) 861–3102, fax (215) 861–3100, or email to *robert.hendler@opm.gov.* Please include your complete mailing address with your request.

SUPPLEMENTARY INFORMATION: This notice serves to update and amend collection, analysis, and maintenance of OPM\Govt-9 (File on Position Classification Appeals, Job Grading Appeals, Retained Grade or Pay Appeals, Fair Labor Standard Act Claims and Complaints, Federal civilian employee Compensation and Leave claims, and Settlement of Accounts for Deceased Civilian Officers and Employees) to clarify that the system includes Federal civilian employee compensation and leave claims and the settlement of accounts for deceased Federal employees and to add a category of routine uses. Revisions include the following: (1) The system includes Federal civilian employee compensation and leave claims and the settlement of accounts for deceased Federal employees; (2) copies of decisions will be provided to the employing and/or former employing agency and other interested Federal agencies to the extent that information is relevant to the agency's administration of these programs; (3) the system manager contact has been updated to reflect the current organizational name; (4) as a result of a re-organization in May 2013, the system location has been updated to reflect current name; (5) the notification and access procedures have been updated to reflect standard OPM practice; and (6) the record source categories have been updated by removing transcript of hearings since hearings are not conducted as part of the adjudication/settlement process.

U.S. Office of Personnel Management.

Elaine Kaplan,

Acting Director.

OPM/GOVT–9
SYSTEM NAME:

File on Position Classification Appeals, Job Grading Appeals, Retained Grade or Pay Appeals, Fair Labor Standard Act (FLSA) Claims and Complaints, Federal Civilian Employee Compensation and Leave Claims, and Settlement of Accounts for Deceased Civilian Officers and Employees.

SYSTEM LOCATION:

These records are located at the Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, Merit System Accountability and Compliance, agency personnel offices (or other designated offices), and Federal records centers.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

a. A current or former Federal employee who has filed a position classification appeal or a job grading appeal with the U.S. Office of Personnel Management, Merit System Accountability and Compliance, or with his or her agency.

b. A current or former Federal employee who has filed a retained grade or pay appeal with the U.S. Office of Personnel Management, Merit System Accountability and Compliance.

c. A current or former Federal employee who has filed a claim or complaint under the Fair Labor Standards Act (FLSA) with the U.S. Office of Personnel Management, Merit System Accountability and Compliance.

d. A current or former Federal employees, or a beneficiary of such current or former employee, who has filed a compensation or leave claim with the U.S. Office of Personnel Management, Merit System Accountability and Compliance, or whose compensation or leave claim has been forwarded to that office by the employee's current or former employing agency.

e. A claimed beneficiary whose dispute concerning the settlement of the account for a deceased Federal civilian officer or employee has been forwarded by the officer or employee's current or former employing agency to the U.S. Office of Personnel Management for settlement.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records contains information or documents relating to the processing and adjudication of a position classification appeal, job grading appeal, retained grade or pay appeal, FLSA claim or complaint, or compensation or leave claim or dispute concerning the settlement of the account for a deceased Federal civilian officer or employee. The records may include information and documents regarding a personnel action of the agency involved and the decision or determination rendered by an agency regarding the classifying or grading of a position, whether an employee is to remain in a retained grade or pay category, the FLSA exemption status of an employee, or other FLSA claims or complaints, a decision or determination by an agency on the compensation or leave claim of an employee or former employee, or the agency position on the settlement of the account for a deceased Federal civilian officer or employee. This system may also include transcripts of agency hearings and statements from agency employees.

Note 1: This system notice also covers agency files created when: (a) An employee appeals a position classification or job grading decision to OPM or within the agency regardless of whether that agency appeal decision is further appealed to OPM, (b) an employee files a retained grade or pay appeal with OPM, (c) a claimant files an FLSA claim or complaint with OPM or to the agency regardless of whether the agency decision is the subject of an FLSA claim or complaint submitted to OPM, (d) a current or former Federal employee or their beneficiary(s) have filed a compensation or leave claim with OPM or with the agency regardless of whether the agency decision is the subject of a claim submitted to OPM, or (e) or a dispute concerning the settlement of the account for a deceased Federal civilian officer or employees has been forwarded to OPM by the deceased employee's former employing agency for resolution.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 5103, 5112, and 5115 for classification appeals, 5346 for job grading appeals, and 5366 for retained grade or pay appeals; 29 U.S.C. 204(f) for FLSA claims and complaints; 31 U.S.C. 3702 for compensation and leave claims; and U.S.C. 5581, 5582, and 5583 and 38 U.S.C. 5122 for disputes concerning the settlement of the account for a deceased Federal civilian officer or employee.

PURPOSE(S):

These records are primarily used to document the processing and adjudication of a position classification appeal, a job grading appeal, a retained grade or pay appeal, an FLSA claim or complaint, compensation and leave claims, or disputes concerning the settlement of the account for a deceased Federal civilian officer or employees. Internally, OPM may use these records to locate individuals for personnel research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

These records and information in these records may be used:

a. To disclose pertinent information to the appropriate Federal, State, or local government agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, when the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

b. To disclose information to the Office of Management and Budget at any stage in the legislative coordination and clearance process in connection with

private relief legislation as set forth in OMB Circular No. A–19.

c. To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.

d. To disclose information to any source from which additional information is requested in the course of adjudicating a position classification appeal, job grading appeal, retained grade or pay appeal, FLSA claim or complaint, compensation and leave claims, or disputes concerning the settlement of the account for a deceased Federal civilian officer or employees to the extent necessary to identify the individual, inform the source of the purpose(s) of the request, and identify the type of information requested.

e. To disclose information to a Federal agency, in response to its request, in connection with the hiring, retaining or assigning of an employee; issuing a security clearance; conducting a security or suitability investigation of an individual; classifying positions; grading jobs; making FLSA exemption status determinations; adjudicating FLSA claims and complaints; adjudicating compensation and leave claims; or resolving disputes concerning the settlement of the account for a deceased Federal civilian officer or employees, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

f. To disclose information to another Federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding.

g. To disclose information to the Department of Justice, or in a proceeding before a court, adjudicative body, or other administrative body before which the agency is authorized to appear, when:

1. The agency, or any component thereof; or

2. Any employee of the agency in his or her official capacity; or

3. Any employee of the agency in his or her individual capacity where the Department of Justice or the agency has agreed to represent the employee; or

4. The United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation, or has an interest in such litigation, and the use of such records by the Department of Justice or the agency is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case it has been determined that the disclosure is compatible with the purpose for which the records were collected.

h. By OPM or an agency in the production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained, or for related workforce studies. While published statistics and studies do not contain individual identifiers, in some instances the selection of elements of data included in the study may be structured in such a way as to make the data individually identifiable by inference.

i. By the National Archives and Records Administration in records management inspections and its role as Archivist.

j. To disclose, in response to a request for discovery or for appearance of a witness, information that is relevant to the subject matter involved in a pending judicial or administrative proceeding.

k. To disclose information to the Merit Systems Protection Board or the Office of the Special Counsel in connection with appeals, special studies of the civil service and other merit systems, review of Office rules and regulations, investigations of alleged or possible prohibited personnel practices, and such other functions; e.g., as promulgated in 5 U.S.C. 1205 and 1206, or as may be authorized by law.

l. To disclose information to the Equal Employment Opportunity Commission when requested in connection with investigations into alleged or possible discrimination practices in the Federal sector, examinations of Federal affirmative employment programs, determinations of compliance by Federal agencies with the Uniform Guidelines on Employee Selection Procedures, or other functions vested in the Commission, and to otherwise ensure compliance with the provisions of 5 U.S.C. 7201.

m. To disclose information to the Federal Labor Relations Authority or its General Counsel when requested in connection with investigations of allegations of unfair labor practices or matters before the Federal Service Impasses Panel.

n. To disclose information to contractors, grantees, or volunteers performing or working on a contract, service, grant, cooperative agreement, or job for the Federal Government.

o. To provide a copy of a decision issued in response to classification, job grading, and retained grade and pay appeals; FLSA claims and complaints, compensation and leave claims, or disputes concerning the settlement of the account for a deceased Federal civilian officer or employees to the employing and/or former employing agency and/or other Federal agencies to the extent that information from a decision is relevant and necessary to the agency's administration of these programs.

POLICIES AND PRACTICES FOR STORAGE, RETRIEVAL, SAFEGUARDS, RETAINING AND DISPOSAL OF RECORDS IN THE SYSTEM:

STORAGE:

These records are maintained in file folders and binders and on index cards, magnetic tape, disks, and microfiche.

RETRIEVABILITY:

These records are retrieved by the subject's name, and the name of the employing agency of the individual on whom the record is maintained.

SAFEGUARDS:

These records are located in lockable metal filing cabinets or automated media in a secured room, with access limited to those persons whose official duties require and such access.

RETENTION AND DISPOSAL:

Records related to position classification appeal, job grading appeal, retained grade or pay appeal files, FLSA claims or complaints, compensation and leave claims, or disputes concerning the settlement of the account for a deceased Federal civilian officer or employees are maintained for 7 years after closing action on the case. Records are destroyed by shredding, burning, or erasing as appropriate.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Associate Director, Merit System Accountability and Compliance, U.S. Office of Personnel Management, 1900 E Street NW., Room 6484, Washington, DC 20415.

NOTIFICATION AND RECORD ACCESS PROCEDURE:

Individuals wishing to determine whether this system of records contains information about them may do so by writing to the U.S. Office of Personnel Management, FOIA/PA Requester Service Center, 1900 E Street NW., Room 5415, Washington, DC 20415–7900 or by emailing *foia@opm.gov.*

Individuals must furnish the following information for their records to be located:

1. Full name.
2. Date and place of birth.
3. Social Security Number.
4. Signature.
5. Available information regarding the type of information requested.
6. The reason why the individual believes this system contains information about him/her.

7. Agency in which employed when the appeal, FLSA claim or complaint, compensation and leave claim, or dispute concerning the settlement of the account for a deceased Federal civilian officer or employee was filed and the approximate date of the closing of the case.

8. Kind of action (e.g., position classification appeal, job grading appeal, retained grade or pay appeal, FLSA claim, complaint, compensation and leave claim, or dispute concerning the settlement of the account for a deceased Federal civilian officer or employee).

9. The address to which the information should be sent.

Individuals requesting access must also comply with OPM's Privacy Act regulations regarding verification of identity and access to records (5 CFR 297).

CONTESTING RECORD PROCEDURE:

Individuals wishing to request amendment of records about them should write to the Office of Personnel Management, FOIA/PA Requester Service Center, 1900 E Street NW., Room 5415, Washington, DC 20415–7900. ATTN: Merit System Accountability and Compliance.

Individuals must furnish the following information in writing for their records to be located:

1. Full name.
2. Date and place of birth.
3. Social Security Number.
4. City, state, and zip code of their Federal Agency.
5. Signature.
6. Precise identification of the information to be amended.
7. Agency in which employed when the appeal or FLSA claim or complaint was filed and the approximate date of the closing of the case.
8. Kind of action (e.g., position classification appeal, job grading appeal, retained grade or pay appeal, FLSA claim or complaint, compensation and leave claim and/or dispute concerning the settlement of the account for a deceased Federal civilian officer or employee).

Individuals requesting amendment must also follow OPM's Privacy Act regulations regarding verification of identity and amendment to records (5 CFR 297).

RECORD SOURCE CATEGORIES:

a. Individual to whom the record pertains.

b. Agency and/or OPM records relating to the action.

c. Statements from employees or testimony of witnesses.

[FR Doc. 2013–23839 Filed 9–30–13; 8:45 am]

BILLING CODE 6325–58–P

POSTAL REGULATORY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, October 9, 2013, at 11 a.m.

PLACE: Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

STATUS: Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov*. A period for public comment will be offered following consideration of the last numbered item in the open session.

MATTERS TO BE CONSIDERED: The agenda for the Commission's October 9, 2013 meeting includes the items identified below.

PORTIONS OPEN TO THE PUBLIC:

1. Report from the Office of Public Affairs and Government Relations on legislative activities and the handling of rate and service inquiries from the public.

2. Report from the Office of General Counsel on the status of Commission dockets.

3. Report from the Office of Accountability and Compliance.

4. Report from the Office of the Secretary and Administration.

PORTION CLOSED TO THE PUBLIC:

5. Discussion of pending litigation.

CONTACT PERSON FOR MORE INFORMATION: Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, at 202–789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at 202–789–6800 or *shoshana.grove@prc.gov* (for inquiries related to meeting location, changes in date or time of the meeting, access for handicapped or disabled persons, the audiocast, or similar matters). The Commission's Web site may also provide information on changes in the date or time of the meeting.

By direction of the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–24102 Filed 9–27–13; 4:15 pm]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rules 201 and 200(g) of Regulation SHO

SEC File No. 270–606, OMB Control No. 3235–0670

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 201 (17 CFR 242.201) and Rule 200(g) (17 CFR 242.200(g)) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 201 is a short sale-related circuit breaker rule that, if triggered, imposes a restriction on the prices at which securities may be sold short. Rule 200(g) provides that a broker-dealer may mark certain qualifying sell orders ''short exempt.'' The information collected under Rule 201's written policies and procedure requirement applicable to trading centers, the written policies and procedures requirement of the broker-dealer provision of Rule 201(c), the written policies and procedures requirement of the riskless principal provision of Rule 201(d)(6), and the ''short exempt'' marking requirement of Rule 200(g) enable the Commission and SROs to examine and monitor for compliance with the requirements of Rule 201 and Rule 200(g).

In addition, the information collected under Rule 201's written policies and procedure requirement applicable to trading centers help ensure that trading centers do not execute or display any impermissibly priced short sale orders, unless an order is marked ''short exempt,'' in accordance with the Rule's requirements. Similarly, the information collected under the written policies and procedures requirement of the broker-dealer provision of Rule 201(c) and the riskless principal provision of Rule 201(d)(6) help to ensure that broker-dealers comply with the requirements of these provisions. The information collected pursuant to the new ''short exempt'' marking requirement of Rule 200(g) also provide an indication to a

trading center when it must execute or display a short sale order without regard to whether the short sale order is at a price that is less than or equal to the current national best bid.

It is estimated that SRO and non-SRO respondents registered with the Commission and subject to the collection of information requirements of Rules 201 and 200(g) incur an aggregate annual burden of 2,029,276 hours to comply with the Rules and an aggregate annual external cost of $65,928,700.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: September 26, 2013.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2013–23872 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30723; File No. 812–14188]

U.S. Global Investors, Inc., et al.; Notice of Application

September 25, 2013.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

SUMMARY OF APPLICATION: Applicants request an order that would permit (a) series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

APPLICANTS: U.S. Global Investors ETF Trust (''Trust''), U.S. Global Investors, Inc. (''Initial Adviser''), and U.S. Global Indices, LLC (an Affiliated Index Provider (defined below)).

FILING DATES: The application was filed on July 30, 2013 and amended on September 24, 2013.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 21, 2013, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants, c/o Frank E. Holmes, U.S. Global Investors, Inc., 7900 Callaghan Road, San Antonio, TX 78229.

FOR FURTHER INFORMATION CONTACT: Mark N. Zaruba, Senior Counsel at (202) 551–6878, or Dalia Osman Blass, Assistant Director, at (202) 551–6821 (Division of Investment Management, Exemptive Applications Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is a Delaware statutory trust that will be registered under the Act as an open-end management investment company with multiple series.

2. The Initial Adviser is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'') and will be the investment adviser to the Funds. Any other Adviser (defined below) will also be registered as an investment adviser under the Advisers Act. The Adviser may enter into sub-advisory agreements with one or more investment advisers to act as sub-advisers to particular Funds (each, a ''Sub-Adviser''). Any Sub-Adviser will either be registered under the Advisers Act or will not be required to register thereunder.

3. The Trust will enter into a distribution agreement with one or more distributors (each, a ''Distributor''). Each Distributor will be a broker-dealer (''Broker'') registered under the Securities Exchange Act of 1934 (the ''Exchange Act'') and will act as distributor and principal underwriter of one or more of the Funds. The Distributor of any Fund may be an affiliated person, as defined in section 2(a)(3) of the Act (''Affiliated Person''), or an affiliated person of an Affiliated Person (''Second-Tier Affiliate''), of that Fund's Adviser and/or Sub-Advisers. No Distributor will be affiliated with any Exchange (defined below).

4. Applicants request that the order apply to the initial series of the Trust described in the application (''Initial Fund''), as well as any additional series of the Trust and other open-end management investment companies, or series thereof, that may be created in the future (''Future Funds''), each of which will operate as an exchange-traded fund (''ETF'') and will track a specified index comprised of domestic or foreign equity and/or fixed income securities (each, an ''Underlying Index''). Any Future Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each, an ''Adviser'') and

(b) comply with the terms and conditions of the application. The Initial Fund and Future Funds, together, are the ''Funds.'' [1]

5. Each Fund will hold certain securities (''Portfolio Securities'') selected to correspond generally to the performance of its Underlying Index. The Underlying Indexes will be comprised solely of equity and/or fixed income securities issued by one or more of the following categories of issuers: (i) Domestic issuers and (ii) non-domestic issuers meeting the requirements for trading in U.S. markets (''Foreign Funds'').

6. Applicants represent that each Fund will invest at least 80% of its assets (excluding securities lending collateral) in the component securities of its respective Underlying Index (''Component Securities'') and TBA Transactions,[2] and in the case of Foreign Funds, Component Securities and Depositary Receipts [3] representing Component Securities. Each Fund may also invest up to 20% of its assets in certain index futures, options, options on index futures, swap contracts or other derivatives, as related to its respective Underlying Index and its Component Securities, cash and cash equivalents, other investment companies, as well as in securities and other instruments not included in its Underlying Index but which the Adviser believes will help the Fund track its Underlying Index. A Fund may also engage in short sales in accordance with its investment objective.

7. The Trust may issue Funds that seek to track Underlying Indexes constructed using 130/30 investment strategies (''130/30 Funds'') or other long/short investment strategies (''Long/Short Funds''). Each Long/Short Fund will establish (i) exposures equal to approximately 100% of the long positions specified by the Long/Short Index [4] and (ii) exposures equal to approximately 100% of the short positions specified by the Long/Short Index. Each 130/30 Fund will include strategies that: (i) Establish long positions in securities so that total long exposure represents approximately 130% of a Fund's net assets; and (ii) simultaneously establish short positions in other securities so that total short exposure represents approximately 30% of such Fund's net assets. Each Business Day, for each Long/Short Fund and 130/30 Fund, the Adviser will provide full portfolio transparency on the Fund's publicly available Web site (''Web site'') by making available the Fund's Portfolio Holdings (defined below) before the commencement of trading of Shares on the Listing Exchange (defined below). [5] The information provided on the Web site will be formatted to be reader-friendly.

8. A Fund will utilize either a replication or representative sampling strategy to track its Underlying Index. A Fund using a replication strategy will invest in the Component Securities of its Underlying Index in the same approximate proportions as in such Underlying Index. A Fund using a representative sampling strategy will hold some, but not necessarily all of the Component Securities of its Underlying Index. Applicants state that a Fund using a representative sampling strategy will not be expected to track the performance of its Underlying Index with the same degree of accuracy as would an investment vehicle that invested in every Component Security of the Underlying Index with the same weighting as the Underlying Index. Applicants expect that each Fund will have an annual tracking error relative to the performance of its Underlying Index of less than 5%.

9. Each Fund will be entitled to use its Underlying Index pursuant to either a licensing agreement with the entity that compiles, creates, sponsors or maintains the Underlying Index (each, an ''Index Provider'') or a sub-licensing arrangement with the applicable Adviser, which will have a licensing agreement with such Index Provider.[6] A ''Self-Indexing Fund'' is a Fund for which an Affiliated Person, or a Second-Tier Affiliate, of the Trust or a Fund, of the Adviser, of any Sub-Adviser to or promoter of a Fund, or of the Distributor (each, an ''Affiliated Index Provider'') [7] will serve as the Index Provider. In the case of Self-Indexing Funds, an Affiliated Index Provider will create a proprietary, rules-based methodology to create Underlying Indexes (each an ''Affiliated Index'').[8] Except with respect to the Self-Indexing Funds, no Index Provider is or will be an Affiliated Person, or a Second-Tier Affiliate, of the Trust or a Fund, of the Adviser, of any Sub-Adviser to or promoter of a Fund, or of the Distributor.

10. Applicants recognize that Self-Indexing Funds could raise concerns regarding the ability of the Affiliated Index Provider to manipulate the Underlying Index to the benefit or detriment of the Self-Indexing Fund. Applicants further recognize the potential for conflicts that may arise with respect to the personal trading activity of personnel of the Affiliated Index Provider who have knowledge of changes to an Underlying Index prior to the time that information is publicly disseminated. Prior orders granted to self-indexing ETFs (''Prior Self-Indexing Orders'') addressed these concerns by creating a framework that required: (i) Transparency of the Underlying Indexes; (ii) the adoption of policies and procedures not otherwise required by

[1] All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the order. A Fund of Funds (as defined below) may rely on the order only to invest in Funds and not in any other registered investment company.

[2] A ''to-be-announced transaction'' or ''TBA Transaction'' is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to settlement date.

[3] Depositary receipts representing foreign securities (''Depositary Receipts'') include American Depositary Receipts and Global Depositary Receipts. The Funds may invest in Depositary Receipts representing foreign securities in which they seek to invest. Depositary Receipts are typically issued by a financial institution (a ''depositary bank'') and evidence ownership interests in a security or a pool of securities that have been deposited with the depositary bank. A Fund will not invest in any Depositary Receipts that the Adviser or any Sub-Adviser deems to be illiquid or for which pricing information is not readily available. No affiliated person of a Fund, the Adviser or any Sub-Adviser will serve as the depositary bank for any Depositary Receipts held by a Fund.

[4] Underlying Indexes that include both long and short positions in securities are referred to as ''Long/Short Indexes.''

[5] Under accounting procedures followed by each Fund, 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.

[6] The licenses for the Self-Indexing Funds will specifically state that the Affiliated Index Provider (or in case of a sub-licensing agreement, the Adviser) must provide the use of the Underlying Indexes and related intellectual property at no cost to the Trust and the Self-Indexing Funds.

[7] Currently U.S. Global Indices, LLC is the only entity that will serve as Affiliated Index Provider. Any future entity that acts as Affiliated Index Provider will comply with the terms and conditions of the application.

[8] The Affiliated Indexes may be made available to registered investment companies, as well as separately managed accounts of institutional investors and privately offered funds that are not deemed to be ''investment companies'' in reliance on section 3(c)(1) or 3(c)(7) of the Act for which the Adviser acts as adviser or subadviser (''Affiliated Accounts'') as well as other such registered investment companies, separately managed accounts and privately offered funds for which it does not act either as adviser or subadviser (''Unaffiliated Accounts''). The Affiliated Accounts and the Unaffiliated Accounts, like the Funds, would seek to track the performance of one or more Underlying Index(es) by investing in the constituents of such Underlying Indexes or a representative sample of such constituents of the Underlying Index. Consistent with the relief requested from section 17(a), the Affiliated Accounts will not engage in Creation Unit transactions with a Fund.

the Act designed to mitigate such conflicts of interest; (iii) limitations on the ability to change the rules for index compilation and the component securities of the index; (iv) that the index provider enter into an agreement with an unaffiliated third party to act as ''Calculation Agent''; and (v) certain limitations designed to separate employees of the index provider, adviser and Calculation Agent (clauses (ii) through (v) are hereinafter referred to as ''Policies and Procedures'').[9]

11. Instead of adopting the same or similar Policies and Procedures, Applicants propose that each day that a Fund, the NYSE and the national securities exchange (as defined in section 2(a)(26) of the Act) (an ''Exchange'') on which the Fund's Shares are primarily listed (''Listing Exchange'') are open for business, including any day that a Fund is required to be open under section 22(e) of the Act (a ''Business Day''), each Self-Indexing Fund will post on its Web site, before commencement of trading of Shares on the Listing Exchange, the identities and quantities of the portfolio securities, assets, and other positions held by the Fund that will form the basis for the Fund's calculation of its NAV at the end of the Business Day (''Portfolio Holdings''). Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will provide an effective alternative mechanism for addressing any such potential conflicts of interest.

Applicants represent that each Self-Indexing Fund's Portfolio Holdings will be as transparent as the portfolio holdings of existing actively managed ETFs. Applicants observe that the framework set forth in the Prior Self-Indexing Orders was established before the Commission began issuing exemptive relief to allow the offering of actively-managed ETFs.[10] Unlike passively-managed ETFs, actively-managed ETFs do not seek to replicate the performance of a specified index but rather seek to achieve their investment objectives by using an ''active'' management strategy. Applicants contend that the structure of actively managed ETFs presents potential conflicts of interest that are the same as those presented by Self-Indexing Funds because the portfolio managers of an actively managed ETF by definition have advance knowledge of pending portfolio changes. However, rather than requiring Policies and Procedures similar to those required under the Prior Self-Indexing Orders, Applicants believe that actively managed ETFs address these potential conflicts of interest appropriately through full portfolio transparency, as the conditions to their relevant exemptive relief require.

13. In addition, Applicants do not believe the potential for conflicts of interest raised by the Adviser's use of the Underlying Indexes in connection with the management of the Self Indexing Funds and the Affiliated Accounts will be substantially different from the potential conflicts presented by an adviser managing two or more registered funds. Both the Act and the Advisers Act contain various protections to address conflicts of interest where an adviser is managing two or more registered funds and these protections will also help address these conflicts with respect to the Self-Indexing Funds.[11]

14. Each Adviser and any Sub-Adviser has adopted or will adopt, pursuant to Rule 206(4)–7 under the Advisers Act, written policies and procedures designed to prevent violations of the Advisers Act and the rules thereunder. These include policies and procedures designed to minimize potential conflicts of interest among the Self-Indexing Funds and the Affiliated Accounts, such as cross trading policies, as well as those designed to ensure the equitable allocation of portfolio transactions and brokerage commissions. In addition, the Adviser has adopted policies and procedures as required under section 204A of the Advisers Act, which are reasonably designed in light of the nature of its business to prevent the misuse, in violation of the Advisers Act or the Exchange Act or the rules thereunder, of material non-public information by the Adviser or an associated person (''Inside Information Policy''). Any Sub-Adviser will be required to adopt and maintain a similar Inside Information Policy. In accordance with the Code of Ethics[12] and Inside Information Policy of the Adviser and Sub-Advisers, personnel of those entities with knowledge about the composition of the Portfolio Deposit[13] will be prohibited from disclosing such information to any other person, except as authorized in the course of their employment, until such information is made public. In addition, an Index Provider will not provide any information relating to changes to an Underlying Index's methodology for the inclusion of component securities, the inclusion or exclusion of specific component securities, or methodology for the calculation or the return of component securities, in advance of a public announcement of such changes by the Index Provider. The Adviser will also include under Item 10.C. of Part 2 of its Form ADV a discussion of its relationship to any Affiliated Index Provider and any material conflicts of interest resulting therefrom, regardless of whether the Affiliated Index Provider is a type of affiliate specified in Item 10.

15. To the extent the Self-Indexing Funds transact with an Affiliated Person of the Adviser or Sub-Adviser, such transactions will comply with the Act, the rules thereunder and the terms and conditions of the requested order. In this regard, each Self-Indexing Fund's board of directors or trustees (''Board'') will periodically review the Self-Indexing Fund's use of an Affiliated Index Provider. Subject to the approval of the Self-Indexing Fund's Board, the Adviser, Affiliated Persons of the Adviser (''Adviser Affiliates'') and Affiliated Persons of any Sub-Adviser (''Sub-Adviser Affiliates'') may be authorized to provide custody, fund accounting and administration and transfer agency services to the Self-Indexing Funds. Any services provided by the Adviser, Adviser Affiliates, Sub-Adviser and Sub-Adviser Affiliates will be performed in accordance with the provisions of the Act, the rules under the Act and any relevant guidelines from the staff of the Commission.

16. In light of the foregoing, Applicants believe it is appropriate to

[9] *See, e.g.,* In the Matter of WisdomTree Investments Inc., et al., Investment Company Act Release Nos. 27324 (May 18, 2006) (notice) and 27391 (June 12, 2006) (order); In the Matter of IndexIQ ETF Trust, et al., Investment Company Act Release Nos. 28638 (Feb. 27, 2009) (notice) and 28653 (March 20, 2009) (order); and Van Eck Associates Corporation, et al., et al., Investment Company Act Release Nos. 29455 (Oct. 1, 2010) (notice) and 29490 (Oct. 26, 2010) (order).

[10] *See, e.g.,* In the Matter of Huntington Asset Advisors, Inc., *et al.,* Investment Company Act Release Nos. 30032 (April 10, 2012) (notice) and 30061 (May 8, 2012) (order); In the Matter of Russell Investment Management Co., et al., Investment Company Act Release Nos. 29655 (April 20, 2011) (notice) and 29671 (May 16, 2011) (order); In the Matter of Eaton Vance Management, *et al.,* Investment Company Act Release Nos. 29591 (March 11, 2011) (notice) and 29620 (March 30, 2011) (order) and; In the Matter of iShares Trust, *et al.,* Investment Company Act Release Nos. 29543 (Dec. 27, 2010) (notice) and 29571 (Jan. 24, 2011) (order).

[11] *See, e.g.,* Rule 17j–1 under the Act and Section 204A under the Advisers Act and Rules 204A–1 and 206(4)–7 under the Advisers Act.

[12] The Adviser has also adopted or will adopt a code of ethics pursuant to Rule 17j–1 under the Act and Rule 204A–1 under the Advisers Act, which contains provisions reasonably necessary to prevent Access Persons (as defined in Rule 17j–1) from engaging in any conduct prohibited in Rule 17j–1 (''Code of Ethics'').

[13] The instruments and cash that the purchaser is required to deliver in exchange for the Creation Units it is purchasing is referred to as the ''Portfolio Deposit.''

allow the Self-Indexing Funds to be fully transparent in lieu of Policies and Procedures from the Prior Self-Indexing Orders discussed above.

17. The Shares of each Fund will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'').[14] On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, unless the Fund is Rebalancing (as defined below). In addition, the Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions)[15] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots;[16] (c) TBA Transactions, short positions, derivatives and other positions that cannot be transferred in kind[17] will be excluded from the Deposit Instruments and the Redemption Instruments;[18] (d) to the extent the Fund determines, on a given Business Day, to use a representative sampling of the Fund's portfolio;[19] or (e) for temporary periods, to effect changes in the Fund's portfolio as a result of the rebalancing of its Underlying Index (any such change, a ''Rebalancing''). If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Deposit Instruments or Redemption Instruments exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the ''Cash Amount'').

18. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount; (b) if, on a given Business Day, the Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, the Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash;[20] (d) if, on a given Business Day, the Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC or DTC (defined below); or (ii) in the case of Foreign Funds holding non-U.S. investments, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if the Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Foreign Fund holding non-U.S. investments would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[21]

19. Creation Units will consist of specified large aggregations of Shares, e.g., at least 25,000 Shares, and it is expected that the initial price of a Creation Unit will range from $750,000 to $10 million. All orders to purchase Creation Units must be placed with the Distributor by or through an ''Authorized Participant'' which is either (1) a ''Participating Party,'' i.e., a broker-dealer or other participant in the Continuous Net Settlement System of the NSCC, a clearing agency registered with the Commission, or (2) a participant in The Depository Trust Company (''DTC'') (''DTC Participant''), which, in either case, has signed a participant agreement with the Distributor. The Distributor will be responsible for transmitting the orders to the Funds and will furnish to those placing such orders confirmation that the orders have been accepted, but applicants state that the Distributor may reject any order which is not submitted in proper form.

20. Each Business Day, before the open of trading on the Listing Exchange, each Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Deposit Instruments and the Redemption Instruments, as well as the estimated Cash Amount (if any), for that day. The list of Deposit Instruments and Redemption Instruments will apply until a new list is announced on the following Business Day, and there will be no intra-day changes to the list except to correct errors in the published list. Each Listing Exchange will disseminate, every 15 seconds during regular Exchange trading hours, through the facilities of the Consolidated Tape Association, an amount for each Fund stated on a per individual Share basis representing the sum of (i) the estimated Cash Amount and (ii) the current value of the Deposit Instruments.

[14] The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 (''Securities Act''). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Funds will comply with the conditions of rule 144A.

[15] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's NAV for the Business Day.

[16] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[17] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[18] Because these instruments will be excluded from the Deposit Instruments and the Redemption Instruments, their value will be reflected in the determination of the Cash Amount (as defined below).

[19] A Fund may only use sampling for this purpose if the sample: (i) Is designed to generate performance that is highly correlated to the performance of the Fund's portfolio; (ii) consists entirely of instruments that are already included in the Fund's portfolio; and (iii) is the same for all Authorized Participants on a given Business Day.

[20] In determining whether a particular Fund will sell or redeem Creation Units entirely on a cash or in-kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the Fund and its investors. For instance, in bond transactions, the Adviser may be able to obtain better execution than Share purchasers because of the Adviser's size, experience and potentially stronger relationships in the fixed income markets. Purchases of Creation Units either on an all cash basis or in-kind are expected to be neutral to the Funds from a tax perspective. In contrast, cash redemptions typically require selling portfolio holdings, which may result in adverse tax consequences for the remaining Fund shareholders that would not occur with an in-kind redemption. As a result, tax consideration may warrant in-kind redemptions.

[21] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

21. Transaction expenses, including operational processing and brokerage costs, will be incurred by a Fund when investors purchase or redeem Creation Units in-kind and such costs have the potential to dilute the interests of the Fund's existing shareholders. Each Fund will impose purchase or redemption transaction fees (''Transaction Fees'') in connection with effecting such purchases or redemptions of Creation Units. In all cases, such Transaction Fees will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities. Since the Transaction Fees are intended to defray the transaction expenses as well as to prevent possible shareholder dilution resulting from the purchase or redemption of Creation Units, the Transaction Fees will be borne only by such purchasers or redeemers.[22] The Distributor will be responsible for delivering the Fund's prospectus to those persons acquiring Shares in Creation Units and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the applicable Fund to implement the delivery of its Shares.

22. Shares of each Fund will be listed and traded individually on an Exchange. It is expected that one or more member firms of an Exchange will be designated to act as a market maker (each, a ''Market Maker'') and maintain a market for Shares trading on the Exchange. Prices of Shares trading on an Exchange will be based on the current bid/offer market. Transactions involving the sale of Shares on an Exchange will be subject to customary brokerage commissions and charges.

23. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs. Market Makers, acting in their roles to provide a fair and orderly secondary market for the Shares, may from time to time find it appropriate to purchase or redeem Creation Units. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.[23] The price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their NAV.

24. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from the Fund, or tender such Shares for redemption to the Fund, in Creation Units only. To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed through an Authorized Participant. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Units.

25. Neither the Trust nor any Fund will be advertised or marketed or otherwise held out as a traditional open-end investment company or a ''mutual fund.'' Instead, each such Fund will be marketed as an ''ETF.'' All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares traded on an Exchange, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and will disclose that the owners of Shares may acquire those Shares from the Fund or tender such Shares for redemption to the Fund in Creation Units only. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit the Funds to register as open-end management investment companies and issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units and redeem Creation Units from each Fund. Applicants further state that because Creation Units may always be purchased and redeemed at NAV, the price of Shares on the secondary market should not vary materially from NAV.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through an underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act.

[22] Where a Fund permits an in-kind purchaser to substitute cash-in-lieu of depositing one or more of the requisite Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Instruments.

[23] Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or the DTC Participants.

Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve a Fund as a party and will not result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their NAV.

Section 22(e)

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants state that settlement of redemptions for Foreign Funds will be contingent not only on the settlement cycle of the United States market, but also on current delivery cycles in local markets for underlying foreign Portfolio Securities held by a Foreign Fund. Applicants state that the delivery cycles currently practicable for transferring Redemption Instruments to redeeming investors, coupled with local market holiday schedules, may require a delivery process of up to fifteen (15) calendar days.[24] Accordingly, with respect to Foreign Funds only, Applicants hereby request relief under section 6(c) from the requirement imposed by section 22(e) to allow Foreign Funds to pay redemption proceeds within fifteen (15) calendar days following the tender of Creation Units for redemption.[25]

8. Applicants believe that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants propose that allowing redemption payments for Creation Units of a Foreign Fund to be made within fifteen calendar days would not be inconsistent with the spirit and intent of section 22(e). Applicants suggest that a redemption payment occurring within fifteen calendar days following a redemption request would adequately afford investor protection.

9. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect creations and redemptions of Creation Units in-kind.

Section 12(d)(1)

10. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from knowingly selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

11. Applicants request an exemption to permit registered management investment companies and unit investment trusts (''UITs'') that are not advised or sponsored by the Adviser, and not part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act as the Funds (such management investment companies are referred to as ''Investing Management Companies,'' such UITs are referred to as ''Investing Trusts,'' and Investing Management Companies and Investing Trusts are collectively referred to as ''Funds of Funds''), to acquire Shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any Broker registered Exchange Act, to sell Shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act.

12. Each Investing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (the ''Fund of Funds Adviser'') and may be sub-advised by investment advisers within the meaning of section 2(a)(20)(B) of the Act (each a ''Fund of Funds Sub-Adviser''). Any investment adviser to an Investing Management Company will be registered under the Advisers Act. Each Investing Trust will be sponsored by a sponsor (''Sponsor'').

13. Applicants submit that the proposed conditions to the requested relief adequately address the concerns underlying the limits in sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees and overly complex fund structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

14. Applicants believe that neither a Fund of Funds nor a Fund of Funds Affiliate would be able to exert undue influence over a Fund.[26] To limit the control that a Fund of Funds may have over a Fund, applicants propose a condition prohibiting a Fund of Funds Adviser or Sponsor, any person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by a Fund of Funds Adviser or Sponsor, or any

[24] Certain countries in which a Fund may invest have historically had settlement periods of up to fifteen (15) calendar days.

[25] Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations Applicants may otherwise have under rule 15c6–1 under the Exchange Act requiring that most securities transactions be settled within three business days of the trade date.

[26] A ''Fund of Funds Affiliate'' is a Fund of Funds Adviser, Fund of Funds Sub-Adviser, Sponsor, promoter, and principal underwriter of a Fund of Funds, and any person controlling, controlled by, or under common control with any of those entities. A ''Fund Affiliate'' is an investment adviser, promoter, or principal underwriter of a Fund and any person controlling, controlled by or under common control with any of these entities.

person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor (''Fund of Funds Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Fund of Funds Sub-Adviser, any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Fund of Funds Sub-Adviser or any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser (''Fund of Funds Sub-Advisory Group'').

15. Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-Adviser, employee or Sponsor of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Fund of Funds Adviser or Fund of Funds Sub-Adviser, employee or Sponsor is an affiliated person (except that any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

16. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of any Investing Management Company, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''disinterested directors or trustees''), will find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Fund in which the Investing Management Company may invest. In addition, under condition B.5., a Fund of Funds Adviser, or a Fund of Funds' trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–1 under the Act) received from a Fund by the Fund of Funds Adviser, trustee or Sponsor or an affiliated person of the Fund of Funds Adviser, trustee or Sponsor, other than any advisory fees paid to the Fund of Funds Adviser, trustee or Sponsor or its affiliated person by a Fund, in connection with the investment by the Fund of Funds in the Fund. Applicants state that any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.[27]

17. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes. To ensure a Fund of Funds is aware of the terms and conditions of the requested order, the Fund of Funds will enter into an agreement with the Fund (''FOF Participation Agreement''). The FOF Participation Agreement will include an acknowledgement from the Fund of Funds that it may rely on the order only to invest in the Funds and not in any other investment company.

18. Applicants also note that a Fund may choose to reject a direct purchase of Shares in Creation Units by a Fund of Funds. To the extent that a Fund of Funds purchases Shares in the secondary market, a Fund would still retain its ability to reject any initial investment by a Fund of Funds in excess of the limits of section 12(d)(1)(A) by declining to enter into a FOF Participation Agreement with the Fund of Funds.

Sections 17(a)(1) and (2) of the Act

19. Sections 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' of another person to include (a) any person directly or indirectly owning, controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to vote by the other person, and (c) any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act defines ''control'' as the power to exercise a controlling influence over the management or policies of a company, and provides that a control relationship will be presumed where one person owns more than 25% of a company's voting securities. The Funds may be deemed to be controlled by the Adviser or an entity controlling, controlled by or under common control with the Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by an Adviser (an ''Affiliated Fund''). Any investor, including Market Makers, owning 5% or holding in excess of 25% of the Trust or such Funds, may be deemed affiliated persons of the Trust or such Funds. In addition, an investor could own 5% or more, or in excess of 25% of the outstanding shares of one or more Affiliated Funds making that investor a Second-Tier Affiliate of the Funds.

20. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act pursuant to sections 6(c) and 17(b) of the Act to permit persons that are Affiliated Persons of the Funds, or Second-Tier Affiliates of the Funds, solely by virtue of one or more of the following: (a) Holding 5% or more, or in excess of 25%, of the outstanding Shares of one or more Funds; (b) an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds, to effectuate purchases and redemptions ''in-kind.''

21. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making ''in-kind'' purchases or ''in-kind'' redemptions of Shares of a Fund in Creation Units. Both the deposit procedures for ''in-kind'' purchases of Creation Units and the redemption procedures for ''in-kind'' redemptions of Creation Units will be effected in exactly the same manner for all purchases and redemptions, regardless of size or number. There will be no discrimination between purchasers or

[27] Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.

redeemers. Deposit Instruments and Redemption Instruments for each Fund will be valued in the identical manner as those Portfolio Securities currently held by such Fund and the valuation of the Deposit Instruments and Redemption Instruments will be made in an identical manner regardless of the identity of the purchaser or redeemer. Applicants do not believe that ''in-kind'' purchases and redemptions will result in abusive self-dealing or overreaching, but rather assert that such procedures will be implemented consistently with each Fund's objectives and with the general purposes of the Act. Applicants believe that ''in-kind'' purchases and redemptions will be made on terms reasonable to Applicants and any affiliated persons because they will be valued pursuant to verifiable objective standards. The method of valuing Portfolio Securities held by a Fund is identical to that used for calculating ''in-kind'' purchase or redemption values and therefore creates no opportunity for affiliated persons or Second-Tier Affiliates of Applicants to effect a transaction detrimental to the other holders of Shares of that Fund. Similarly, Applicants submit that, by using the same standards for valuing Portfolio Securities held by a Fund as are used for calculating ''in-kind'' redemptions or purchases, the Fund will ensure that its NAV will not be adversely affected by such securities transactions. Applicants also note that the ability to take deposits and make redemptions ''in-kind'' will help each Fund to track closely its Underlying Index and therefore aid in achieving the Fund's objectives.

22. Applicants also seek relief under sections 6(c) and 17(b) from section 17(a) to permit a Fund that is an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds to sell its Shares to and redeem its Shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[28] Applicants state that the terms of the transactions are fair and reasonable and do not involve overreaching. Applicants note that any consideration paid by a Fund of Funds for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund.[29] Applicants believe that any proposed transactions directly between the Funds and Funds of Funds will be consistent with the policies of each Fund of Funds. The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the investment restrictions of any such Fund of Funds and will be consistent with the investment policies set forth in the Fund of Funds' registration statement. Applicants also state that the proposed transactions are consistent with the general purposes of the Act and are appropriate in the public interest.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. ETF Relief

1. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based ETFs.

2. As long as a Fund operates in reliance on the requested order, Shares of such Fund will be listed on an Exchange.

3. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from the Fund and tender those Shares for redemption to a Fund in Creation Units only.

4. The Web site, which is and will be publicly accessible at no charge, will contain, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or the midpoint of the bid/ask spread at the time of the calculation of such NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

5. Each Self-Indexing Fund, Long/Short Fund and 130/30 Fund will post on the Web site on each Business Day, before commencement of trading of Shares on the Exchange, the Fund's Portfolio Holdings.

6. No Adviser or any Sub-Adviser, directly or indirectly, will cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for a Fund through a transaction in which the Fund could not engage directly.

B. Section 12(d)(1) Relief

1. The members of a Fund of Funds' Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of a Fund of Funds' Sub-Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Fund of Funds' Advisory Group or the Fund of Funds' Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund's Shares. This condition does not apply to the Fund of Funds' Sub-Advisory Group with respect to a Fund for which the Fund of Funds' Sub-Adviser or a person controlling, controlled by or under common control with the Fund of Funds' Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in a Fund to influence the terms of any services or transactions between the Fund of Funds or Fund of Funds Affiliate and the Fund or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Fund of Funds Adviser and Fund of Funds Sub-Adviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or a Fund of

[28] Although applicants believe that most Funds of Funds will purchase Shares in the secondary market and will not purchase Creation Units directly from a Fund, a Fund of Funds might seek to transact in Creation Units directly with a Fund that is an affiliated person of a Fund of Funds. To the extent that purchases and sales of Shares occur in the secondary market and not through principal transactions directly between a Fund of Funds and a Fund, relief from Section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to a Fund of Funds and redemptions of those Shares. Applicants are not seeking relief from Section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

[29] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of Shares of a Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to a Fund of Funds, may be prohibited by Section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

Funds Affiliate from a Fund or Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of a Fund exceeds the limits in section 12(d)(1)(A)(i) of the Act, the Board of the Fund, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of Section 2(a)(19) of the Act (''non-interested Board members''), will determine that any consideration paid by the Fund to the Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Fund of Funds Adviser, or trustee or Sponsor of an Investing Trust, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–l under the Act) received from a Fund by the Fund of Funds Adviser, or trustee or Sponsor of the Investing Trust, or an affiliated person of the Fund of Funds Adviser, or trustee or Sponsor of the Investing Trust, other than any advisory fees paid to the Fund of Funds Adviser, trustee or Sponsor of an Investing Trust, or its affiliated person by the Fund, in connection with the investment by the Fund of Funds in the Fund. Any Fund of Funds Sub-Adviser will waive fees otherwise payable to the Fund of Funds Sub-Adviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Fund of Funds Sub-Adviser, or an affiliated person of the Fund of Funds Sub-Adviser, other than any advisory fees paid to the Fund of Funds Sub-Adviser or its affiliated person by the Fund, in connection with the investment by the Investing Management Company in the Fund made at the direction of the Fund of Funds Sub-Adviser. In the event that the Fund of Funds Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any Affiliated Underwriting.

7. The Board of a Fund, including a majority of the non-interested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Fund. The Board will consider, among other things: (i) Whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Fund.

8. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limit in section 12(d)(1)(A), a Fund of Funds and the Trust will execute a FOF Participation Agreement stating without limitation that their respective boards of directors or trustees and their investment advisers, or trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Fund of the investment. At such time, the Fund of Funds will also transmit to the Fund a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be fully recorded in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a Fund of Funds as set forth in NASD Conduct Rule 2830.

12. No Fund will acquire securities of an investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent the Fund acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Fund to acquire securities of one or more investment companies for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23832 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30716; File No. 812–14183]

Forethought Variable Insurance Trust, et al.; Notice of Application

September 25, 2013.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements.

SUMMARY:

Summary of Application: Applicants request an order that would permit them to enter into and materially amend sub-advisory agreements with Wholly-Owned Sub-Advisers (as defined below) and non-affiliated sub-advisers without shareholder approval and would grant relief from certain disclosure requirements.

APPLICANTS: Forethought Variable Insurance Trust (the ''Trust'') and Forethought Investment Advisors, LLC (''FIA'').

DATES: *Filing Dates:* The application was filed on July 23, 2013 and amended on September 20, 2013.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 21, 2013, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants, 300 North Meridian St., Suite 1800, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT: Emerson S. Davis, Sr., Senior Counsel, at (202) 551–6868, or Daniele Marchesani, Branch Chief, at (202) 551–6821 (Division of Investment Management, Exemptive Applications Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is organized as a Delaware statutory trust and is registered under the Act as an open-end management investment company. The Trust may offer one or more series of shares (each, a ''Series'') with its own distinct investment objective, strategies, policies and restrictions. FIA is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). Each Series will have as its investment adviser, FIA, or another investment adviser controlling, controlled by or under common control with FIA or its successors (each, an ''Adviser'').[1] Any future Adviser will also be registered as an investment adviser under the Advisers Act.[2]

2. The Adviser will serve as the investment adviser to each Series pursuant to an investment advisory agreement with the Trust (''Investment Advisory Agreement''). The Investment Advisory Agreement will be approved by the board of trustees of the Trust (''Board''),[3] including a majority of the members of the Board who are not ''interested persons,'' as defined in section 2(a)(19) of the Act, of the Trust, of a Series or the Adviser (''Independent Trustees'') and by the shareholders of the relevant Series as required by sections 15(a) and 15(c) of the Act and rule 18f-2 thereunder. The terms of the Investment Advisory Agreement comply with section 15(a) of the Act.

3. Under the terms of the Investment Advisory Agreement, the Adviser, subject to the supervision of the Board, will provide continuous investment management of the assets of each Series. The Adviser will periodically review each Series' investment objective, policies and strategies, and based on the need of a Series may recommend changes to the investment objective, policies and strategies of the Series for consideration by the Board. For its services to each Series under the Investment Advisory Agreement, the Adviser will receive an advisory fee from that Series based on the average daily net assets of that Series. The Investment Advisory Agreement provides that the Adviser may, subject to the approval of the Board, including a majority of the Independent Trustees, and the shareholders of the applicable Series (if required), delegate portfolio management responsibilities of all or a portion of the assets of a Series to a Sub-Adviser.[4]

4. Applicants request an order to permit the Adviser, subject to the approval of the Board, including a majority of the Independent Trustees, to, without obtaining shareholder approval: (i) Select Sub-Advisers to manage all or a portion of the assets of a Series and enter into Sub-Advisory Agreements (as defined below) with the Sub-Advisers, and (ii) materially amend Sub-Advisory Agreements with the Sub-Advisers.[5] The requested relief will not extend to any sub-adviser, other than a Wholly-Owned Sub-Adviser, who is an affiliated person, as defined in section 2(a)(3) of the Act, of the Sub-Advised Series, of the Trust, or of the Adviser,

[1] For purposes of the requested order, ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] Applicants request that the relief apply to applicants, as well as to any future Series and any other existing or future registered open-end management investment company or series thereof that (a) is advised by an Adviser, (b) uses the manager of managers structure described in the application (''Manager of Managers Structure''), and (c) complies with the terms and conditions of the application (''Sub-Advised Series''). All registered open-end investment companies that currently intend to rely on the requested order are named as applicants. Any entity that relies on the requested order will do so only in accordance with the terms and conditions contained in the application.

[3] The term ''Board'' also includes the board of trustees or directors of a future Series.

[4] As used herein, a ''Sub-Adviser'' is (a) an indirect or direct ''wholly-owned subsidiary'' (as such term is defined in the Act) of the Adviser for that Series; (b) a sister company of the Adviser for that Series that is an indirect or direct ''wholly-owned subsidiary'' (as such term is defined in the Act) of the same entity that, indirectly or directly, wholly owns the Adviser (each of (a) and (b), a ''Wholly-Owned Sub-Adviser'' and collectively, the ''Wholly-Owned Sub-Advisers''), or (c) not an ''affiliated person'' (as such term is defined in section 2(a)(3) of the Act) of the applicable Series, the Trust, or the Adviser, except to the extent that an affiliation arises solely because the Sub-Adviser serves as a sub-adviser to a Series (each, a ''Non-Affiliated Sub-Adviser'').

[5] Shareholder approval will continue to be required for any other sub-adviser change (not otherwise permitted by rule or other action of the Commission or staff) and material amendments to an existing sub-advisory agreement with any sub-adviser other than a Non-Affiliated Sub-Adviser or a Wholly-Owned Sub-Adviser (all such changes referred to as ''Ineligible Sub-Adviser Changes'').

other than by reason of serving as a sub-adviser to one or more of the Sub-Advised Series (''Affiliated Sub-Adviser'').

5. Pursuant to the terms of the Investment Advisory Agreement, the Adviser will have overall responsibility for the management and investment of each Series' assets. These responsibilities include recommending the removal or replacement of Sub-Advisers, determining the portion of that Sub-Advised Series' assets to be managed by any given Sub-Adviser and reallocating those assets as necessary from time to time.

6. The Adviser will enter into sub-advisory agreements with various Sub-Advisers (''Sub-Advisory Agreements'') to provide investment management services to the Sub-Advised Series.[6] The terms of the Sub-Advisory Agreements will comply with the requirements of section 15(a) of the Act and will be approved by the Board, including a majority of the Independent Trustees, in accordance with sections 15(a) and 15(c) of the Act and rule 18f-2 thereunder. The specific day-to-day investment decisions for each applicable Series will be made by that Series' Sub-Adviser, which has discretionary authority to invest the assets or a portion of the assets of that Series subject to the general supervision of the Adviser and the Board. The Adviser will compensate each Sub-Adviser out of the advisory fees paid to the Adviser under the Investment Advisory Agreement; in the future, Sub-Advised Series may directly pay advisory fees to the Sub-Advisers.

7. Sub-Advised Series will inform shareholders of the hiring of a new Sub-Adviser pursuant to the following procedures (''Notice and Access Procedures''): (a) Within 90 days after a new Sub-Adviser is hired for any Sub-Advised Series, that Sub-Advised Series will send its shareholders either a Multi-Manager Notice or a Multi-Manager Notice and Multi-Manager Information Statement[7]; and (b) the Sub-Advised Series will make the Multi-Manager Information Statement available on the Web site identified in the Multi-Manager Notice no later than when the Multi-Manager Notice (or Multi-Manager Notice and Multi-Manager Information Statement) is first sent to shareholders, and will maintain it on that Web site for at least 90 days thereafter. In the circumstances described in the application, a proxy solicitation to approve the appointment of new Sub-Advisers provides no more meaningful information to shareholders than the proposed Multi-Manager Information Statement. Applicants state that each Board would comply with the requirements of sections 15(a) and 15(c) of the Act before entering into or amending a Sub-Advisory Agreement.

8. Applicants also request an order exempting the Sub-Advised Series from certain disclosure obligations that may require each Sub-Advised Series to disclose fees paid by the Adviser to each Sub-Adviser. Applicants seek relief to permit each Sub-Advised Series to disclose (as a dollar amount and a percentage of the Sub-Advised Series' net assets): (a) The aggregate fees paid to the Adviser and any Wholly-Owned Sub-Advisers; (b) the aggregate fees paid to Non-Affiliated Sub-Advisers; and (c) the fee paid to each Affiliated Sub-Adviser (collectively, the ''Aggregate Fee Disclosure'').

Applicants' Legal Analysis

1. Section 15(a) of the Act states, in part, that it is unlawful for any person to act as an investment adviser to a registered investment company ''except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company.'' Rule 18f-2 under the Act provides that each series or class of stock in a series investment company affected by a matter must approve that matter if the Act requires shareholder approval.

2. Form N–1A is the registration statement used by open-end investment companies. Item 19(a)(3) of Form N–1A requires a registered investment company to disclose in its statement of additional information the method of computing the ''advisory fee payable'' by the investment company, including the total dollar amounts that the investment company ''paid to the adviser (aggregated with amounts paid to affiliated advisers, if any), and any advisers who are not affiliated persons of the adviser, under the investment advisory contract for the last three fiscal years.''

3. Rule 20a-1 under the Act requires proxies solicited with respect to a registered investment company to comply with Schedule 14A under the Exchange Act. Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A, taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the ''rate of compensation of the investment adviser,'' the ''aggregate amount of the investment adviser's fee,'' a description of the ''terms of the contract to be acted upon,'' and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

4. Regulation S–X sets forth the requirements for financial statements required to be included as part of a registered investment company's registration statement and shareholder reports filed with the Commission. Sections 6–07(2)(a), (b), and (c) of Regulation S–X require a registered investment company to include in its financial statement information about the investment advisory fees.

5. Section 6(c) of the Act provides that the Commission by order upon application may conditionally or unconditionally exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or from any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that their requested relief meets this standard for the reasons discussed below.

6. Applicants assert that the shareholders expect the Adviser, subject to the review and approval of the Board, to select the Sub-Advisers that are suited to achieve the Series' investment objective. Applicants assert that, from the perspective of the shareholder, the role of the Sub-Adviser is substantially equivalent to the role of the individual portfolio managers employed by an investment adviser to a traditional investment company. Applicants

[6] If the name of any Sub-Advised Series contains the name of a Sub-Adviser, the name of the Adviser that serves as the primary adviser to the Sub-Advised Series, or a trademark or trade name that is owned by that Adviser, will precede the name of the Sub-Adviser.

[7] A ''Multi-Manager Notice'' will be modeled on a Notice of Internet Availability as defined in rule 14a-16 under the Securities Exchange Act of 1934 (''Exchange Act''), and specifically will, among other things: (a) Summarize the relevant information regarding the new Sub-Adviser; (b) inform shareholders that the Multi-Manager Information Statement is available on a Web site; (c) provide the Web site address; (d) state the time period during which the Multi-Manager Information Statement will remain available on that Web site; (e) provide instructions for accessing and printing the Multi-Manager Information Statement; and (f) instruct the shareholder that a paper or email copy of the Multi-Manager Information Statement may be obtained, without charge, by contacting the Sub-Advised Series.

A ''Multi-Manager Information Statement'' will meet the requirements of Regulation 14C, Schedule 14C and Item 22 of Schedule 14A under the Exchange Act for an information statement, except as modified by the order to permit Aggregate Fee Disclosure (as defined below). Multi-Manager Information Statements will be filed with the Commission via the EDGAR system.

believe that permitting the Adviser to perform the duties for which the shareholders of the Sub-Advised Series are paying the Adviser—the selection, supervision and evaluation of the Sub-Adviser—without incurring unnecessary delays or expenses is appropriate in the interest of the Series' shareholders and will allow the Series to operate more efficiently. Applicants state that the Investment Advisory Agreement will continue to be fully subject to section 15(a) of the Act and rule 18f-2 under the Act and approved by the Board, including a majority of the Independent Trustees, in the manner required by sections 15(a) and 15(c) of the Act. Applicants are not seeking an exemption with respect to the Investment Advisory Agreement.

7. Applicants assert that disclosure of the individual fees that the Adviser or Sub-Advised Series would pay to the Sub-Advisers would not serve any meaningful purpose. Applicants contend that the primary reasons for requiring disclosure of individual fees paid to Sub-Advisers are to inform shareholders of expenses to be charged by a particular Sub-Advised Series and to enable shareholders to compare the fees to those of other comparable investment companies. Applicants believe that the requested relief satisfies these objectives because the advisory fee paid to the Adviser, or the Aggregate Fee Disclosure, in the case of a Sub-Advised Series that directly compensates a Sub-Adviser, will be fully disclosed and, therefore, shareholders will know what the Sub-Advised Series' fees and expenses are and will be able to compare the advisory fees a Sub-Advised Series is charged to those of other investment companies. Applicants assert that the requested disclosure relief would benefit shareholders of the Sub-Advised Series because it would improve the Adviser's ability to negotiate the fees paid to Sub-Advisers. Applicants state that the Adviser may be able to negotiate rates that are below a Sub-Adviser's ''posted'' amounts if the Adviser is not required to disclose the Sub-Advisers' fees to the public. Applicants submit that the relief requested to use Aggregate Fee Disclosure will encourage Sub-Advisers to negotiate lower sub-advisory fees with the Adviser if the lower fees are not required to be made public.

8. For the reasons discussed above, applicants submit that the requested relief meets the standards for relief under section 6(c) of the Act. Applicants state that the operation of the Sub-Advised Series in the manner described in the application must be approved by shareholders of a Sub-Advised Series before that Sub-Advised Series may rely on the requested relief. In addition, applicants state that the proposed conditions to the requested relief are designed to address any potential conflicts of interest, including any posed by the use of Wholly-Owned Sub-Advisers, and provide that shareholders are informed when new Sub-Advisers are hired. Applicants assert that conditions 6, 7, 9, 10 and 11 are designed to provide the Board with sufficient independence and the resources and information it needs to monitor and address any conflicts of interest with affiliated persons of the Adviser, including Wholly-Owned Sub-Advisers. Applicants state that, accordingly, they believe the requested relief is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Sub-Advised Series may rely on the order requested in the application, the operation of the Sub-Advised Series in the manner described in the application, including the hiring of Wholly-Owned Sub-Advisers, will be approved by a majority of the Sub-Advised Series' outstanding voting securities (or if the Sub-Advised Series serves as a funding medium for any sub-account of a registered separate account, pursuant to voting instructions provided by the unitholders of the sub-account), as defined in the Act, or in the case of a Sub-Advised Series whose public shareholders (or variable contract owners through a registered separate account) purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder before offering the Sub-Advised Series' shares to the public (or the variable contract owners through a separate account).

2. The prospectus for each Sub-Advised Series will disclose the existence, substance, and effect of any order granted pursuant to the application. Each Sub-Advised Series will hold itself out to the public as employing the Manager of Managers Structure. Each prospectus will prominently disclose that the Adviser has the ultimate responsibility, subject to oversight by the Board, to oversee the Sub-Advisers and recommend their hiring, termination and replacement.

3. The Adviser will provide general management services to each Sub-Advised Series, including overall supervisory responsibility for the general management and investment of the Sub-Advised Series' assets, and, subject to review and approval by the Board, the Adviser will: (a) Set the Sub-Advised Series' overall investment strategies; (b) evaluate, select, and recommend Sub-Advisers to manage all or a portion of the Sub-Advised Series' assets; and (c) implement procedures reasonably designed to ensure that the Sub-Advisers comply with a Sub-Advised Series' investment objectives, policies and restrictions. Subject to review by the Board, the Adviser will (a) when appropriate, allocate and reallocate the Sub-Advised Series' assets among multiple Sub-Advisers; and (b) monitor and evaluate the performance of Sub-Advisers.

4. A Sub-Advised Series will not make any Ineligible Sub-Adviser Changes without the approval of the shareholders of the applicable Sub-Advised Series.

5. A Sub-Advised Series will inform shareholders (or, if the Sub-Advised Series serves as a funding medium for any sub-account of a registered separate account, the Adviser will inform the unitholders of the sub-account) of the hiring of a new Sub-Adviser within 90 days after the hiring of the new Sub-Adviser pursuant to the Notice and Access Procedures.

6. At all times, at least a majority of the Board will be Independent Trustees, and the selection and nomination of new or additional Independent Trustees will be placed within the discretion of the then-existing Independent Trustees.

7. Independent Legal Counsel, as defined in rule 0–1(a)(6) under the Act, will continue to be engaged to represent the Independent Trustees. The selection of such counsel will be within the discretion of the then-existing Independent Trustees.

8. The Adviser will provide the Board, no less frequently than quarterly, with information about the profitability of the Adviser on a per Sub-Advised Series basis. The information will reflect the impact on profitability of the hiring or termination of any sub-adviser during the applicable quarter.

9. Whenever a sub-adviser is hired or terminated, the Adviser will provide the Board with information showing the expected impact on the profitability of the Adviser.

10. Whenever a sub-adviser change is proposed for a Sub-Advised Series with an Affiliated Sub-Adviser or a Wholly-Owned Sub-Adviser, the Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the Trust's Board minutes, that such change is in the best interests

of the Sub-Advised Series and its shareholders and does not involve a conflict of interest from which the Adviser or the Affiliated Sub-Adviser or Wholly-Owned Sub-Adviser derives an inappropriate advantage.

11. No trustee or officer of the Trust or of a Sub-Advised Series or any partner, director, manager or officer of the Adviser will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person) any interest in a Sub-Adviser except for: (a) ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser; or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly traded company that is either a Sub-Adviser or an entity that controls, is controlled by, or is under common control with a Sub-Adviser.

12. Each Sub-Advised Series will disclose the Aggregate Fee Disclosure in its registration statement.

13. In the event the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

14. For Sub-Advised Series that pay fees to a Sub-Adviser directly from fund assets, any changes to a Sub-Advisory Agreement that would result in an increase in the total management and advisory fees payable by a Sub-Advised Series will be required to be approved by the shareholders of the Sub-Advised Series.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23831 Filed 9–30–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70501; SR–NSCC–2013–02]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To Institute Supplemental Liquidity Deposits to Its Clearing Funding Designed To Increase Liquidity Resources To Meet Its Liquidity Needs

September 25, 2013.

On March 21, 2013, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to institute supplemental liquidity deposits to its Clearing Fund in order to increase liquidity resources to meet its liquidity needs (''Proposed Rule Change''). The Proposed Rule Change was published for comment in the **Federal Register** on April 10, 2013.[3]

On April 19, 2013, NSCC filed with the Commission Amendment No. 1 to the Proposed Rule Change, which, on May 29, 2013, the Commission published for comment in the **Federal Register** and designated a longer period for Commission action on the Proposed Rule Change, as amended.[4]

On June 11, 2013, NSCC filed Amendment No. 2 to the Proposed Rule Change, as previously modified by Amendment No. 1, which, on July 15, 2013, the Commission published for comment in the **Federal Register** and issued an order instituting proceedings to determine whether to approve or disapprove the Proposed Rule Change, as amended (''Order Instituting Proceedings'').[5] In the Order Instituting Proceedings, the Commission solicited comment on whether Amendment No. 2 adequately addresses the concern raised by some commenters that the Proposed Rule Change, as amended, could have a discriminatory impact on NSCC's non-bank affiliated members who would be subject to the proposal but who do not currently participate in NSCC's Credit Facility.[6]

Prior to issuing the Order Instituting Proceedings, the Commission had received fourteen comment letters to the proposal contained in the Proposed Rule Change and its related Advance Notice,[7] including NSCC's response to the comment letters received as of June 10, 2013.[8] In response to the Order Instituting Proceedings, the Commission received eight additional comment letters, including NSCC's response to the comment letters received as of August 20, 2013 to the Order Instituting Proceedings.[9]

Section 19(b)(2)(B)(ii)(I) of the Exchange Act provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving a proposed rule change not later than 180 days after the date of publication of notice of the filing of the proposed rule change.[10] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4. NSCC also filed the proposal contained in the Proposed Rule Change as advance notice SR–NSCC–2013–802 (''Advance Notice''), as modified by Amendment No. 1, pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) thereunder. *See* Release No. 34–69451 (Apr. 25, 2013), 78 FR 25496 (May 1, 2013). On May 20, 2013, the Commission extended the period of review of the Advance Notice, as modified by Amendment No. 1. Release No. 34–69605 (May 20, 2013), 78 FR 31616 (May 24, 2013). On June 11, 2013, NSCC filed Amendment No. 2 to the Advance Notice, as previously modified by Amendment No.1. Release No. 34–69954 (Jul. 9, 2013), 78 FR 42127 (Jul. 15, 2013). On July 18, 2013, the Commission made a request of NSCC to provide additional information regarding the Advance Notice, as amended, pursuant to Section 806(e)(1)(D) of the Clearing Supervision Act. 12 U.S.C. 5465(e)(1)(D). Upon the Commission's receipt of NSCC's complete response to that request, the Commission will have 60 days to issue an objection or no objection to the Advance Notice. *See* 12 U.S.C. 5465(e)(1)(E) and (G). The proposal in the Proposed Rule Change, as amended, and the Advance Notice, as amended, shall not take effect until all regulatory actions required with respect to the proposal are completed.

[3] Release No. 34–69313 (Apr. 4, 2013), 78 FR 21487 (Apr. 10, 2013).

[4] *See* Release No. 34–69620 (May 22, 2013), 78 FR 32292 (May 29, 2013).

[5] Release No. 34–69951 (Jul. 9, 2013), 78 FR 42140 (Jul. 15, 2013).

[6] *See id.*

[7] *See* Comments Received on File Nos. SR–NSCC–2013–02 (*http://sec.gov/comments/sr-nscc-2013–02/nscc201302.shtml*) and SR–NSCC–2013–802 (*http://sec.gov/comments/sr-nscc-2013-802/nscc2013802.shtml*). Since the proposal contained in the Proposed Rule Change was also filed as an Advance Notice, *see* Release No. 34–69451, *supra* note 2, the Commission is considering all public comments received on the proposal regardless of whether the comments are submitted to the Proposed Rule Change, as amended, or the Advance Notice, as amended.

[8] NSCC also received a comment letter directly prior to filing the Proposed Rule Change and related Advance Notice with the Commission, which NSCC provided to the Commission in Amendment No. 1 to the filings. *See* Exhibit 2 to File No. SR–NSCC–2013–02 (*http://sec.gov/rules/sro/nscc/2013/34-69620-ex2.pdf*).

[9] *See* Comments Received, *supra* note 7.

[10] 15 U.S.C. 78s(b)(2)(B)(ii)(I).

Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination.[11] The Proposed Rule Change was published for notice and comment in the **Federal Register** on April 10, 2013. The 180th day after that publication date is October 7, 2013.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the Proposed Rule Change, as amended, so that it has sufficient time to consider the amended proposal, the issues raised in the comment letters to the amended proposal, including comment letters submitted in response to the Order Instituting Proceedings, and NSCC's responses to such comments.

Accordingly, the Commission, pursuant to Section 19(b)(2)(B)(ii)(II) of the Exchange Act,[12] designates December 6, 2013, as the date by which the Commission should either approve or disapprove the Proposed Rule Change (SR–NSCC–2013–02).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

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[11] 15 U.S.C. 78s(b)(2)(B)(ii)(II).

[12] *Id.*

[13] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70498; File No. SR–MIAX–2013–43]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Implement an Equity Rights Program

September 25, 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 September 13, 2013, Miami International Securities Exchange LLC (''Exchange'' or ''MIAX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to implement an equity rights program.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing*, at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to implement an equity rights program (''Program'') pursuant to which units representing the right to acquire equity in the Exchange's parent holding company, Miami International Holdings (''MIH'') would be issued to a participating Member in exchange for payment of an initial purchase price or the prepayment of certain transaction fees and the achievement of certain liquidity addition volume thresholds on the Exchange over a 23-month period. The purpose of the Program is to promote the long-term interests of MIAX by providing incentives designed to encourage future MIH owners and MIAX market participants to contribute to the growth and success of MIAX, by being active liquidity providers and takers to provide enhanced levels of trading volume to MIAX's market, through an opportunity to increase their proprietary interests in MIAX's enterprise value.

Members that participate in the Program will have two options to choose from: (i) An offering of A-Units; and/or (ii) an offering of B-Units.[3]

A-Units Option

Members that participate in the A-Unit option of the Program will be issued for each unit (i) 101,695 shares of MIH common stock and (ii) warrants to purchase 2,182,639 shares of common stock of MIH in exchange for such participant Member's initial cash capital contribution of $508,475, and with such warrants being exercisable upon the achievement by the participating Member of certain volume thresholds on the Exchange during a 23-month measurement period commencing September 13, 2013. A total of 10 A-Units will be offered. The total equity ownership of MIH common stock held by any one participant Member will be subject to a cap of 19.9%.[4]

The warrants will vest in six (6) tranches: (i) One (1) tranche, upon initial investment; and (ii) five (5) tranches during a measurement period of months 1–23 of the Program. In addition, the participant Members may earn or lose warrants on a pro-rata basis based upon meeting volume commitments during the measurement periods, as detailed below.

Upon the initial investment, the participant Member would receive common shares equal to 101,695 shares of the common stock and 10% of the warrants will vest. A participant Member will be eligible to earn the remaining warrants during measurement periods provided that the

[3] The Program which provides equity-like consideration in exchange for market making or the provision of liquidity, order flow or volume is open to market participants generally. All MIAX Members may participate subject to their satisfaction of eligibility requirements. To be designated as a participant Member, an applicant must: (i) Be a Member in good standing of MIAX; (ii) qualify as an ''accredited investor'' as such term is defined in Regulation D of the Securities Act of 1933; and (iii) have executed all required documentation for Program participation. *See infra* note 9, and accompanying text. Members may elect to participate in either or both of the options. If either the A-Unit or the B-Unit option is oversubscribed, the units in the oversubscribed option will be allocated on a pro-rata basis that may result in a fractional allocation.

[4] *See* Ninth Article (b)(i)(B), Amended and Restated Certificate of Incorporation of Miami International Holdings, Inc., dated August 31, 2012 (providing that no Exchange Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares constituting more than twenty percent (20%) of any class of capital stock of the Corporation). Any purported transfer of shares or ownership of shares in violation of the ownership cap by a Member would be subject to the limitations of the Certificate of Incorporation, including the non-recognition of voting rights of shares in excess of the cap and a redemption right by MIH for excess shares. *See* Ninth Article (d) and (e), Amended and Restated Certificate of Incorporation of Miami International Holdings, Inc., dated August 31, 2012.

participant has achieved a specified percentage of the total national average daily volume of options contracts reported to The Options Clearing Corporation (''OCC'') (''OCC ADV'') on MIAX of all option classes listed on MIAX.[5]

The remaining five (5) tranches, of 90% of the warrants, will vest during the following measurement periods: (i) 8.1% of the warrants resulting from months 1–3, with a volume commitment of 0.225% of OCC ADV on MIAX per A-Unit[6]; (ii) 11.7% of the warrants resulting from months 4–5, with a volume commitment of 0.335% of OCC ADV on MIAX per A-Unit; (iii) 19.8% of the warrants resulting from months 6–10, with a volume commitment of 0.445% of OCC ADV on MIAX per A-Unit; (iv) 23.4% of the warrants resulting from months 11–16, with a volume commitment of 0.556% of OCC ADV on MIAX per A-Unit; and (v) 27% of the warrants resulting from months 17–23, with a volume commitment of 0.667% of OCC ADV on MIAX per A-Unit. If a participant Member exceeds 100% of the volume commitment during a tranche's measurement period, the Member is able to earn, on a pro-rata basis, warrants not earned by other participant Members. If a participant Member reaches 70–99% of the volume commitment during a tranche's measurement period, the Member will earn a reduced amount of warrants on a pro-rata basis applicable to such measurement period. If a participant Member fails to reach a minimum of 70% of the volume commitment during a tranche's measurement period, the Member will lose all right to that tranche of warrants. Notwithstanding, in the event a participant Member has not satisfied the volume commitment for any one measurement period (other than measurement period 5), the participant Member will have an opportunity to vest those warrants if such participant Member applies a portion of the Members performance from the measurement period immediately following to the prior measurement period to ensure a minimum of 70% of the volume commitment in prior period and in addition has satisfied the volume commitment for the measurement period immediately following.

B-Units Option

Members that participate in the B-Unit option of the Program will be issued for each unit warrants to purchase 1,713,251 shares of common stock of MIH in exchange for the prepayment of Exchange fees in the amount of $500,000 for the 22-month period commencing October 1, 2013, and with such warrants being exercisable upon the achievement by the participating Member of certain volume thresholds on the Exchange during a 23-month measurement period commencing September 13, 2013. A total of 10 B-Units will be offered. The total equity ownership of MIH common stock held by any one participant Member will be subject to a cap of 19.9%.

The warrants will vest in five (5) tranches during the following measurement periods: (i) 9% of the warrants resulting from months 1–3, with a volume commitment of 0.225% of OCC ADV on MIAX per B-Unit[7]; (ii) 13% of the warrants resulting from months 4–5, with a volume commitment of 0.335% of OCC ADV on MIAX per B-Unit; (iii) 22% of the warrants resulting from months 6–10, with a volume commitment of 0.445% of OCC ADV on MIAX per B-Unit; (iv) 26% of the warrants resulting from months 11–16, with a volume commitment of 0.556% of OCC ADV on MIAX per B-Unit; and (v) 30% of the warrants resulting from months 17–23, with a volume commitment of 0.667% of OCC ADV on MIAX per B-Unit. If a participant Member exceeds 100% of the volume commitment during any one tranche's measurement period, the Member is able to earn, on a pro-rata basis, warrants not earned by other participant Members. If a participant Member reaches 70–99% of the volume commitment during any one tranche's measurement period, the Member will earn a reduced amount of warrants on a pro-rata basis applicable to such measurement period. If a participant Member fails to reach a minimum of 70% of the volume commitment during the measurement period, the Member will lose all right to that tranche of warrants. Notwithstanding, in the event a participant Member has not satisfied the volume commitment for any one measurement period (other than measurement period 5), the participant Member will have an opportunity to vest those warrants if such participant Member applies a portion of the Members performance from the measurement period immediately following to the prior measurement period to ensure a minimum of 70% of the volume commitment in prior period and in addition has satisfied the volume commitment for the measurement period immediately following.

Once a participant Member has prepaid Exchange fees for the initial 22-month period, each month the participant Member may execute contracts and accumulate transaction fees based on the prevailing MIAX Options Fee Schedule in effect at the time. Once a B-Unit participant Member has executed contract volume whereby the total accumulated transaction fees equal the prepaid amount, all subsequently executed contracts will be billed and collected at the appropriate rate as defined in the MIAX Options Fee Schedule.

Provisions Applicable to Both A-Units and B-Units

Each participant Member will have a standard piggyback registration right to include the common shares and the common shares issuable upon exercise of the warrants should MIH file a Registration Statement under the Securities Exchange Act of 1933 [sic]. Each participant Member will also have the right to participate pro rata in all future offerings of MIH securities for so long as the participant Member holds at least 51% of the common shares purchased by the participating Member directly or issuable upon the exercise of warrants included in at least one B-Unit. MIH will have the right of first refusal to purchase any common shares or warrant shares that a participant Member decides to transfer or sell. Other participant Members will have the secondary right of first refusal to purchase any common shares or warrant shares that a participant Member decides to transfer or sell.

[5] If an options class is not listed on MIAX, then the trading volume in that options class will be omitted from the calculation of % OCC ADV. Priority Customer-to-Priority Customer Crossing transactions where no fees are paid to the Exchange, special strategies, and contracts as to which a Member acts solely as clearing agent will not be counted in the number of option contracts executed on the Exchange by any Member. (Incidental Priority Customer-to-Priority Customer transactions, that are not crossing transactions, will be counted in the number of options contracts executed on the Exchange by a Member.) Special strategies for the purpose of calculating trading volume include: (i) Dividend strategy; (ii) merger strategy; (iii) short stock interest strategy; (iv) reversal and conversion strategies; (v) jelly roll strategy; and (vi) similar strategies offered by an options exchange that are subject to a fee cap. Trading in special strategies currently is not available on MIAX. Special strategies will be omitted from the calculation of % OCC ADV to the extent it is possible to identify such transactions. Calculation of % OCC ADV will be discounted by 5% of ADV for complex order functionality not yet established on the Exchange until such time that functionality is available on MIAX.

[6] The first measurement period will begin on the date of filing and end November 30, 2013. Therefore, September 13, 2013 through November 30, 2013 will count as months 1–3 for purposes of the measurement period.

[7] The first measurement period will begin on the date of filing and end November 30, 2013. Therefore, September 13, 2013 through November 30, 2013 will count as months 1–3 for purposes of the measurement period.

In addition, beginning one (1) year after the last month of the final measurement period, for a period of 90 days, the participant Member will have a right to sell the shares back to MIH at a price per share equal to a fixed percentage of fair market value [8] of the common stock. The right to sell the shares back will reoccur on an annual basis and last for a 90 day period. Years 1 and 2 after the final measurement period, the participant Member may sell back 10% of the common shares vested at a price equal to 50% of the fair market value. Year 3 after the final measurement period, the participant Member may sell back 30% of the common shares vested at a price equal to 60% of the fair market value. Year 4 after the final measurement period, the participant Member may sell back 60% of the common shares vested at a price equal to 70% of the fair market value. Year 5 after the final measurement period, the participant Member may sell back 90% of the common shares vested at a price equal to 80% of the fair market value. Year 6 after the final measurement period, the participant Member may sell back 100% of the common shares vested at a price equal to 90% of the fair market value.

When a participating Member acquires a certain number of units, the Member can appoint one director to the MIH Board and/or the MIAX Board.[9] The Exchange notes that the number of non-industry directors on the MIAX Board, including at least one independent director, must equal or exceed the number of industry directors and Member representatives, and that additional new non-industry directors and Member representative directors will need to be added in order to maintain this status. The Exchange also notes that any directors that may be selected by a participating Member would not be counted towards the 20% Member representative requirement on the MIAX Board. In addition, the Exchange notes that a Member is only entitled to a new seat if they are not currently represented on the MIAX board.

All applicants will be subject to the same eligibility and designation criteria, and all participant Members will participate in the Program on the same terms, conditions and restrictions. To be designated as a participant Member, an applicant must: (i) Be a Member in good standing of MIAX; (ii) qualify as an ''accredited investor'' as such term is defined in Regulation D of the Securities Act of 1933;[10] and (iii) have executed all required documentation for Program participation. Participant Members must have executed the definitive documentation, satisfied the eligibility criteria required of Program participants enumerated above, and tendered the minimum cash investment or prepayment of fees by September 27, 2013, with a closing to occur on September 30, 2013.

As discussed above, the purpose of the Program is to encourage Members to direct greater trade volume to MIAX to enhance trading volume in MIAX's market. Increased volume will provide for greater liquidity and enhanced price discovery, which benefits all market participants. Other exchanges currently engage in the practice of incentivizing increased order flow in order to attract liquidity providers through equity sharing arrangements.[11] The Program similarly intends to attract order flow, which will increase liquidity, thereby providing greater trading opportunities and tighter spreads for other market participants and causing a corresponding increase in order flow from these other market participants. The Program will similarly reward the liquidity providers that provide this additional volume with a potential proprietary interest in MIAX.

The specific volume thresholds of the Program's measurement periods were set based upon business determinations and analysis of current volume levels. The volume thresholds are intended to incentivize firms to increase the number of orders that are sent to MIAX to achieve the next threshold. Increasing the number of orders that are sent to MIAX will in turn provide tighter and more liquid markets, and therefore attract more business as well.

MIAX will initiate the measurement period on the date of filing, September 13, 2013.[12] The Exchange will notify Members of the implementation of the Program and the dates of the enrollment period by Regulatory Circular, and will post a copy of this rule filing on its Web site. Any MIAX Member that is interested in participating in the Program may contact MIAX for more information and legal documentation and will be required to enter into a nondisclosure agreement regarding this additional Program information.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act [13] in general, and furthers the objectives of Section 6(b)(5) of the Act [14] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) of the Act [15] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[16] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

In particular, the proposed rule change is equitable and not unfairly discriminatory, because all Members may elect to participate (or elect to not participate) in the Program and earn units on the same terms and conditions, assuming they satisfy the same eligibility criteria as described above. The eligibility criteria are objective; thus, all Members have the ability to satisfy them. The Board also has authorized MIAX to offer common

[8] ''Fair market value'' means the value of the MIH common stock as determined by a nationally-recognized firm of independent certified public accountants to be jointly selected by the MIH and the participant Member, if such common stock is not publicly traded.

[9] The Commission notes that MIAX will need to submit a separate proposed rule change to make changes to its corporate governance documents to accommodate aspects of the proposal that involve or affect the boards of MIAX and Miami International Holdings.

[10] The purpose of this criterion relates to the ability of MIH to sell shares of common stock pursuant to an exemption from registration under the Securities Act of 1933. The definition of ''accredited investor'' under Rule 501(a)(1) of the Act includes any broker or dealer registered pursuant to Section 15 of the Act. MIAX Rule 200(b) requires a Member to be registered as a broker or dealer pursuant to Section 15 of the Act, therefore all MIAX Members will satisfy this criterion.

[11] *See, e.g.,* Securities Exchange Act Release Nos. 62358 (June 22, 2010), 75 FR 37861 (June 30, 2010) (SR–NSX–2010–06); 64742 (June 24, 2011), 76 FR 38436 (June 30, 2011) (SR–NYSEAmex–2011–018); 69200 (March 21, 2013), 78 FR 18657 (March 27, 2013) (SR–CBOE–2013–31).

[12] MIAX previously provided notice to Members on August 21, 2013 that the measurement period for the volume thresholds would be commencing on September 3, 2013. *See* MIAX Regulatory Circular, RC–2013–52. However, MIAX has decided instead to use September 13, 2013, to coincide with the date of filing.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(4).

shares in MIH to any Member that requests designation to participate in the Program and otherwise satisfies the eligibility criteria to ensure that all Members will have the opportunity to own common shares and thus participate in the Program if they so choose. In addition, participant Members will earn warrants on a pro-rata basis upon meeting fixed volume threshold amounts during the measurement periods that will apply to all participant Members.

The Exchange believes that the methodology used to calculate the volume thresholds is fair, reasonable and not unfairly discriminatory because it is based on objective criteria that are designed to omit from the calculation functionality that is not available on the Exchange and types of transactions that are subject to little or no transaction fees. Specifically, the Exchange believes excluding Priority Customer-to-Priority Customer Crossing transactions where no fees are paid to the Exchange, special strategies, and contracts as to which a Member acts solely as clearing agent from the number of option contracts executed on the Exchange by any Member is reasonable and not unfairly discriminatory because participating Members could otherwise game the volume thresholds by executing excess volumes in these types of transactions in which either no transaction fees are charged on the Exchange, or the transaction is subject to a fee cap. The Program is designed to reward participating Members for bringing their orders and quotes to the Exchange to be executed on the Exchange. The Exchange believes it is appropriate to exclude special strategies from the OCC volume calculation since those transactions are not executed on the Exchange. The Exchange believes that omitting clearing only transactions from the calculation to be fair and reasonable because the fact that a Member is clearing a trade is coincidental to the choice of where to execute that trade. And, because clearing only transactions are not executed on the MIAX, they don't fall within the intended transactions that qualify for the Program. In addition, if the Exchange were to reward the party clearing a trade, the Exchange would possibly be double counting that trade—once for the executing party and once for the clearing party. Furthermore, the Exchange believes that counting incidental Priority Customer-to-Priority Customer transactions, which are not crossing transactions, in the number of options contracts executed on the Exchange by a Member is fair and reasonable because in these situations the Priority Customer is not necessarily choosing to execute against another Priority Customer in order to avoid a transaction fee.

The Exchange believes the Program is equitable and reasonable because an increase in volume and liquidity would benefit all market participants by providing more trading opportunities and tighter spreads, even to those market participants that do not participate in the Program. Additionally, the Exchange believes the proposed rule change is consistent with the Act because, as described above, the Program is designed to bring greater volume and liquidity to the Exchange, which will benefit all market participants by providing tighter quoting and better prices, all of which perfects the mechanism for a free and open market and national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will improve competition by providing market participants with another option when determining where to execute orders and post liquidity.

The Exchange believes that the proposed change would increase both intermarket and intramarket competition by incenting participant Members to direct their orders to the Exchange, which will enhance the quality of quoting and increase the volume of contracts traded here. To the extent that there is an additional competitive burden on non-participant Members, the Exchange believes that this is appropriate because the Program should incent Members to direct additional order flow to the Exchange and thus provide additional liquidity that enhances the quality of its markets and increases the volume of contracts traded here. To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

Given the robust competition for volume among options markets, many of which offer the same products, implementing a program to attract order flow like the one being proposed in this filing is consistent with the above-mentioned goals of the Act. This is especially true for the smaller options markets, such as MIAX, which is competing for volume with much larger exchanges that dominate the options trading industry. As a new exchange, MIAX has a nominal percentage of the average daily trading volume in options, so it is unlikely that the Program could cause any competitive harm to the options market or to market participants. Rather, the Program is a modest attempt by a small options market to attract order volume away from larger competitors by adopting an innovative pricing strategy, as evidenced by the volume thresholds of the Program that represent fractions of 1% of OCC ADV. The Exchange notes that if the Program resulted in a modest percentage increase in the average daily trading volume in options executing on MIAX, while such percentage would represent a large volume increase for MIAX, it would represent a minimal reduction in volume of its larger competitors in the industry. The Exchange believes that the Program will help further competition, because market participants will have yet another additional option in determining where to execute orders and post liquidity if they factor the benefits of MIAX equity participation into the determination.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[17] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2013–43 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–43. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–MIAX–2013–43 and should be submitted on or before October 22, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23826 Filed 9–30–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70505; File No. SR–MIAX–2013–44]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by Miami International Securities Exchange LLC To Amend Exchange Rule 604 in Connection With Market Maker Continuous Quoting Obligations

September 25, 2013.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2013, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Rule 604 in connection with Market Maker continuous quoting obligations.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 604 to exclude intra-day add-on series (''Intra-day Adds'') from the Market Makers' continuous quoting obligations on the day such series are added for trading. Additionally, the proposed rule change clarifies in the Interpretations and Policies to Rule 604 that: (1) Lead Market Makers (''LMMs'')[3] may still receive directed orders and participation entitlements in all Intra-day Adds on the day such series are added for trading provided the LMM is quoting the Intra-day Add and meets all other directed order and participation entitlement requirements set forth in Rules 514(h) and (i); and (2) Primary Lead Market Makers (''PLMMs'')[4] may still receive participation entitlements in all Intra-day Adds on the day such series are added for trading provided the PLMM is quoting the Intra-day Add and meets all other participation entitlement requirements set forth in Rules 514(g) and (i). The proposal is based on the recently approved change by Chicago Board Options Exchange, Incorporated (''CBOE'').[5]

Intra-day Adds are series that can be added to the System after the opening of trading on the Exchange. These series may be added at any time during the trading day and differ from other newly added series, which are added prior to the opening of trading. In the event a series is added after the opening of trading, the Exchange will disseminate

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[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Rule 100 defines a Lead Market Maker as a Member registered with the Exchange for the purpose of making markets in securities traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of these Rules with respect to Lead Market Makers. When a Lead Market Maker is appointed to act in the capacity of a Primary Lead Market Maker, the additional rights and responsibilities of a Primary Lead Market Maker specified in Chapter VI of these Rules will apply.

[4] Exchange Rule 100 defines a Primary Lead Market Maker as a Lead Market Maker appointed by the Exchange to act as the Primary Lead Market Maker for the purpose of making markets in securities traded on the Exchange. The Primary Lead Market Maker is vested with the rights and responsibilities specified in Chapter VI of these Rules with respect to Primary Lead Market Makers.

[5] *See* Securities Exchange Act Release Nos. 69338 (April 8, 2013), 78 FR 21981 (April 12, 2013) (SR–CBOE–2013–019) (Order approving); 68944 (February 15, 2013), 78 FR 12377 (February 22, 2013) (SR–CBOE–2013–019).

a Listings Alert to Members and anyone else subscribing to MIAX notices and publications advising that a new series has been listed. Listing Alerts are also publically available on the Exchange's Web site. Any Market Maker with an appointment in the class in which the series is added will be permitted to quote in the new series.

Currently, Exchange Rule 604 imposes certain obligations on Market Makers, including obligations to provide continuous quotes. Specifically, Rule 604(e)(1) requires a PLMM to provide continuous two-sided quotes (*i.e.,* 90% of the time) in the lesser of 99% of the non-adjusted option series, or 100% of the non-adjusted option series minus one put-call pair, in each class in which the PLMM is assigned. Rule 604(e)(2) requires an LMM to provide continuous two-sided quotes (*i.e.,* 90% of the time) in at least 90% of the non-adjusted option series in each of the LMM's appointed classes. And, Rule 604(e)(3) requires a Registered Market Maker (''RMM'')[6] to provide continuous two-sided quotes throughout the trading day (*i.e.,* 90% of the time) in 60% of the non-adjusted series that have a time to expiration of less than nine months in each of the RMM's appointed classes. The proposed rule change seeks to exclude Intra-day Adds from these continuous quoting obligations.

In order to comply with their continuous quoting obligations, Market Makers have automated quoting systems in place that use complex calculations based on a variety of market factors to compute quotes in their appointed classes and transmit these quotes to the Exchange's trading System. The Market Maker quoting system computations also factor in their market risk models. It is the Exchange's understanding that for some Market Makers their quoting systems will not automatically produce continuous quotes in Intra-day Adds on the trading day during which those series are added. These Market Makers have indicated that the only way they could quote in series on the trading day during which they are added would be to completely shut down and restart their systems. As a result, the Exchange further understands that several Market Makers would not be able to quote Intra-day Adds during the trading day on which such series are added (although the Market Makers generally would be able to quote these series upon the opening of the next trading day, assuming those series continue to be listed on the Exchange). The required work on Market Makers' systems to allow them to quote Intra-day Adds, would be significant and costly.

The inability to quote Intra-day Adds makes it extremely difficult for Market Makers to comply with their obligation to quote in a substantial percentage of series in their appointed classes during a trading day on which Intra-day Adds are added in those classes. For example, if there are 1,000 series listed in an LMM's appointed class and the LMM is quoting in 900 of these series, the LMM is in compliance with the current minimum requirement to quote in 90% of series in its appointed class (assuming the LMM quotes in this number of series 90% of the trading day). However, if an Intra-day Add is added in the LMM's appointed class during the trading day, and the LMM's system does not automatically quote in this series, then the LMM would not comply, as it would be quoting in 900 of 1,001 series. This noncompliance would be compounded if more than one Intra-day Add is listed in a class during the same trading day. Further, if in an effort to be in compliance, Market Makers turned their systems off to quote in Intra-day Adds on the trading day during which those series are added, then the Market Makers could satisfy the standard to quote in a minimum percentage of series in their appointed classes but would risk violating their obligation to quote for minimum percentage of the trading day. Theoretically, Market Makers might also need to repeatedly turn their systems off to accommodate multiple Intra-day Adds.

The Exchange believes that it would be impracticable, particularly given that a number of Market Makers who use their systems to quote on multiple markets and not solely on the Exchange, for Market Makers to turn off their systems to accommodate quoting in Intra-day Adds on the day during which those series are added on the Exchange. In addition, the Exchange believes this would interfere with the continuity of its market and reduce liquidity, which would ultimately harm investors and contradicts the purpose of the Market Maker continuous quoting obligation. This proposed rule change excludes Intra-day Adds from these continuous quoting obligations to address this conflict.

The Exchange believes this proposed relief would result in a minimal reduction, if any, in liquidity in these series. Market Makers' quoting systems would add these series the next trading day, so if there is any slight reduction in liquidity in these few series, it would only last for a short period of time (until the following trading day). Additionally, this potential small reduction in liquidity would be far outweighed by the reduction in liquidity that the Exchange believes would result from the withdrawals from and reductions in applications for Market Maker appointments if the Exchange did not provide this relief.

The current quoting obligation in Intra-day Adds is a minor part of a Market Maker's overall obligations. Market Makers will still be obligated to provide continuous two-sided markets in a substantial number of series in their appointed classes. Further, Market Makers would still be obligated to quote the Intra-day Adds the following day, and, thus, their quoting relief is very short lived and could, potentially, only last a few hours or until the opening of trading the following day. The Exchange believes that the burden of continuous electronic quoting in the extremely small number of series Intra-day Adds represent is counter to the Exchange's efforts to continuously increase liquidity in its listed option classes. The Exchange believes the proposed rule change will continue to ensure that Market Makers create a fair and orderly market in the option classes to which they are assigned, as it does not absolve Market Makers from providing continuous electronic quotes in a significant percentage of series of each class for a substantial portion of the trading day. Market Makers must engage in activities that constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, including (1) competing with other Market Makers to improve markets in all series of options classes comprising their appointments; (2) making markets that, absent changed market conditions, will be honored in accordance with firm quote rules; and (3) updating market quotations in response to changed market conditions in their appointed options classes and to assure that any market quote it causes to be disseminated is accurate.

The proposed rule change also clarifies that while PLMMs and LMMs will not be required to provide continuous quotes in Intra-day Adds on the day during which such series are added for trading, PLMMs and LMMs may still receive a participation entitlement in such series if they elect to quote in that series and otherwise satisfy the entitlement requirements set forth in Rule 514. Specifically, the Exchange is proposing to revise the Interpretations and Policies to Rule 604

[6] Exchange Rule 100 defines a Registered Market Maker as a Member registered with the Exchange for the purpose of making markets in securities traded on the Exchange, who is not a Lead Market Maker and is vested with the rights and responsibilities specified in Chapter VI of these Rules with respect to Registered Market Makers.

to provide that (1) LMMs may still receive directed orders and participation entitlements in all Intra-day Adds on the day during which such series are added for trading in which they are quoting provided the LMM meets all other entitlement requirements set forth in Rules 514(h) and (i); and (2) PLMMs may still receive participation entitlements in all Intra-day Adds on the day during which such series are added for trading in which they are quoting provided the PLMM meets all other entitlement requirements set forth in Rules 514(g) and (i). LMMs already receive directed orders and participation entitlements in series they are not required to quote. For example, the continuous quoting requirement of Rule 604 currently does not apply to LMMs quoting option series with a time to expiration of nine months or greater. Interpretations and Policies .01 currently provides that LMMs may receive directed orders and participation entitlements when quoting such long-term series, provided the LMM meets all other entitlement requirements as set forth in Rules 514(h) and (i). In addition, an LMM is currently required to provide continuous electronic quotes in at least 90% of the non-adjusted option series of each multiply listed option class allocated to it for 90% of the trading day. If the LMM elects to quote in 100% of the non-adjusted series in an option class allocated to it, it can receive directed orders and participation entitlements in all of those series when quoting at the best price, including the 10% of the series in which it is not required to quote. Finally, with respect to PLMMs, the continuous quoting requirement of Rule 604 currently does not apply to PLMMs quoting adjusted option series; if a PLMM elects to quote an adjusted option series, it can receive the participation entitlement provided the PLMM meets all other entitlement requirements as set forth in Rules 514(g) and (i). Thus, under the proposed rule change, the market would continue to function as it does now. The Exchange believes this benefit is appropriate, as it provides incentives for PLMMs and LMMs to quote in as many series as possible in their appointed classes, even those series in which the Rules do not require them to continuously quote.

The Exchange does not believe that the proposed rule change would adversely affect the quality of the Exchange's markets or lead to a material decrease in liquidity. Rather, the Exchange believes that its current market structure, with its high rate of participation by Market Makers, permits the proposed rule change without fear of losing liquidity. The Exchange also believes that market-making activity and liquidity could materially decrease without the proposed rule change to exclude Intra-day Adds from Market Maker continuous quoting obligations on the trading day during which they are added for trading. The Exchange believes that this proposed relief will encourage Market Makers to continue appointments and other Members to request Market Maker appointments, and, as a result, expand liquidity in options classes listed on the Exchange to the benefit of the Exchange, its Members and public customers. The Exchange believes that its Market Makers would be disadvantaged without this proposed relief. Other Members and public customers would also be disadvantaged if Market Makers withdrew from appointments in options classes, resulting in reduced liquidity and volume in those classes. Additionally, the Exchange believes that the proposed rule change to clarify that PLMMs and LMMs may receive participation entitlements in Intra-day Adds on the day during which such series are added for trading if they satisfy the other entitlement requirements as set forth in Exchange Rules, even if the Rules do not require the Market Makers to continuously quote in those series, will incent Market Makers to quote in series in which they are not required to quote, which may increase liquidity in their appointed classes.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) [7] of the Act. Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [8] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitation [sic] transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to exclude Intra-day Adds during the day that such series are added for trading from Market Makers' quoting obligations promotes just and equitable principles of trade because it promotes liquidity and continuity in the marketplace and would prevent interruptions in quoting or reduced liquidity that may otherwise result. The Exchange also believes that the proposed rule change supports the quality of the Exchange's markets because it does not significantly change the current quoting obligations of Market Makers. Market Makers must still provide continuous electronic quotes for a significant part of the trading day in a substantial number of series of each appointed class. The proposed relief is offset by a Market-Maker's obligation to quote in these series beginning the next trading day. With respect to RMMs, even if the RMM does not quote Intra-day Adds on the trading day during which they are added, this would be further offset by the RMM's continued obligation to quote in these series when requested by an Exchange Official. Accordingly, the proposed rule change supports the quality of the Exchange's trading markets by helping to ensure that Market Makers will continue to be obligated to quote in Intra-day Adds if, and when, the need arises and on an ongoing basis following the trading day during which the series are added. The Exchange believes this proposed change is reasonable and is offset by Market-Makers' continued responsibilities to provide significant liquidity to the market to the benefit of market participants.

The Exchange believes this proposed rule change, on balance, is a minor change and should not impact the quality of the Exchange's trading markets. Among other things, Intra-day Adds represent an insignificant percentage of series listed on the Exchange each day. The Exchange further believes that the potential small reduction in liquidity in Intra-day Adds that may result from the proposed relief would be far outweighed by the significant reduction in liquidity in appointed classes that the Exchange believes could occur from withdrawals from and reductions in applications for Market-Maker appointments without the proposed relief. The proposed rule change also removes impediments to and allows for a free and open market,

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

while protecting investors, by promoting additional transparency regarding Market-Makers' obligations and benefits in the Exchange Rules. In addition, the Exchange believes that the proposed rule change is designed to not permit unfair discrimination among Market Makers, as the proposed rule change provides the proposed relief for all Market Makers.

The proposed rule change to clarify that LMMs may receive directed orders and participation entitlements, and PLMMs may receive participation entitlements in Intra-day Adds in their appointed classes in which they are quoting, even though they are not required to quote such series, further supports the quality of the Exchange's trading markets because it encourages LMMs and PLMMs to quote in as many series as possible, which ultimately benefits all investors. This benefit is offset by the LMMs' and PLMMs' continued quoting obligations and the fact that their quotes in these ''non-required'' series must still satisfy all of their other obligations under the Rules. The Exchange also believes that this proposed change is consistent with its current practice, pursuant to which (1) LMMs receive directed orders and participation entitlements in long-term series, adjusted series and additional series in which they elect to quote above the minimum percentage of series in which they are required to continuously quote under the Rules; and (2) PLMMs receive participation entitlements in adjusted series.

For the foregoing reasons, the Exchange believes that the proposed rule change is appropriate and consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change to exclude Intra-day Adds during the day which such series are added for trading from Market Makers' quoting obligations will cause any unnecessary burden on intra-market competition because it provides the same relief to a group of similarly situated market participants, that is, Market Makers. The Exchange does not believe the proposed change will cause any unnecessary burden on inter-market competition because Intra-day Adds are a very small portion of series on the Exchange. The Exchange further believes that the potential small reduction in liquidity in Intra-day Adds that may result from the proposed relief would be far outweighed by the significant reduction in liquidity in appointed classes that the Exchange believes could occur from withdrawals from and reductions in applications for Market-Maker appointments without the proposed relief. In addition, the Exchange believes that the proposed rule change will in fact relieve any burden on, or otherwise promote, competition. The Exchange believes that excluding Intra-day Adds on the day during which they are added for trading from Market-Maker obligations will promote trading activity on the Exchange to the benefit of the Exchange, its Members, and market participants.

The Exchange does not believe the proposed rule change to clarify that LMMs and PLMMs may receive participation entitlements in Intra-day Adds in their appointed classes in which they are quoting, even though they are not required to quote, provided the other requirements set forth in the Rules are satisfied, will cause any unnecessary burden on intra-market competition because it too provides the same relief to a group of similarly situated market participants, that is all LMMs and PLMMs. The Exchange does not believe the proposed change will cause any unnecessary burden on inter-market competition because LMMs are currently entitled to receive directed orders and participation entitlements, and PLMMs are currently entitled to receive participation entitlements on series they are not obligated to quote in under the Rules. In addition, the Exchange believes that the proposed rule change will in fact promote competition. The Exchange believes allowing LMMs to receive directed orders and participation entitlements, and PLMMs to receive participation entitlements in Intra-day Adds will promote trading activity on the Exchange because it will provide incentives to LMMs and PLMMs to quote in such series though not obligated to do so, to the benefit of the Exchange, its Members, and market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) [12] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that waiver of the operative delay would permit the Exchange to implement the changes proposed herein immediately.

Under the proposal, the Exchange would amend certain of its rules pertaining to the trading of options in order to exclude Intra-day Adds from Market Makers' continuous quoting obligations on the day such series are added for trading. If, and only if, they are in fact quoting them, LMMs and PLMMs will be eligible to receive directed orders and participation entitlements in all Intra-day Adds on the day such series are added for trading, provided the LMM or PLMM meets all other directed order and participation entitlement requirements. The Exchange notes that eliminating the continuous quoting obligations for Intra-day Adds will ensure fair competition among the exchanges and encourage greater liquidity on the Exchange to the benefit of investors. Further, the Exchange represents that the proposed rule change also will promote consistency among the competing options exchanges that have Intra-day

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

Adds and reduce the current compliance burdens imposed on Market Makers by the application of different continuous quoting standards.

The Commission notes that MIAX's proposal is based on a proposal submitted by another exchange that the Commission approved,[14] and it raises no novel regulatory issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[15]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[16] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MIAX–2013–44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–44. 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 at 100 F Street NE., Washington, DC 20549–1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2013–44 and should be submitted on or before October 22, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23903 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

[14] *See supra* note 5. The Commission notes that it did not receive any comments on CBOE–2013–019.

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70502; File No. SR–OCC–2013–13]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change Relating to the Use of Manual Signatures, Reduction of Segregated Long Positions in Accounts With Aggregated Long Positions, Requirements To Be Physically Present, and Other Technical Changes to OCC's By-Laws and Rules To Better Reflect Current Operational Practices

September 25, 2013.

I. Introduction

On August 5, 2013, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2013–13 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on August 22, 2013.[3] The Commission received no comment letters. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

OCC is amending a number of provisions in its By-Laws and Rules to update and better reflect OCC's current operational practices.

First, OCC is amending certain rules to remove references to manual signatures. OCC is removing references to manual signatures within Rule 201 because OCC has adopted and implemented electronic processes and controls within its clearance and settlement systems to allow authorized individuals to electronically verify and validate information such as trade data and banking instructions.[4] Similarly, OCC is amending Rule 202 to remove certain references to manual signatures on certain documents (e.g. certificates, checks, receipts, and orders) but will continue to require clearing members to provide OCC with a list of individuals authorized to act on behalf of a clearing member, who will in turn be provided with appropriate electronic access to its clearance and settlement systems.[5]

Second, OCC is amending Rule 611(c) to better reflect the current practice that, in the event of a closing transaction or exercise in an account with aggregate long positions, segregated long positions are reduced before unsegregated long positions, and that clearing members may not choose an alternative reduction method.

Third, in order to better reflect technological advancements as well as the decentralized operational structures and remote access adopted to address business continuity and disaster recovery, OCC is amending Rule 201 which currently requires that an authorized representative of a clearing member be present in such clearing member's office during specific hours each day. Instead, OCC will require an authorized representative of a clearing member to be available during such times as OCC may specify from time to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Act Release No. 34–70225 (August 16, 2013), 78 FR 52227 (August 22, 2013).

[4] See OCC Rule 205, which requires clearing members to electronically submit items to OCC, and Rule 212, which allows OCC to assign clearing members access codes for electronic data entry.

[5] OCC will also make conforming changes to the forms required by OCC to list the individuals authorized to act on behalf of a clearing member.

time. OCC is also amending Rule 204 to add Rule 204.01 in order to clarify that, each clearing member shall be deemed to have designated OCC's primary processing facility (or, if in operation, OCC's back-up processing) as the office through which it shall clear confirmed trades and otherwise conduct all of its business with OCC on any given day.

Fourth, OCC is amending Rules 207, 208, and 611(b) to reflect changes to the names of, information contained within, and manner in which clearing members may amend various reports. Additional amendments are being made to Rule 611(b) to clarify that clearing members may electronically submit instructions to OCC regarding their segregated long positions.

Fifth, OCC is amending Articles I and VI of the By-Laws as well as Rule 801 in order to remove references to the clearing international transactions and the International Clearing System, a system which is now dormant. OCC is further amending Article VI of the By-Laws and Rule 801 to remove reference to XMI index options, which are no longer traded. An additional amendment is being made to Rule 801 so that OCC, not OCC's Board of Directors, may choose exercise notices that are not eligible for late processing.

Finally, OCC will add language to Rule 211.01 to reflect that OCC satisfies the notification requirements of Rule 211 to provide notice of rule changes to clearing members and other registered clearing agencies by posting proposed rule change filings on OCC's Web site.

III. Discussion

Section 19(b)(2)(C) of the Act [6] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act [7] requires that the rules of a clearing agency that is registered with the Commission be designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and in general, to protect investors and the public interest.

The Commission finds that the rule change is consistent with Section 17A(b)(3)(F) of the Act.[8] Advances in technology and certain regulatory changes have made certain requirements within OCC's Rules and By-Laws unnecessary. Therefore, by updating OCC Rules and By-Laws so that they are better tailored to the current operational and technological environment in which OCC and its clearing members operate and by eliminating those provisions that may impose unnecessary costs and inefficiencies related to outdated processing and staffing, the rule change should help promote the prompt and accurate clearance and settlement of securities transactions and remove impediments to the national system.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [9] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (File No. SR–OCC–2013–13) be and hereby is *approved.*[11]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23830 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(2)(C).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] *Id.*

[9] 15 U.S.C. 78q–1.

[10] 15 U.S.C. 78s(b)(2).

[11] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70496; File No. SR–ICC–2013–07]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change To Provide for the Clearance of Standard Emerging European and Middle Eastern Sovereign Single Names

September 25, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 17, 2013, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by ICC. 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 purpose of proposed rule change is to adopt rules that will provide the basis for ICC to clear additional credit default swap contracts. Specifically, ICC is proposing to amend Section 26D of its Rules to provide for the clearance of additional Standard Emerging Sovereign Single Name constituents of the CDX Emerging Markets Index (''SES Contracts''). Currently, ICC clears four Standard Latin America Sovereign Single Name constituents of the CDX Emerging Markets Index. The proposed changes to the ICC Rules would provide for the clearance of Standard Emerging European and Middle Eastern Sovereign Single Name constituents of the CDX Emerging Markets Index, specifically the Republic of Turkey and the Russian Federation (the ''SEEME Contracts'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC 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. ICC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of these statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

ICC currently clears four Standard Latin America Sovereign SES Contracts. The addition of the SEEME Contracts will allow market participants an increased ability to manage risk. ICC believes that clearance of the SEEME Contracts will facilitate the prompt and accurate settlement of security-based swaps and contribute to the safeguarding of securities and funds associated with security-based swap transactions. ICC is requesting approval for SEEME Contracts on two sovereign reference entities, the Republic of Turkey and the Russian Federation.

SEEME Contracts have similar terms to the Standard Latin America

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Sovereign Single Name constituents of the CDX Emerging Markets Index currently cleared by ICC and governed by Section 26D of the ICC rules. Accordingly, the proposed changes to Section 26D of the ICC rules include the addition of ''Standard Emerging European and Middle Eastern Sovereign'' as a Transaction Type for SES Contracts and the addition of the European Region as the CDS Region for SEEME Contracts.

Rule 26D–102 is modified to indicate the specific Eligible SES Reference Entities to be cleared by ICC, namely the Federative Republic of Brazil, the United Mexican States, the Bolivian Republic of Venezuela, the Argentine Republic, the Republic of Turkey and the Russian Federation.

Rules 26D–303 (SES Contract Adjustments) and 26D–315 (Terms of the Cleared SES Contract) are modified to incorporate SEEME Contracts as a Transaction Type for SES Contracts.

Rule 26D–309 is modified to state specifically that ICC will not accept a trade for clearance and settlement if at the time of submission or acceptance of the trade or at the time of novation the CDS Participant submitting the trade is domiciled in the country of the Eligible SES Reference Entity for such SES Contract.

Rule 26D–315(b) is also modified to indicate that for purposes of the CDS Committee Rules, for SEEME Contracts the CDS Region is the European Region.

Section 17A(b)(3)(F) of the Act [3] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions. ICC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC, in particular, to Section 17(A)(b)(3)(F), because ICC believes that the clearance of SEEME Contracts will facilitate the prompt and accurate settlement of securities, specifically security-based swaps, and contribute to the safeguarding of securities and funds associated with security-based swap transactions in ICC's custody or control, or for which ICC is responsible.

B. Self-Regulatory Organization's Statement on Burden on Competition

SEEME Contracts will be available to all ICC Participants for clearing. The clearing of SEEME Contracts by ICC does not preclude the offering of SEEME Contracts for clearing by other market participants. Therefore, ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

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–ICC–2013–07 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–ICC–2013–07. 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 filings also will be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's Web site at *https://www.theice.com/notices/Notices.shtml?regulatoryFilings.*

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–ICC–2013–07 and should be submitted on or before October 22, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[4]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23825 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

[3] 15 U.S.C. 78q–1(b)(3)(F).

[4] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70504; File No. SR–NYSEArca–2013–93]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule To Include an Additional Market Maker Monthly Posting Credit Tier

September 25, 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 September 17, 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, II, and III below, which Items

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (''Fee Schedule'') to include an additional Market Maker monthly posting credit tier. The Exchange proposes to implement the fee change effective October 1, 2013. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to include an additional Market Maker monthly posting credit tier. The Exchange proposes to implement the fee change effective October 1, 2013.

The Exchange currently offers two Market Maker monthly posting credit tiers applicable to posted electronic Market Maker executions in Penny Pilot issues and SPY, as follows:

Tier	Qualification basis (average electronic executions per day)		Credit applied to posted electronic market maker executions in penny pilot issues (except SPY)	Credit applied to posted electronic market maker executions in SPY
Base			($0.32)	($0.32)
Super Tier	80,000 Contracts from Market Maker Posted Orders in All Issues, or.	200,000 Contracts Combined from all orders in Penny Pilot Issues, all account types, with at least 100,000 Contracts from Posted Orders in Penny Pilot Issues[4].	($0.37)	($0.39)

The Exchange proposes to reduce the base credit from $0.32 to $0.28 for both Penny Pilot issues and SPY and create a new Select Tier that would offer a credit of $0.32 for both Penny Pilot issues and SPY if the Market Maker has average electronic executions per day of 30,000 contracts from Market Maker posted orders in all issues. Credits for the Super Tier would remain the same. The resulting tiers and pricing would be as follows:

Tier	Qualification basis (average electronic executions per day)		Credit applied to posted electronic market maker executions in penny pilot issues (except SPY)	Credit applied to posted electronic market maker executions in SPY
Base			($0.28)	($0.28)
Select Tier	30,000 Contracts from Market Maker Posted Orders in All Issues.		($0.32)	($0.32)
Super Tier	80,000 Contracts from Market Maker Posted Orders in All Issues, or.	200,000 Contracts Combined from all orders in Penny Pilot Issues, all account types, with at least 100,000 Contracts from Posted Orders in Penny Pilot Issues[5].	($0.37)	($0.39)

The Exchange notes that the proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that OTP Holders and OTP Firms, including Market Makers, would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[7] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change is reasonable because

[4] This calculation includes transaction volume from the Market Maker's affiliates.

[5] This calculation includes transaction volume from the Market Maker's affiliates.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

reducing the base Market Maker monthly posting credit and adding a new Select Tier would encourage Market Makers to post greater volumes in all issues, including non-Penny Pilot issues, in order to qualify for the Select Tier credit of $0.32. The proposed change is also reasonable because it is designed to attract higher volumes of Market Maker posted orders to the Exchange, which would benefit all market participants by offering greater price discovery, increased transparency, and an increased opportunity to trade on the Exchange. Encouraging Market Makers to send higher volumes of orders to the Exchange would also contribute to the Exchange's depth of book as well as to the top of book liquidity. The Exchange also believes that the proposed credits are reasonable because they are within a range of similar credits available on other option exchanges.[8]

The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it would apply to all Market Makers on an equal and non-discriminatory basis. The Exchange further believes that the proposed change is equitable and not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volumes in Market Maker posted orders, including both Penny Pilot issues and non-Penny Pilot issues. The proposed lower credit for Market Makers in the base tier is reasonable and equitable because it would reasonably ensure that the Exchange will derive sufficient revenue to continue to fund the higher credits available under the Select Tier and Super Tier for the benefit of all market participants.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[9] 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. Instead, the Exchange believes that the proposed change would continue to encourage competition, including by attracting additional liquidity to the Exchange, which would continue to make the Exchange a more competitive venue for, among other things, order execution and price discovery. The Exchange does not believe that the proposed change will impair the ability of Market Makers or competing order execution venues to maintain their competitive standing in the financial markets.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[10] of the Act and subparagraph (f)(2) of Rule 19b–4[11] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2013–93 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–2013–93. 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–2013–93, and should be submitted on or before October 22, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23902 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

[8] NASDAQ Options Market (''NOM'') credits range from −$0.25 to −$0.40. Topaz Exchange, LLC (''Topaz'') credits range from −0.30 to −$0.39.

[9] 15 U.S.C. 78f(b)(8).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70500; File No. SR–NYSEArca–2013–91]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Options Fee Schedule To Specify the Frequency With Which the Exchange May Change the Options Regulatory Fee

September 25, 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 September 13, 2013, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (''Fee Schedule'') to specify the frequency with which the Exchange may change the Options Regulatory Fee (''ORF''). The Exchange proposes to implement the change effective October 1, 2013. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to specify the frequency with which the Exchange may change the ORF. The Exchange proposes to implement the change effective October 1, 2013.

The ORF is assessed by the Exchange on each OTP Holder or OTP Firm for all options transactions executed or cleared by the OTP Holder or OTP Firm that are cleared by The Options Clearing Corporation (''OCC'') in the customer range (i.e., transactions that clear in the customer account of the OTP Holder's or OTP Firm's clearing firm at OCC) regardless of the exchange on which the transaction occurs. The fee is collected indirectly from OTP Holders and OTP Firms through their clearing firms by OCC on behalf of the Exchange. The dues and fees paid by OTP Holders and OTP Firms go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation.

In response to feedback from participants requesting greater certainty as to when ORF changes may occur, the Exchange proposes to specify in the Fee Schedule that the Exchange may only increase or decrease the ORF semi-annually, and any such fee change will be effective on the first business day of February or August.[3] In addition to submitting a proposed rule change to the Securities and Exchange Commission (''Commission'') as required by the Act to increase or decrease the ORF, the Exchange will notify participants via a Trader Update of any anticipated change in the amount of the fee at least 30 calendar days prior to the effective date of the change. The Exchange believes that by providing guidance on the timing of any changes to the ORF, the Exchange would make it easier for participants to ensure their systems are configured to properly account for the ORF.

The proposed change is not intended to address any other issues, and the Exchange is not aware of any problems that OTP Holders or OTP Firms would have in complying with the proposed change.

[3] The Commission notes that in a prior filing, the Exchange committed to continue to monitor the amount of revenue collected from the ORF so that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. *See, e.g.,* Securities Exchange Act Release No. 68174 (November 7, 2012), 77 FR 67845 (November 14, 2012) (SR–NYSEArca–2012–118).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[5] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it will give participants certainty on the timing of changes, if any, and better enable them to properly account for ORF charges among their customers. The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will apply in the same manner to all OTP Holders and OTP Firms that are subject to the ORF and provide them with additional advance notice of changes to that fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[6] 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 proposed change is not intended to address a competitive issue but rather to provide OTP Holders and OTP Firms with better notice of any change that the Exchange may make to the ORF. In any event, because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their trading practices, the Exchange believes that the degree to which fee or credit changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed change will impair the ability of OTP Holders, OTP Firms, or competing order execution venues to maintain their competitive standing in the financial markets.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] 15 U.S.C. 78f(b)(8).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [7] of the Act and subparagraph (f)(2) of Rule 19b–4 [8] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [9] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2013–91 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–2013–91. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEArca–2013–91 and should be submitted on or before October 22, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23828 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 15 U.S.C. 78s(b)(2)(B).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70499; File No. SR–NYSEMKT–2013–76]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Amex Options Fee Schedule To Specify the Frequency With Which the Exchange May Change the Options Regulatory Fee

September 25, 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 September 13, 2013, NYSE MKT LLC (''NYSE MKT'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Amex Options Fee Schedule (''Fee Schedule'') to specify the frequency with which the Exchange may change the Options Regulatory Fee (''ORF''). The Exchange proposes to implement the change effective October 1, 2013. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to specify the frequency with which the Exchange may change the ORF. The Exchange proposes to implement the change effective October 1, 2013.

The ORF is assessed by the Exchange on each ATP Holder for all options transactions, including mini-options, executed or cleared by the ATP Holder that are cleared by The Options Clearing Corporation (''OCC'') in the customer range (i.e., transactions that clear in the customer account of the ATP Holder's clearing firm at OCC) regardless of the exchange on which the transaction occurs. The fee is collected indirectly from ATP Holders through their clearing firms by OCC on behalf of the Exchange. The dues and fees paid by ATP Holders go into the general funds of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Exchange, a portion of which is used to help pay the costs of regulation.

In response to feedback from participants requesting greater certainty as to when ORF changes may occur, the Exchange proposes to specify in the Fee Schedule that the Exchange may only increase or decrease the ORF semi-annually, and any such fee change will be effective on the first business day of February or August.[3] In addition to submitting a proposed rule change to the Securities and Exchange Commission (''Commission'') as required by the Act to increase or decrease the ORF, the Exchange will notify participants via a Trader Update of any anticipated change in the amount of the fee at least 30 calendar days prior to the effective date of the change. The Exchange believes that by providing guidance on the timing of any changes to the ORF, the Exchange would make it easier for participants to ensure their systems are configured to properly account for the ORF.

The proposed change is not intended to address any other issues, and the Exchange is not aware of any problems that ATP Firms would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[5] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it will give participants certainty on the timing of changes, if any, and better enable them to properly account for ORF charges among their customers. The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it will apply in the same manner to all ATP Holders that are subject to the ORF and provide them with additional advance notice of changes to that fee.

[3] The Commission notes that in a prior filing, the Exchange committed to continue to monitor the amount of revenue collected from the ORF so that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. *See, e.g.,* Securities Exchange Act Release No. 68183 (November 8, 2012), 77 FR 68186 (November 15, 2012) (SR–NYSEMKT–2012–54).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[6] 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 proposed change is not intended to address a competitive issue but rather to provide ATP Holders with better notice of any change that the Exchange may make to the ORF. In any event, because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their trading practices, the Exchange believes that the degree to which fee or credit changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed change will impair the ability of ATP Holders or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[7] of the Act and subparagraph (f)(2) of Rule 19b–4[8] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[9] of the Act to determine whether the proposed rule change should be approved or disapproved.

[6] 15 U.S.C. 78f(b)(8).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 15 U.S.C. 78s(b)(2)(B).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2013–76 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2013–76. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEMKT–2013–76 and should be submitted on or before October 22, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23827 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70503; File No. SR–NYSEArca–2013–95]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule To Add an Additional Tier to the Lead Market Maker Rights Fees

September 25, 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 September 19, 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, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (''Fee Schedule'') to add an additional tier to the Lead Market Maker (''LMM'') rights fees. The Exchange proposes to implement the fee change effective October 1, 2013. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to add an additional tier to the LMM rights fees. The Exchange proposes to implement the fee change effective October 1, 2013.

OTP Firms acting as LMMs are assessed a fee for LMM rights for each appointed issue.[4] The LMM rights fee is based on the average national daily volume (''ADV'') of Customer contracts traded in that issue.[5] The LMM rights fees are assessed at the end of each month on each issue that an LMM holds in its LMM appointment. Currently, the LMM rights fees are charged as follows:

Average national daily customer contracts	Monthly issue fee
0–1,000	$45
1,001 to 2,000	75
2,001 to 5,000	200
5,001 to 15,000	375
15,001 to 100,000	750
Over 100,000	1,500

The Exchange's formal listing standards are provided under NYSE Arca Rule 5.3 (Criteria for Underlying Securities) and prescribe the minimum standards that must be satisfied before the Exchange lists a particular issue. However, the Exchange is not required to list an issue simply because it satisfies the minimum standards. To date, the Exchange generally has not listed an issue if the Exchange anticipated that it would trade an ADV of 100 or fewer Customer contracts because the minimal revenue associated with such low-volume issues would not offset the costs of listing and maintaining the listing of such issues. However, other exchanges do list such issues, and the Exchange has determined that it may be appropriate to list these low-volume issues as a convenience for OTP Holders and OTP Firms whose customers wish to transact in such issues and to satisfy requests of LMMs that have requested appointments in such issues.

In order to better align the Exchange's revenue with the costs of listing these low-volume issues, the Exchange proposes to add an additional LMM rights fee tier for issues with an ADV of Customer contracts of between 0 and 100. The LMM rights fee for this new tier would be $125. The resulting LMM rights fees would be charged as follows:

Average national daily customer contracts	Monthly issue fee
0–100	$125
101–1,000	45
1001 to 2,000	75
2,001 to 5,000	200
5,001 to 15,000	375
15,001 to 100,000	750
Over 100,000	1,500

The Exchange proposes that the new LMM rights fee tier apply only to (i) an option listed on the Exchange for the first time on or after October 1, 2013, and (ii) an option listed on the Exchange prior to October 1, 2013 that is reallocated to a new LMM on or after October 1, 2013. Thus, the LMM for an issue with an ADV of Customer contracts within the new lowest tier (*i.e.,* 0–100 contracts) that listed on the Exchange prior to October 1, 2013 would continue to be subject to the $45 monthly issue fee. If, on or after October 1, 2013, the LMM relinquished that appointment and a new LMM applied for and was granted an appointment in that issue, then the new LMM would be subject to the revised fees; following the reallocation, if the issue traded a monthly ADV of 100 or fewer Customer contracts, then the new LMM would pay the $125 monthly fee.

The proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that LMMs would have in complying with the proposed change.[6]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[8] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its

[10] 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.

[4] ''OTP Firm'' is defined in NYSE Arca Rule 1.1(r). ''Market Maker'' is defined in NYSE Arca Rule 6.32. ''Lead Market Maker'' is defined in NYSE Arca Rule 6.82.

[5] The term ''Customer'' excludes a broker-dealer. *See* NYSE Arca Rule 6.1A(a)(4).

[6] The Exchange notes that NYSE MKT LLC submitted a similar proposal to implement a rights tier and fee for low-volume issues listed on NYSE Amex Options LLC. *See* Securities Exchange Act Release No. 67153 (June 7, 2012), 77 FR 35437 (June 13, 2012) (SR–NYSEMKT–2012–05).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4) and (5).

facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that including an additional LMM rights fee tier with a corresponding fee of $125 is reasonable because it would better balance the Exchange's costs to list and maintain the listing of these lowest volume issues against the minimal revenue that such issues are anticipated to generate for the Exchange. The Exchange also believes that it is reasonable to grandfather LMMs that hold an appointment in an issue listed before October 1, 2013 at the lower $45 fee level in order to create an incentive for LMMs to maintain those appointments.

The fee increase is also reasonable, equitable, and not unfairly discriminatory because it will encourage more efficient use of the Exchange's resources. Unfettered growth in option listings without an offsetting growth in volume would ultimately result in increased costs for all participants on the Exchange. As a result of the fee increase, LMMs that wish to request new appointments in the lowest volume issues would directly contribute toward some of the Exchange's costs to support that trading instead of having those costs shared among all Exchange participants. The Exchange also believes that the fee increase is equitable and not unfairly discriminatory because LMMs choose to apply for appointments, and thus only those LMMs that are willing to pay the applicable fee will apply for the appointment. An LMM that does not wish to pay the higher fee for a new appointment after October 1, 2013 will not request such an appointment, nor will it be required to take one. The Exchange believes that it is equitable and not unfairly discriminatory to grandfather those LMMs that maintain appointments in previously listed issues that have a monthly ADV of 100 or fewer Customer contracts after October 1, 2013 at the $45 monthly fee level; otherwise, those LMMs would face a significant monthly fee increase. The Exchange believes that grandfathering is fair and reasonable in light of existing LMMs' expectations concerning fee levels at the time their appointments were accepted.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[9] 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 proposed rule change would enhance competition among exchanges by permitting the Exchange to better balance its revenues and costs when listing extremely low-volume issues that also may be listed on other exchanges. The Exchange does not believe that the proposed change would burden competition among LMMs because LMMs apply for such appointments based on their own business decisions.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[10] of the Act and subparagraph (f)(2) of Rule 19b–4[11] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2013–95 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2013–95. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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–2013–95, and should be submitted on or before October 22, 2013.

[9] 15 U.S.C. 78f(b)(8).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–23901 Filed 9–30–13; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13775 and #13776]

California Disaster #CA–00212

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of California dated 09/24/2013.

Incident: Clover Fire

Incident Period: 09/09/2013 through 09/15/2013.

Effective Date: 09/24/2013.

Physical Loan Application Deadline Date: 11/25/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 06/24/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Shasta.

Contiguous Counties:

California: Lassen, Modoc, Plumas, Siskiyou, Tehama, Trinity.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.875
Homeowners Without Credit Available Elsewhere	1.937
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	2.875
Non-Profit Organizations Without Credit Available Elsewhere	2.875
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	2.875

The number assigned to this disaster for physical damage is 13775 5 and for economic injury is 13776 0.

The State which received an EIDL Declaration # is California.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: September 24, 2013.

Jeanne Hulit,

Acting Administrator.

[FR Doc. 2013–23809 Filed 9–30–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13777 and #13778]

Pennsylvania Disaster #PA–00064

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the Commonwealth of Pennsylvania dated 09/24/2013.

Incident: Storms and Severe Weather.

Incident Period: 08/28/2013 through 09/03/2013.

Effective Date: 09/24/2013.

Physical Loan Application Deadline Date: 11/25/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 06/24/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations. The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Armstrong.

Contiguous Counties: Pennsylvania: Allegheny; Butler; Clarion; Indiana; Jefferson; Westmoreland.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	3.875
Homeowners without credit available elsewhere	1.937
Businesses with credit available elsewhere	6.000
Businesses without credit available elsewhere	4.000
Non-profit organizations with credit available elsewhere	2.875
Non-profit organizations without credit available elsewhere	2.875
For Economic Injury:	
Businesses & small agricultural cooperatives without credit available elsewhere	4.000
Non-profit organizations without credit available elsewhere	2.875

The number assigned to this disaster for physical damage is 13777 6 and for economic injury is 13778 0.

The Commonwealth which received an EIDL Declaration # is Pennsylvania.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: September 24, 2013.

Jeanne Hulit,

Acting Administrator.

[FR Doc. 2013–23808 Filed 9–30–13; 8:45 am]

BILLING CODE 8025–01–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Energy Resource Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of meeting.

SUMMARY: The TVA Regional Energy Resource Council (RERC) will hold an orientation meeting on Wednesday, October 23, 2013, regarding regional energy related issues in the Tennessee Valley.

The RERC was established to advise TVA on its energy resource activities and the priorities among competing objectives and values. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

The meeting agenda includes the following:

1. Introductions.

2. Presentation(s) and discussion concerning the purpose and scope of the RERC, energy resources in the Valley, energy issues and the Integrated Resource Plan process.

[13] 17 CFR 200.30–3(a)(12).

3. Public Comments.
4. Council Discussion.

The RERC will hear opinions and views of citizens by providing a public comment session. The public comment session will be held at 1:30 p.m. C.D.T. on Wednesday, October 23, 2013. Persons wishing to speak are requested to register at the door by 12:30 p.m. on Wednesday, October 23, 2013, and will be called on during the public comment period. Handout materials should be limited to one printed page. Written comments are also invited and may be mailed to the Regional Energy Resource Council, Tennessee Valley Authority, 400 West Summit Hill Drive, WT–11 B, Knoxville, Tennessee 37902.

DATES: The meeting will be held on Wednesday, October 23, 2013, from 8:30 a.m. to 4 p.m. c.d.t.

ADDRESSES: The meeting will be held at the Tennessee Valley Authority's Central In-Process Training Center, 29199 US Highway 72, Hollywood, Alabama, 35752, and will be open to the public. Anyone needing special access or accommodations should let the contact below know at least a week in advance.

FOR FURTHER INFORMATION CONTACT: Beth Keel, 400 West Summit Hill Drive, WT–11 B, Knoxville, Tennessee 37902, (865) 632–6113.

Dated: September 25, 2013.

John W. Myers,

Director, Environmental Policy & Regulatory Affairs, Tennessee Valley Authority.

[FR Doc. 2013–23919 Filed 9–30–13; 8:45 am]

BILLING CODE 8120–08–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR–2013–0030]

2013 Special 301 Out-of-Cycle Review of Notorious Markets: Notice of Extension for Public Comments

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of extension of deadline for public comments.

SUMMARY: The Office of the United States Trade Representative published a request for comments in the 2013 Special 301 Out-of-Cycle Review of Notorious Markets in the **Federal Register** of September 20, 2013. That notice provided a deadline for comments of October 11, 2013. This notice extends that deadline to October 25, 2013.

DATES: The extended deadline for interested parties to submit written comments is October 25, 2013.

ADDRESSES: All written comments should be sent electronically via *http://www.regulations.gov,* docket number USTR–2013–0030. Submissions should contain the term ''2013 Out-of-Cycle Review of Notorious Markets'' in the ''Type Comment'' field on *http://www.regulations.gov*. If you are unable to provide submissions at *www.regulations.gov,* please contact Cecelia Jones-Davis, Executive Assistant, Office of the United States Trade Representative, at (202) 395–9651, to arrange for an alternative method of transmission.

FOR FURTHER INFORMATION CONTACT: Cecelia Jones-Davis, Executive Assistant, Office of the United States Trade Representative, at (202) 395–9651. Further information about Special 301 can be found at *http://www.ustr.gov*.

SUPPLEMENTARY INFORMATION: USTR conducts a yearly Out-of-Cycle Review of Notorious Markets, resulting in publication, separately from the annual Special 301 report, of a ''Notorious Markets List.'' The Office of the United States Trade Representative (USTR) is requesting written submissions from the public identifying potential Internet and physical notorious markets that exist outside the United States and that may be included in the 2013 Notorious Markets List. Further information regarding requirements for submissions is included in the September 20, 2014 **Federal Register** notice requesting public comments in the 2013 Special 301 Out-of-Cycle Review of Notorious Markets (78 FR 57924).

Stanford K. McCoy,

Assistant U.S. Trade Representative for Intellectual Property and Innovation.

[FR Doc. 2013–23856 Filed 9–30–13; 8:45 am]

BILLING CODE 3290–F3–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Public Comments on Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act in Calendar Year 2014

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: The African Growth and Opportunity Act Implementation Subcommittee of the Trade Policy Staff Committee (''Subcommittee'') is requesting written public comments for the annual review of the eligibility of sub-Saharan African countries to receive the benefits of the African Growth and Opportunity Act (AGOA). The Subcommittee will consider these comments in developing recommendations on AGOA country eligibility for calendar year 2014 for the President. Comments received related to the child labor criteria may also be considered by the Secretary of Labor in the preparation of the Department of Labor's report on child labor as required under section 412(c) of the Trade and Development Act of 2000. This notice identifies the eligibility criteria that must be considered under AGOA, and lists those sub-Saharan African countries that are currently eligible for the benefits of the AGOA and those that were ineligible for such benefits in 2013.

DATES: To ensure consideration, public comments must be submitted to the Office of the U.S. Trade Representative (USTR) by October 25, 2013.

ADDRESSES: USTR strongly prefers electronic submissions made at *http://www.regulations.gov,* docket number USTR–2013–0035 See ''Requirements for Submission,'' below. If you are unable to make a submission at *www.regulations.gov*, please contact Yvonne Jamison, Trade Policy Staff Committee, at (202) 395–3475 to make other arrangements.

FOR FURTHER INFORMATION CONTACT: For procedural questions, please contact Yvonne Jamison, Office of the U.S. Trade Representative, 600 17th Street NW., Room F516, Washington, DC, 20508, at (202) 395–3475. All other questions should be directed to Constance Hamilton, Deputy Assistant U.S. Trade Representative for Africa, Office of the U.S. Trade Representative, at (202) 395–9514.

SUPPLEMENTARY INFORMATION: The AGOA (Title I of the Trade and Development Act of 2000, Public Law 106–200) (19 U.S.C. 3721 *et seq.*), as amended, authorizes the President to designate sub-Saharan African countries as beneficiaries eligible for duty-free treatment for certain additional products under the Generalized System of Preferences (GSP) (Title V of the Trade Act of 1974 (19 U.S.C. 2461 *et seq.*) (1974 Act)), as well as for the preferential treatment the AGOA provides for certain textile and apparel articles.

The President may designate a sub-Saharan African country as a beneficiary eligible for both the additional GSP benefits and the textile and apparel benefits of AGOA if he determines that the country meets the eligibility criteria set forth in: (1) section 104 of the AGOA

(19 U.S.C. 3703); and (2) section 502 of the 1974 Act (19 U.S.C. 2462).

Section 104 of AGOA includes requirements that the country has established or is making substantial progress toward establishing, *inter alia:* a market-based economy; the rule of law, political pluralism, and the right to due process; the elimination of barriers to U.S. trade and investment; economic policies to reduce poverty; a system to combat corruption and bribery; and protection of internationally recognized worker rights. In addition, the country may not engage in activities that undermine U.S. national security or foreign policy interests or engage in gross violations of internationally recognized human rights. Please see section 104 of AGOA and section 502 of the 1974 Act for a complete list of the AGOA eligibility criteria.

Section 506A of the 1974 Act requires that, if the President determines that a beneficiary sub-Saharan African country is not meeting the eligibility requirements, he must terminate the designation of the country as a beneficiary sub-Saharan African country. For 2013, 39 countries were designated as beneficiary sub-Saharan African countries. These countries, as well as the countries currently designated as ineligible, are listed below. Section 506A of the 1974 Act provides that the President shall monitor and review annually the progress of each sub-Saharan African country in meeting the foregoing eligibility criteria in order to determine whether each beneficiary sub-Saharan African country should continue to be eligible, and whether each sub-Saharan African country that is currently not a beneficiary sub-Saharan African country, should be designated as such a country.

The Subcommittee is seeking public comments in connection with the annual review of the eligibility of beneficiary sub-Saharan African countries for AGOA's benefits. The Subcommittee will consider any such comments in developing recommendations on country eligibility for the President. Comments related to the child labor criteria may also be considered by the Secretary of Labor in making the findings required under section 504 of the 1974 Act.

The following sub-Saharan African countries were designated as beneficiary sub-Saharan African countries in 2013:

Angola
Republic of Benin
Republic of Botswana
Burkina Faso
Burundi
Republic of Cape Verde
Republic of Cameroon
Republic of Chad
Federal Islamic Republic of Comoros
Republic of Congo
Republic of Cote d'Ivoire
Republic of Djibouti
Ethiopia
Gabonese Republic
The Gambia
Republic of Ghana
Republic of Guinea
Republic of Kenya
Kingdom of Lesotho
Republic of Liberia
Republic of Malawi
Republic of Mali
Islamic Republic of Mauritania
Republic of Mauritius
Republic of Mozambique
Republic of Namibia
Republic of Niger
Federal Republic of Nigeria
Republic of Rwanda
Sao Tome & Principe
Republic of Senegal
Republic of Seychelles
Republic of Sierra Leone
Republic of South Africa
Republic of South Sudan
Kingdom of Swaziland
United Republic of Tanzania
Republic of Togo
Republic of Uganda
Republic of Zambia

The following sub-Saharan African countries were not designated as beneficiary sub-Saharan African countries in 2013:

Central African Republic
Democratic Republic of Congo
Republic of Equatorial Guinea
State of Eritrea
Republic of Guinea-Bissau
Republic of Madagascar
Republic of Mali
Somalia
Republic of Sudan
Republic of Zimbabwe

Requirements for Submissions: Comments must be submitted in English. To ensure the most timely and expeditious receipt and consideration of petitions, USTR has arranged to accept on-line submissions via *http://www.regulations.gov*. To submit petitions via this site, enter docket number USTR–2013–0035 on the home page and click ''search.'' The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice on search-results page and click on the link entitled ''Submit a Comment.'' (For further information on using the *http://www.regulations,gov* Web site, please consult the resources provided on the Web site by clicking on ''Help'' at the top of the home page.)

The *http://www.regulations.gov* Web site provides the option of making submissions by filling in a ''Type Comment'' field, or by attaching a document. USTR prefers comments to be submitted as attachments. When doing this, it is sufficient to type ''See attached'' in the ''Type Comment'' field. Submissions in Microsoft Word (.doc) or Adobe Acrobat (pdf) are preferred.

Persons wishing to file comments containing business confidential information must submit both a business confidential version and a public version. Persons submitting business confidential information should write ''See attached BC comments'' in the ''Type Comment'' field. Any page containing business confidential information must be clearly marked BUSINESS CONFIDENTIAL on the top of that page. Persons submitting a business confidential comment must also submit a separate public version of that comment with the business confidential information deleted. Persons should write ''See attached public version'' in the ''Type Comment'' field of the public submission. Submissions should not attach separate cover letters; rather, information that might appear in the cover letter should be included in the comments you submit. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments to a submission in the same file as the submission itself and not as separate files.

Public versions of all documents relating to this review will be available for review no later than two weeks after the due date at *www.regulations.gov,* docket number USTR–2013–0035.

Douglas Bell,

Chair, Trade Policy Staff Committee.

[FR Doc. 2013–23863 Filed 9–30–13; 8:45 am]

BILLING CODE 3290–F3–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination Regarding Waiver of Discriminatory Purchasing Requirements With Respect to Goods and Services of a New Member State of the European Union (Republic of Croatia)

AGENCY: Office of the United States Trade Representative.

ACTION: Determination Regarding Waiver of Discriminatory Purchasing Requirements under the Trade Agreements Act of 1979.

DATES: *Effective Date:* September 30, 2013.

FOR FURTHER INFORMATION CONTACT: Scott J. Pietan, Director of International Procurement Policy, Office of the United States Trade Representative, (202) 395–9646.

SUPPLEMENTARY INFORMATION: The European Union (''EU'') is a party to the World Trade Organization (''WTO'') Agreement on Government Procurement (''GPA'') and has assumed rights and obligations under the GPA on behalf of its Member States. On July 1, 2013, the Republic of Croatia acceded to the EU. In light of that accession, the EU has committed to assume rights and obligations on behalf of the new Member State under the GPA. On June 27, 2013 the WTO Committee on Government Procurement approved the application of the GPA to the Republic of Croatia. The United States, which is also a party to the GPA, has agreed to waive discriminatory purchasing requirements for eligible products and suppliers of the Republic of Croatia, beginning on September 30, 2013.

Section 1–201 of Executive Order 12260 of December 31, 1980 delegated the functions of the President under sections 301 and 302 of the Trade Agreements Act of 1979 (''the Trade Agreements Act'') (19 U.S.C. 2511, 2512) to the United States Trade Representative.

Determination: In conformity with sections 301 and 302 of the Trade Agreements Act, and in order to carry out U.S. obligations under the GPA, I hereby determine that:

1. The European Union, including the Republic of Croatia, is an instrumentality that: (A) is a party to the GPA; and (B) will provide appropriate reciprocal competitive government procurement opportunities to United States products and services and suppliers of such products and services. In accordance with section 301(b)(1) of the Trade Agreements Act, the European Union is so designated for purposes of section 301(a) of the Trade Agreements Act.

2. Accordingly, beginning on September 30, 2013, with respect to eligible products (namely, those goods and services covered under the GPA for procurement by the United States) of the Republic of Croatia and suppliers of such products, the application of any law, regulation, procedure, or practice regarding government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded—

(A) To United States products and suppliers of such products, or

(B) To eligible products of another foreign country or instrumentality which is a party to the GPA and suppliers of such products, shall be waived. This waiver shall be applied by all entities listed in United States Annexes 1 and 3 of GPA Appendix 1.

3. The Trade Representative may modify or withdraw the designation in paragraph 1 and the waiver in paragraph 2.

4. This notice shall not affect the treatment to be accorded to eligible products of any country that was a Member State of the European Union before September 30, 2013.

Dated: September 17, 2013.

Mike Froman,

United States Trade Representative.

[FR Doc. 2013–23857 Filed 9–30–13; 8:45 am]

BILLING CODE 3290–F3–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Discretionary Funding Opportunity

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Funding Availability (NOFA): Solicitation of Project Proposals for Innovative Safety, Resiliency, and All-Hazards Emergency Response and Recovery Research Demonstrations.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of $29,000,000 in Research, Development, Demonstration, and Deployment Program funds for innovative safety, resiliency, and all-hazards emergency response and recovery research demonstration projects of national significance.

This NOFA makes funds available for cooperative agreements to engage in the demonstration of innovative technologies, methods, practices and techniques in three areas: (1) Operational safety, (2) infrastructure or equipment resiliency and (3) all-hazards emergency response and recovery methods. Eligible applicants include providers of public transportation; State and local governmental entities; departments, agencies, and instrumentalities of the Government including Federal laboratories; private or non-profit organizations; institutions of higher education; and technical and community colleges.

This notice solicits competitive proposals addressing priorities established by FTA for these research areas, provides instructions for submitting proposals, and describes criteria FTA will use to identify meritorious proposals for funding. This NOFA is also available on the FTA Web site at: *www.fta.dot.gov.* FTA will announce final selections on the Web site and in the **Federal Register**. Additionally, a synopsis of this funding opportunity will appear on the government-wide electronic grants Web site *www.grants.gov* (GRANTS.GOV).

DATES: Complete proposals must be submitted electronically through the (GRANTS.GOV) ''APPLY'' function by December 2, 2013. Prospective applicants should initiate the process by registering on the GRANTS.GOV Web site promptly to ensure completion of the application process before the submission deadline. Instructions for applying can be found on FTA's Web site at *http://www.fta.dot.gov/grants/13077.html* and in the ''FIND'' module of *GRANTS.GOV.* Mail and fax submissions will not be accepted.

FOR FURTHER INFORMATION CONTACT: For specific information regarding the three areas of research targeted within this NOFA contact the following program specialists in FTA's Office of Research, Demonstration, and Innovation (TRI):

For operational safety questions, contact Roy Chen, Office of Technology, email: *royweishun.chen@dot.gov.*

For infrastructure or equipment resiliency questions, please contact Terrell Williams, Office of Technology, email: *terrell.williams@dot.gov.*

For all-hazards emergency response and recovery questions contact Patrick Centolanzi, Office of Technology, email: *patrick.centolanzi@dot.gov.*

For general program information on this opportunity, contact Matthew Lesh, email: *matthew.lesh@dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION:

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Appendix A: Registration in GRANTS.GOV

A. Authority

The Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112–55, made $25,000,000 available to carry out innovative research and demonstrations of national significance under 49 U.S.C. 5312. Of that amount, this NOFA makes $20.8 million available for innovative safety,

resiliency, and all-hazards emergency response and recovery research and demonstration projects of national significance. Projects awarded from FY 2012 research funds have no minimum, non-Federal, cost share requirement. This NOFA also makes available an additional $8.2 million in section 5312 FY 2013 research funds. However, amendments made to section 5312(f) by the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, require that those funds be matched by a non-Federal share of no less than 20 percent.

B. Purpose

A key strategic goal of DOT and FTA is to improve and maintain America's public transportation systems to ensure they are safe and in a state of good repair in order to meet performance objectives. The innovative research and demonstrations solicited by this NOFA are intended to develop and showcase promising technologies, methods, practices and techniques that improve public transportation systems. To this end, this NOFA seeks proposals for projects that engage in the demonstration of innovative technologies, methods, practices and techniques in three areas: (1) Operational safety, (2) infrastructure or equipment resiliency and (3) all-hazards emergency response and recovery methods.

This NOFA also describes proposal requirements, deadlines, and evaluation criteria.

C. Program Information

1. Eligible Proposers

Proposals will be accepted from providers of public transportation; State and local governmental entities; departments, agencies, and instrumentalities of the Government including Federal laboratories; private or non-profit organizations; institutions of higher education; and technical and community colleges. Substantial partnerships are encouraged with entities that can add value and expertise to the project. Examples of such entities include: Consortia of public transportation providers; manufacturers and suppliers to the public transportation industry; departments, agencies, and instrumentalities of the Government, including Federal laboratories; State and local governmental entities; non-profit organizations; institutions of higher education; or technical and community colleges. For-profit companies may participate on project teams; however, recipients and subrecipients of funding under this program may not charge a fee or make a profit from the FTA program funding.

The proposal must include a detailed statement regarding the role of any public transportation provider who is a project partner but may not be the lead applicant in the implementation of the project.

2. Eligible Projects

Eligible project proposals will indicate a focus on one of the following three areas: (1) Operational safety, (2) infrastructure or equipment resiliency and (3) all-hazards emergency response and recovery methods.

Project proposals must include a research, development and/or synthesis phase, a demonstration phase, and a project evaluation by an independent third-party. All phases are critical to project selection. Revenue-service, full-scale demonstrations are preferred where practicable. However, in cases where a full-scale demonstration would be impractical, detailed plans for a sub-scale demonstration or model of the innovative technology or practice will be considered. Basic research or studies that do not result in any demonstration of the potential for commercialization or broad deployment of the technology or practice within the scope of the project will not be funded.

(a) *Operational Safety.* Projects will develop and demonstrate new or substantially-improved, technologies, methods, practices and techniques that will increase the operational safety of public transportation services and reduce the risk of transit-related injuries and fatalities. Candidate technologies or practices for demonstration may include, but are not limited to: Electronic intrusion detection, remote rail monitoring, train undercarriage inspection systems, vehicle crashworthiness, connected vehicle infrastructure and intelligent at-grade railroad crossing warning systems, platform-edge doors, and automatic detection of distracted and/or fatigued operators.

(b) *Resiliency.* Projects will identify, develop, and demonstrate technologies, methods, practices and techniques for increasing the resiliency of public transportation systems to natural disasters and other emergencies that result from an external cause. A resilient public transit system has design-level robustness that minimizes the damage or incapacitation caused by a natural disaster or other emergency, and which allows it to continue to deliver service after an emergency; it is adaptable so that it can prepare for and respond appropriately to events in real time; and it can recover quickly from these events through effective and well-prepared response and recovery operations. These three attributes—robustness, adaptiveness, and readiness—form the foundations of a resilient public transit system.

Candidate technologies or practices for demonstration may include, but are not limited to: Increased corrosion resistance of transportation assets to saltwater, decreased system wide vulnerability to flooding and severe weather incidents, or increased resiliency of transportation assets to extreme heat or cold or prolonged temperature variations.

(c) *All-Hazards Emergency Response and Recovery.* Projects will investigate technologies, methods, practices and techniques that can improve communication with emergency responders in the event of emergencies, disruptions, and catastrophic failures and conduct a demonstration of the most promising methods and/or technologies in an operational environment to restore transit services. Candidate technologies or practices include, but are not limited to: Improved detection of, location of, communication with, and/or response to injured or ill passengers, senior and disabled passengers, emergency response personnel, equipment breakdowns, service disruptions, or hazardous conditions; and utilization of transit assets in non-transit emergency response and recovery efforts.

3. Funding Amounts and Requirements

Total project cost will be determined by each applicant. Applicants may apply for a minimum FTA project share of $500,000 and a maximum FTA project share of $5,000,000, consistent with the match requirements of funds used. FTA may select an application for an award of less than the originally-proposed amount if FTA determines that the project goals can be achieved with a lower award amount or if doing so is expected to result in a more advantageous portfolio of projects. Proposals should provide a detailed budget proposal for fully-realized project as well as a reduced scope and budget if the project can be scaled down and still achieve useful results. Applicants should specify and justify the minimum award amount needed to achieve effective project results including an independent third party evaluation phase.

To ensure that these funds are invested wisely, FTA reserves the right to award only some, or none, of the available funding in the event that that the projects proposed do not merit the

full amount requested, or any award, based on the stated evaluation criteria.

Funds made available under this program may be used to fund operating expenses, preventive maintenance, and corrective maintenance directly associated with the demonstration of the targeted innovative technologies, methods, or practices, but may not be used to cover such expenses for equipment not essential to the project. Non-federal funding of expenses related to the projects may be counted toward the applicants' matching local cost share. FTA will not reimburse costs incurred prior to project selection unless FTA has granted the applicant a Letter of No Prejudice (LONP) in advance of project selection. Due to the multi-year origin of these funds, awards made using FY12 funds do not require a minimum, non-Federal, cost share. Awards made using FY13 funds will require a minimum 20 percent non-Federal cost share. Based on the number of proposals received, local match contributions of the proposals and the types of projects proposed, FTA will determine which year of funding will be attributed to projects during the selection process. Regardless of minimum share requirements, cost sharing is an evaluation criterion and proposals with higher local cost share will be considered more favorably. Cash and other high-quality matches will be considered more favorably than in-kind cost matching, though all are acceptable. FTA will not approve deferred local share. Recipients must comply with all applicable FTA requirements.

Eligible sources of non-Federal matching funds include:

(a) Cash from non-governmental sources other than revenues from providing public transportation services;

(b) Non-farebox revenues from the operation of public transportation service, such as the sale of advertising and concession revenues. A voluntary or mandatory fee that a college, university, or similar institution imposes on all its students for free or discounted transit service is not farebox revenue;

(c) Amounts received under a service agreement with a State or local social service agency or private social service organization;

(d) Undistributed cash surpluses, replacement or depreciation cash funds, reserves available in cash, or new capital;

(e) Amounts appropriated or otherwise made available to a department or agency of the Government (other than the Department of Transportation); and

(f) In-kind contribution such as the market value of in-kind contributions integral to the project may be counted as a contribution toward local share.

D. Proposal Submission Process

Project proposals must be submitted electronically through *GRANTS.GOV* (*www.grants.gov*) by December 2, 2013. Mail and fax submissions will not be accepted. A complete proposal submission will consist of at least two files: (1) the SF 424 Mandatory Form (downloaded from *GRANTS.GOV*) and (2) the Applicant and Proposal Profile for the ''Innovative Safety, Resiliency, and All-Hazards Emergency Response and Recovery Research Demonstrations'' found on the FTA Web site or through GRANTS.GOV. The Applicant and Proposal Profile provides guidance and a consistent format for proposers to respond to the criteria outlined in this NOFA. Once completed, the Applicant and Proposal Profile must be placed in the attachments section of the SF 424 Mandatory Form. Proposers must use the Applicant and Proposal Profile designated for the ''Innovative Safety, Resiliency, and All-Hazards Emergency Response and Recovery Research Demonstrations'' and attach it to their submission in *GRANTS.GOV* to successfully complete the application process. A proposal submission may also contain additional supporting documentation as attachments. Supporting documentation could include but is not limited to: Support letters, pictures, digitized drawings, spreadsheets, and brochures.

Within 24 to 48 hours after submitting an electronic proposal, the applicant should receive three email messages from *GRANTS.GOV:* (1) Confirmation of successful transmission to *GRANTS.GOV,* (2) confirmation of successful validation by *GRANTS.GOV,* and (3) confirmation of successful validation by FTA. If confirmations of successful validation are not received and a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation, as described in the email notice and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments were updated and check the box on the supplemental form indicating this is a resubmission.

FTA strongly encourages proposers to submit their project proposals at least 72 hours prior to the due date to allow time to receive the validation messages and to correct any problems that may have caused a rejection notification. FTA will not accept submissions after the stated submission deadline for any reason. *GRANTS.GOV* scheduled maintenance and outage times are announced on *GRANTS.GOV.* Deadlines will not be extended due to scheduled maintenance or outages.

Proposers are encouraged to begin the process of registration on the *GRANTS.GOV* Web site well in advance of the submission deadline. Instructions on the *GRANTS.GOV* registration process are listed in Appendix A. Registration is a multi-step process, which may take 3 to 5 days, but could take as much as several weeks to complete before an application can be submitted if the applicant needs to obtain certain identifying numbers external to *GRANTS.GOV* (for example, applying for an Employer Identification Number). Registered proposers may still be required to take steps to keep their registration up to date before submissions can be made successfully: (1) registration in the System for Award Management (SAM) is renewed annually and (2) persons making submissions on behalf of the Authorized Organization Representative (AOR) must be authorized in *GRANTS.GOV* by the AOR to make submissions.

Proposers may submit one proposal for each project or one proposal containing multiple projects. Proposers submitting multiple projects in one proposal must be sure to clearly define each project by completing a profile for each project. Supplemental profiles must be added within the proposal by clicking the ''ADD PROJECT'' button in Section II of the Applicant and Proposal Profile.

Information such as proposer name, Federal amount requested, local match amount, description of areas served, may be requested in varying degrees of detail on both the SF 424 Form and Applicant and Proposal Profile. Proposers must fill in all fields unless stated otherwise on the forms. Proposers should use both the ''CHECK PACKAGE FOR ERRORS'' and the ''VALIDATE FORM'' validation buttons on both forms to check all required fields on the forms, and ensure that the Federal and local amounts specified are consistent. The information described in Sections ''E'' through ''H'' below MUST be included and/or addressed on the SF 424 Form and Applicant and Proposal Profile for all requests for ''Innovative Safety, Resiliency, and All-Hazards Emergency Response and Recovery Research Demonstrations'' funding.

E. Proposal Information

1. Name of Applicant

2. Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number if available. (Note: If selected, applicant will be required to provide DUNS number prior to grant award).

3. Contact information including: Contact name, title, address, Congressional district, fax and phone number, and email address if available.

4. Description of public transportation services including areas currently served by the public transportation system, if any.

5. Name of person(s) authorized to apply on behalf of the system (attach a signed transmittal letter) must accompany the proposal.

F. Proposal Content

For complete and up-to-date guidance on the project information and project evaluation criteria that must be documented, refer to the applicable program on the FTA Web site: *http://www.fta.dot.gov/grants/13077.html.* At a minimum, every proposal must:

1. Submit an SF–424 Form with the correct Applicant and Proposal Profile attached, as described above.

2. State the project title and describe the project scope to be funded in the executive summary, as well as the theme area (operational safety, infrastructure or equipment resiliency or all-hazards emergency response and recovery methods).

3. Indicate the type of service provided, project type and fleet information.

4. Address each specific and general evaluation criterion described in Section G below separately, demonstrating how the project responds to each criterion.

5. Provide a line-item budget for the total project with enough detail to indicate the various key components of the project. Project budgets must include a line item for an independent third-party project evaluation of the overall effectiveness of the research and demonstration by an organization or individual that has not otherwise participated in the project. Project schedules should include this third-party evaluation within two years of the date of award. As FTA may elect to fund only part of some project proposals, the budget should provide for the minimum amount necessary to fund specific project components of independent utility. If the project can be scaled, provide a scaling plan describing the minimum funding necessary for a feasible project and the impacts of a reduced funding level.

6. Provide the Federal amount requested.

7. If applicable, document the matching funds, including amount and source of the match (Matching funds may include local or private sector financial participation in the project).

8. The proposed location(s) of the research and demonstration and the transit service mode that the technology will be demonstrated in.

9. Any requested deviations from FTA requirements (FTA is not inclined to grant deviations from its requirements, but may consider deviations if the applicant can show a compelling benefit).

10. If the proposed project represents steps toward a larger goal, applicants may provide a brief description of suggested follow-on research and/or demonstrations. FTA cannot guarantee selection or funding of such follow-on activities.

11. The technology to be used in this demonstration and explanation of the principle of operation for the transit service mode specified.

12. Potential issues (technical or other) that may impact the success of the project.

13. Provide support documentation, including financial statements, bond-ratings, and documents supporting the commitment of non-federal funding to the project, or a timeframe upon which those commitments would be made.

14. Address whether other Federal funds have been sought for the project.

15. Provide a project time-line outlining steps from project development through completion, depicting significant milestones including but not limited to the anticipated date on which requests for proposals for project components or contracting are expected and actual or expected delivery dates.

16. Provide Congressional district information for the project's place of performance.

G. Evaluation Criteria

FTA will evaluate proposals based on the criteria described in this section. All of the projects share the same general evaluation criteria listed in Section G(1). In addition, each research and demonstration area has specific evaluation criteria listed in Section G(2). Proposals must provide sufficiently detailed information for FTA to evaluate them against these criteria.

(1) General Evaluation Criteria

(a) Project Effectiveness

(i) The effectiveness of the project in achieving and demonstrating the specific objectives of the technology area(s) described above;

(ii) Significant impacts on DOT and FTA strategic objectives for improving Safety or State of Good Repair. Additional impacts on other strategic objectives for the goals of Economic Competitiveness, Livable Communities, and Environmental Sustainability will be considered favorably;

(iii) The multimodal (bus, BRT, light rail, heavy rail, ferry, commuter rail, monorail, automated guideway, inclined plane, etc.) applicability of the demonstration; and

(iv) The degree of improvement over current technologies and practices.

(b) Project Innovation

The project identifies a unique, significant, or innovative approach for public transportation operations.

(c) National Applicability

The degree to which the project could be replicated by other transit agencies regionally or nationally.

(d) Project Schedule, Milestones, and Readiness

(i) The timeliness of the proposed project schedule, and the reasonableness of the proposed milestones.

(ii) A written commitment from all the project partners.

(iii) The availability of existing resources (physical facilities, human resources, partnerships) to carry out the project.

(iv) The demonstrated capacity and experience of the partners to carry out the demonstration project of similar size and/or scope and specific prior experience with demonstration projects.

(v) Details on whether the proposed demonstration is a new effort or a continuation of a related research or demonstration project.

(e) Project Management

(i) The proposal provides specific details demonstrating the lead applicant's role in the management of the project and the involvement of other partners to include a provider(s) of public transit service.

(ii) The applicant is in a fundable status for FTA awards.

(iii) The proposal demonstrates the applicant's project team's technical capacity to carry out the project, including the project approach or project management plan.

(iv) There are no outstanding legal, technical, or financial issues with the project partners that would make this a high-risk project.

(v) If local match is provided, the source(s) of local match is identified and is available for prompt project implementation if selected (no deferred local share will be allowed).

(f) Commercialization or Dissemination Plan

(i) The application demonstrates an effective, timely, and realistic plan for moving the results of the project into the transit marketplace.

(ii) Describe how the project team plans to disseminate the result of the project to the transit industry.

(g) Return on Investment

(i) The cost-effectiveness of the proposed research and demonstration effort;

(ii) The cost-effectiveness of the specific anticipated technologies when they are later adopted or commercialized;

(iii) The anticipated measurable benefits relative to the Federal cost share (leveraging the Federal investment with greater non-Federal cost share will tend to increase the cost-effectiveness of a project).

(iv) Any anticipated intangible benefits, such as making public transportation more appealing to potential passengers, providing educational opportunities, or reducing negative externalities such as traffic congestion.

(2) Specific Evaluation Criteria

Applicants will need to provide a detailed narrative describing the outcomes of a project towards addressing Operating Safety, Infrastructure and Equipment Resiliency, or All-Hazards Emergency Response and Recovery. Applicants should also provide metrics that address a project's ability to meet these outcomes.

(a) Operating Safety Technology

Metrics could include, but are not limited to: Predicted reduction in public transportation fatalities or injuries, predicted reduction in ''close calls,'' or predicted reduction in property damage to transit vehicles, infrastructure or vehicles and objects involved in transit vehicle collisions.

(b) Infrastructure & Equipment Resiliency

Metrics could include, but are not limited to: A decrease in vulnerability of a transit asset to a particular type of event, reduced costs for responding to and recovering from a particular type of event, increases in the useful life of a transit asset, or improvements to the ability of a transit system to provide service during and in the immediate aftermath of an event. Metrics could also include measurable improvements in the condition of a transit asset to a particular impact like corrosion or severe weather, or measureable effects such as asset damage avoided during a particular incident.

(c) All-Hazards Emergency Response and Recovery

Metrics could include, but are not limited to: Increases in reliability of access to systems during emergencies, increases in speed of access during emergencies, improvements to ease of operation, or robustness of access (A system's ability to continue functioning when portions of it are incapacitated).

H. Review and Selection Process

A technical evaluation committee comprised of FTA staff and representatives of other collaborative government agencies will review project proposals against the described evaluation criteria. The technical evaluation committee reserves the right to evaluate proposals it receives and to seek clarification from any proposer about any statement that is made in a proposal that FTA finds ambiguous. FTA may also request additional documentation or information to be considered during the evaluation process. To provide the ability to evaluate technologies in a wide variety of conditions and locales, FTA may select projects to ensure geographic diversity among demonstrations under this NOFA.

After a thorough evaluation of all eligible proposals, the technical evaluation committee will provide project recommendations to the FTA Administrator. The FTA Administrator will determine the final list of project selections, the amount of funding for each project, and which fiscal year funds will be attributable to each project. FTA supports a balanced research portfolio that includes at least one project from each research area; however, depending on the results of the evaluation of proposals, it is possible that no projects will be funded in one or more of the research areas. The applicant's receipt of other Federal funding may be considered in FTA's award decisions.

I. Award Information

To enhance the value of the portfolio of research and demonstration projects to be implemented, FTA reserves the right to request an adjustment of the project scope and budget of any proposal selected for funding. Such adjustments shall not constitute a material alteration of any aspect of the proposal that influenced the proposal evaluation or decision to fund the project.

If an application proposes a specific party(ies) to provide unique or innovative goods or services on a project, FTA reserves the right to name such party as a key party and to make any award conditional upon the participation of the key party. A key party is essential to the project as approved by FTA and is therefore eligible for a noncompetitive award by the project sponsor to provide the goods or services described in the application. A key party's participation on a selected project may not be substituted without FTA's approval.

FTA expects to announce the selected projects and notify successful proposers in Fall 2013.

J. Award Administration

Successful proposers will apply for, and FTA will award funding through its ''TEAM'' grant and cooperative agreement management system once selected projects have been identified and published in the **Federal Register**. These projects will be administered and managed by FTA's Office of Research, Demonstration, and Innovation (TRI) in accordance with the applicable Federal requirements of 49 U.S.C. Chapter 53 and FTA Circular 6100.1D.

(1) Cooperative Agreement Requirements

FTA intends to apply 49 U.S.C. 53 requirements, the FTA Master Agreement, and FTA Circular 6100.1D, ''Research, Technical Assistance, and Training Programs: Application Instructions and Program Management Guidelines,'' issued May 1, 2011, to projects selected under this program unless otherwise specified in the cooperative agreement. Technical assistance regarding these requirements is available from FTA. This FTA Circular may be found at: *http://www.fta.dot.gov/images/carousel_images/Final_Research_Circular_—_Policy_Counci_3-28-2011.pdf.*

Applicants must sign and submit current Certifications and Assurances before receiving a grant. If the applicant has already submitted the annual Certifications and Assurances in TEAM, they do not need to be resubmitted. The Applicant assures that it will comply with all applicable Federal statutes, regulations, Executive Orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The Applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The Applicant understands that Federal laws,

regulations, policies, and administrative practices might be modified from time to time and may affect the implementation of the project. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise.

(2) Reporting Requirements

FTA reporting requirements include standard reporting requirements identified in FTA Circular 6100.1D and the Master Grant Agreement.

(3) Independent Third-Party Evaluation of Project Success

FTA is required by 49 U.S.C. Section 5312(d)(4) to evaluate every demonstration of innovation within two years after award. Applicants must arrange for, and FTA must approve, an independent third-party evaluation of the project's success. This third-party evaluation is an eligible project expense, and must be completed within two years of the project award.

K. Technical Assistance

FTA will post answers to commonly asked questions about this NOFA at *www.fta.dot.gov.* Technical assistance regarding these requirements is available from FTA's Office of Research, Demonstration, and Innovation (TRI) by contacting the appropriate person(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. TRI will contact those applicants selected for funding to provide assistance in preparing the documentation necessary to apply for the cooperative agreement and to clarify reporting requirements.

Peter Rogoff,

Administrator.

Appendix A

REGISTERING IN SAM AND GRANTS.GOV

Registration in Brief

Registration can take as little as 3–5 business days, but since there could be unexpected steps or delays (for example, if you need to obtain an EIN), FTA recommends allowing ample time, up to several weeks, for completion of all steps.

STEP 1: Obtain DUNS Number

Same day. If requested by phone (1–866–705–5711) DUNS is provided immediately. If your organization does not have one, you will need to go to the Dun & Bradstreet Web site at *http://fedgov.dnb.com/webform* to obtain the number. *Information for Foreign Registrants. *Webform requests take 1–2 business days.

STEP 2: Register with SAM

Three to five business days or up to two weeks. If you already have a TIN, your SAM registration will take 3–5 business days to process. If you are applying for an EIN please allow up to two weeks. Ensure that your organization is registered with the System for Award Management (SAM) at System for Award Management (SAM). If your organization is not, an authorizing official of your organization must register.

STEP 3: Username & Password

Same day. Complete your AOR (Authorized Organization Representative) profile on Grants.gov and create your username and password. You will need to use your organization's DUNS Number to complete this step. *https://apply07.grants.gov/apply/OrcRegister.*

STEP 4: AOR Authorization

*Same day. The E-Business Point of Contact (E-Biz POC) at your organization must login to Grants.gov to confirm you as an Authorized Organization Representative (AOR). Please note that there can be more than one AOR for your organization. In some cases the E-Biz POC is also the AOR for an organization. *Time depends on responsiveness of your E-Biz POC.

STEP 5: Track AOR Status

At any time, you can track your AOR status by logging in with your username and password. Login as an Applicant (enter your username & password you obtained in Step 3) using the following link: *applicant_profile.jsp.*

[FR Doc. 2013–23885 Filed 9–30–13; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35767]

Allentown and Auburn Railroad Company, Inc.—Change in Operators Exemption—Rail Line of Kutztown Transportation Authority

Allentown and Auburn Railroad Company, Inc. (AARR), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to change operators [1] from East Penn Railroad, LLC (ESPN) to AARR over a 4.12-mile rail line between milepost 0.17, at Topton, Pa., and milepost 4.29, at Kutztown, Pa. (the Line).[2] The Line is owned by the Kutztown Transportation Authority (KTA), a municipal authority organized under the Pennsylvania Municipal Authorities Act of 1954.[3] The change in operators for the Line is being accomplished through ESPN's assignment of its authority to operate the Line to AARR with the consent of KTA. This change in operators is exempt under 49 CFR 1150.31(a)(3).[4]

This exemption will be effective on October 18, 2013 (30 days after the verified notice was filed).[5] The transaction is expected to be consummated on or sometime after the effective date.

AARR certifies that this transaction will not result in AARR's becoming a Class II or Class I rail carrier and that the projected annual revenue of AARR will not exceed $5 million.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than October 11, 2013 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35767, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Karl Morell, Ball Janik LLP, Suite 225, 655 Fifteenth Street NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: September 26, 2013.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–23920 Filed 9–30–13; 8:45 am]

BILLING CODE 4915–01–P

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[1] AARR's verified notice of exemption is captioned as an operation exemption. However, because the operator of the Line will change via assignment of the current operator's lease, the authority sought is more properly a change in operators exemption. The docket has been recaptioned accordingly.

[2] ESPN was authorized to operate the Line in *East Penn Railroad—Operation Exemption—Kutztown Transportation Authority,* FD 35104 (STB served Dec. 13, 2007).

[3] *Id.*

[4] To qualify for a change of operators exemption, an applicant must give notice to shippers on the line. 49 CFR 1150.32(b). In a letter filed September 18, 2013, AARR certified to the Board that it provided notice to the only active shipper on the Line.

[5] AARR filed its verified notice of exemption on September 12, 2013, and supplemented it by letter filed on September 18, 2013. The date of AARR's supplement will be considered the filing date for purposes of calculating the effective date of the exemption.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35768]

Rogue Valley Terminal Railroad Corporation—Corporate Family Transaction Exemption

Rogue Valley Terminal Railroad Corporation (Rogue Valley),[1] a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a corporate family transaction in which Rogue Valley will transfer ownership of track and right-of-way of a line of railroad in White City, Or., to a corporate affiliate.

According to Rogue Valley, it currently owns and operates approximately 14 miles of rail line located in the Medford Industrial Park in White City, Or., where it connects with the Central Oregon and Pacific Railroad, Inc. CTT and Rogue Valley propose to establish a new corporate affiliate, Medford Industrial Trainline Management LLC (Medford), to which Rogue Valley will convey the track and the underlying right of way it presently owns while retaining an operating easement and the common carrier operations for itself. Rogue Valley states that it will own the majority interest in Medford, with the minority interest to be owned by the Modoc Rail Academy, a railroad training and education school.

The exemption will be effective on October 18, 2013 (30 days after the verified notice was filed). Applicant states that the parties intend to consummate the proposed transaction on or about October 19, 2013, but may not do so prior to the October 18, 2013 effective date of the exemption.

According to Rogue Valley, the purpose of the proposed transaction is to allow it to transfer ownership of the track and right of way comprising the line to a new corporate affiliate, Medford, while retaining an operating easement and the common carrier obligation for itself. Rogue Valley states that Medford will use the line to train new railroad train and engineer personnel and will not interfere with Rogue Valley's ability to meet its common carrier obligation to customers.

The line transfer is a transaction within a corporate family exempted from prior review and approval under 49 CFR 1180.2(d)(3). Applicant states that the transaction will not result in adverse changes in service levels, significant operational changes, or changes in the competitive balance with carriers outside the corporate family.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III rail carriers.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than October 11, 2013 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35768, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on applicant's representative, John D. Heffner, Strasburger & Price, LLP, 1700 K Street NW., Suite 640, Washington, DC 20006.

Board decisions and notices are available on our Web site at ''*www.stb.dot.gov.*''

Decided: September 26, 2013.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–23929 Filed 9–30–13; 8:45 am]

BILLING CODE 4915–01–P

[1] Rogue Valley was formerly known as WCTU Railway LLC, or White City Terminal & Utility Co. (WCTU) and was indirectly controlled by Berkshire Hathaway (Berkshire). On December 17, 2012, Berkshire divested itself of WCTU by selling it to RVTR Rail Holdings (RVTR). RVTR was subsequently renamed CCT Rail Systems Corporation (CCT) and WCTU was renamed Rogue Valley.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 290 (Sub-No. 358X); Docket No. AB 55 (Sub-No. 732X)]

Norfolk Southern Railway Company—Discontinuance of Service Exemption—in Claiborne County, TN, and Bell County, KY; CSX Transportation, Inc.—Discontinuance of Trackage Rights Exemption—in Claiborne County, TN, and Bell County, KY

Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc. (CSXT) (collectively, applicants), have jointly filed a verified notice of exemption under 49 CFR part 1152 Subpart F—*Exempt Abandonments and Discontinuances of Service and Trackage Rights* for NSR to discontinue service over, and for CSXT to discontinue trackage rights operations over, approximately 5.0 miles of rail line between milepost 80.0 C, north of Clairfield in Claiborne County, Tenn., and milepost 85.0, at Fonde in Bell County, Ky. (the Line). The Line traverses United States Postal Service Zip Codes 37715 and 40940.

NSR and CSXT have certified that: (1) No local traffic has moved over the Line for at least two years; (2) any overhead traffic can be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements of 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to these exemptions, any employee adversely affected by the service discontinuance/discontinuance of trackage rights shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon. in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, these exemptions will be effective on November 1, 2013, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2)[1] must be filed by October 15, 2013.[2] Petitions to reopen must be filed by October 22, 2013, with the Surface

[1] Each OFA must be accompanied by the filing fee, which currently is set at $1,600. *See* 49 CFR 1002.2(f)(25).

[2] Because applicants are seeking to discontinue service, not to abandon the line, trail use/rail banking and public use conditions are not appropriate. Likewise, no environmental or historical documentation is required here under 49 CFR§ 1105.6(c) and 1105.8(b), respectively.

Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to applicants' representatives: Louis E. Gitomer, 600 Baltimore Ave., Suite 301, Towson, MD 21204, and Robert A. Wimbish, 2401 Pennsylvania Ave. NW., Suite 300, Washington, DC 20037.

If the verified notice contains false or misleading information, the exemptions are void *ab initio.*

Board decisions and notices are available on our Web site at ''*www.stb.dot.gov.*''

Decided: September 26, 2013.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–23922 Filed 9–30–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection: Direct Deposit Sign-Up Form

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A). Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Direct Deposit Sign-Up Form.

DATES: Written comments should be received on or before November 30, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Fiscal Service, Bruce A. Sharp, 200 Third Street A4–A, Parkersburg, WV 26106–1328, or *bruce.sharp@bpd.treas.gov.* The opportunity to make comments online is also available at *www.pracomment.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies should be directed to Bruce A. Sharp, Bureau of the Fiscal Service, 200 Third Street A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Direct Deposit Sign-Up Form.

OMB Number: 1535–0128.

Form Number: PD F 5396.

Abstract: The information is collected to process requests for direct deposit of a Series HH or Series H bond interest payment or a savings bond redemption payment to a financial institution.

Current Actions: Revision.

Type of Review: Extension.

Affected Public: Individuals.

Estimated Number of Respondents: 55,000.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 9,167.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: September 26, 2013.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2013–23934 Filed 9–30–13; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL DEPOSIT INSURANCE CORPORATION

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities; Information Collection Renewal; Submission for OMB Review Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Federal Deposit Insurance Corporation (FDIC); and National Credit Union Administration (NCUA).

ACTION: Notice and request for comment.

SUMMARY: The OCC, FDIC, and NCUA (the Agencies), are soliciting public comment on the renewal of a collection of information by the Agencies. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice.

The Agencies are soliciting comment concerning renewal of their information collection titled, ''Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks.'' The agencies are also giving notice that they are sending their collections to OMB for review.

DATES: Comments must be received by October 31, 2013.

ADDRESSES: *OCC:* Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0246, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11,Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FDIC: Interested parties are invited to submit written comments. All comments should refer to the name of the collection, ''Reverse Mortgage Products Guidance.'' Comments may be submitted by any of the following methods:

- *http://www.fdic.gov/regulations/laws/federal/notices.html.*

• *Email: comments@fdic.gov.* Include the name and number of the collection in the subject line of the message.

• *Mail:* Gary A. Kuiper (202) 898–3877, Counsel, Federal Deposit Insurance Corporation, NYA–5046, 550 17th Street NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

A copy of the comments may also be submitted to the FDIC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

NCUA: You may submit comments by any of the following methods (Please send comments by one method only):

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

• *NCUA Web site: http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx* Follow the instructions for submitting comments.

• *Email:* Address to *regcomments@ncua.gov.* Include ''[Your name] Comments on Reverse Mortgage Products Guidance, '' in the email subject line.

• *Fax:* (703) 518–6319. Use the subject line described above for email.

• *Mail:* Address to Mary F. Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier:* Same as mail address.

Public inspection: All public comments are available on the agency's Web site at *http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library, at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518–6546 or send an email to *OGC Mail @ncua.gov.*

Additionally, please send a copy of your comments by mail to: OMB Desk Officer, 1557–0246; 3064–0176; 3133–0187, U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503, or by email to: *oira submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT:

OCC: You can request additional information or a copy of the information collection from Johnny Vilela or Mary H. Gottlieb, OCC Clearance Officers, (202) 649–5490, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mailstop 9W–11, Washington, DC 20219.

FDIC: Michael R. Evans, Fair Lending Specialist, Compliance Policy Section, Division of Supervision and Consumer Protection, (202) 898–6611; or Richard M. Schwartz, Counsel, (202) 898–7424, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

NCUA: Tracy Sumpter, Paperwork Clearance Officer, 703–518–6444, Office of the Chief Information Officer, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party.

With respect to renewal of this collection of information, the Agencies invite comments on:

(a) Whether the collection of information is necessary for the proper performance of the Federal banking agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(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; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

The Agencies are proposing to extend OMB approval of the following information collection:

Title of Information Collection: Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks.

OMB Control Numbers: 1557–0246; 3064–0176; and 3133–0187.

Abstract: On December 16, 2009, the OCC, FDIC, FRB and NCUA sought comment on the guidance,[1] and they issued it in final form on August 17, 2010.[2] The guidance focused on the need to provide adequate information to consumers about reverse mortgage products; to provide qualified independent counseling to consumers considering these products; and to avoid potential conflicts of interest. It also addressed related policies, procedures, internal controls, and third party risk management.

Prior to the effective date of the final guidance, the Agencies obtained PRA approval from OMB for the information collection requirements contained therein. These information collection requirements included implementation of policies and procedures, training, and program maintenance. The requirements are outlined below:

• Institutions offering reverse mortgages should have written policies and procedures that prohibit the practice of directing a consumer to a particular counseling agency or contacting a counselor on the consumer's behalf.

• Policies should be clear so that originators do not have an inappropriate incentive to sell other products that appear linked to the granting of a mortgage.

• Legal and compliance reviews should include oversight of compensation programs so that lending personnel are not improperly encouraged to direct consumers to particular products.

• Training should be designed so that relevant lending personnel are able to convey information to consumers about product terms and risks in a timely, accurate, and balanced manner.

The Agencies are now seeking renewal of the PRA approval granted by OMB for these information collection requirements.

Affected Public:

OCC: National banks, Federal savings associations, their subsidiaries, and Federal branches or agencies of foreign banks.

FDIC: Insured state nonmember banks.

NCUA: Federally-insured credit unions.

Type of Review: Regular.

Estimated Burden:

OCC:

Number of respondents: 97.

Burden per respondent: 40 hours to implement policies and procedures and to provide training; 8 hours annually to maintain program.

Total estimated annual burden: 4,656 hours.

[1] 74 FR 66652.

[2] 75 FR 50801.

FDIC:

Number of respondents: 48.

Burden per respondent: 40 hours to implement policies and procedures and to provide training; 8 hours annually to maintain program.

Total estimated annual burden: 2,304 hours.

NCUA:

Number of respondents: 85.

Burden per respondent: 40 hours to implement policies and procedures and to provide training; 8 hours annually to maintain program.

Total estimated annual burden: 4,080 hours.

Dated: September 6, 2013.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division.

Dated at Washington, DC, this 9th day of September, 2013.

Federal Deposit Insurance Corporation.

Robert E Feldman,

Executive Secretary.

Dated: September 24, 2013.

By the National Credit Union Administration.

Gerard S. Poliquin,

Secretary of the Board.

[FR Doc. 2013–23771 Filed 9–30–13; 8:45 am]

BILLING CODE 4810–33–P, 6714–01–P; 7535–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1023

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code.

DATES: Written comments should be received on or before December 2, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code.

OMB Number: 1545–0056.

Form Number: Form 1023.

Abstract: Form 1023 is filed by applicants seeking Federal income tax exemption as organizations described in section 501(c)(3) of the Internal Revenue Code. IRS uses the information to determine if the applicant is exempt and whether the applicant is a private foundation.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 33,378.

Estimated Time per Respondents: 120 hours.

Estimated Total Annual Burden Hours: 4,005,360.

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: September 10, 2013.

Allan Hopkins,

IRS Tax Analyst.

[FR Doc. 2013–23805 Filed 9–30–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Request for Applications for the IRS Advisory Committee on Tax Exempt and Government Entities

AGENCY: Internal Revenue Service (IRS); Tax Exempt and Government Entities Division, Treasury.

ACTION: Notice and request for applicants or nominations.

SUMMARY: The Internal Revenue Service (IRS) is requesting applications for membership to serve on the Advisory Committee on Tax Exempt and Government Entities (ACT). Applications will be accepted for the following vacancies, which will occur in June 2014: Two (2) employee plans; two (2) exempt organizations; three (3) federal, state, and local governments; two (2) Indian Tribal Governments; and one (1) tax-exempt bonds. To ensure appropriate balance of membership, final selection from qualified candidates will be determined based on experience, qualifications, and other expertise. Members of the ACT may not be federally registered lobbyists.

DATES: Written applications or nominations must be received on or before Nov. 4, 2013.

ADDRESSES: Send all applications and nominations to: Mark J. Kirbabas; Acting Designated Federal Officer; TE/GE Communications and Liaison; 1111 Constitution Ave. NW.,—SE: T: CL–NCA 679; Washington, DC 20224; FAX: (202) 317–8814. (not a toll-free number); email: *Mark.J.Kirbabas@irs.gov.*

Application: Applicants may use the ACT Application Form on the IRS Web site (*IRS.gov*) or may send an application by letter with the following information: Name; Other Name(s) Used and Date(s) (required for FBI check); Date of Birth (required for FBI check); City and State of Birth (required for FBI Check); Current Address; Telephone and Fax Numbers; and email address, if any. Applications should also describe and document the proposed member's qualifications for membership on the

ACT. Applications should also specify the vacancy for which they wish to be considered.

FOR FURTHER INFORMATION CONTACT: Mark Kirbabas (202) 317–8444 (not a toll-free number) or by email at *Mark.J.Kirbabas@irs.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Committee on Tax Exempt and Government Entities (ACT), governed by the Federal Advisory Committee Act, Public Law 92–463, is an organized public forum for discussion of relevant employee plans, exempt organizations, tax-exempt bonds, and federal, state, local, and Indian tribal government issues between officials of the IRS and representatives of the above communities. The ACT also enables the IRS to receive regular input with respect to the development and implementation of IRS policy concerning these communities. ACT members present the interested public's observations about current or proposed IRS policies, programs, and procedures, as well as suggest improvements. ACT members shall be appointed by the Secretary of the Treasury and shall serve for two-year terms. Terms can be extended for an additional year. ACT members will not be paid for their time or services. ACT members will be reimbursed for their travel-related expenses to attend working sessions and public meetings, in accordance with 5 U.S.C. 5703.

The Secretary of the Treasury invites those individuals, organizations, and groups affiliated with employee plans and exempt organizations to nominate individuals for membership on the ACT. Nominations should describe and document the proposed member's qualifications for ACT membership, including the nominee's past or current affiliations and dealings with the particular community or segment of the community that he or she wishes to represent (such as, employee plans). Nominations should also specify the vacancy for which they wish to be considered. The Department of the Treasury seeks a diverse group of members representing a broad spectrum of persons experienced in employee plans and exempt organizations.

Nominees must go through a clearance process before selection by the Department of the Treasury. In accordance with the Department of the Treasury Directive 21–03, the clearance process includes, among other things, pre-appointment and annual tax checks, and an FBI criminal and subversive name check, fingerprint check, and security clearance.

Dated: September 25, 2013.

Mark J. Kirbabas,

Acting Designated Federal Officer, Tax Exempt and Government Entities Division, Internal Revenue Service.

[FR Doc. 2013–23993 Filed 9–30–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Board of Veterans Appeals, Voice of the Veteran Appellant Surveys; Correction

AGENCY: Board of Veterans Appeals, Department of Veterans Affairs.

ACTION: Notice; correction.

SUMMARY: The Department of Veterans Affairs (VA) published an information collection notice in a **Federal Register** on September 6, 2013 (78 FR 54956), that contained errors. VA announced that the Board of Veterans' Affairs was announcing an opportunity for public comment on the proposed collection. We have also corrected the frequency of response that was listed as quarterly to annually. 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 or *crystal.rennie@va.gov.*

Correction

In FR Doc. 2013–21699, published on September 6, 2013, at 78 FR 54956, make the following corrections.

On page 54956, in the third column, at the ''**AGENCY**'' heading, third column, remove the first instance of the word ''Affairs'', and add, in its place, ''Appeals''. In the ''**SUMMARY**'', third column, remove the first instance of the word ''Affairs'', and add, in its place, ''Appeals''. In the ''**SUPPLEMENTARY INFORMATION**'' section, first column on page 54957, remove each instance of ''VBA'', and add, in its place, ''BVA''. In the ''FREQUENCY OF RESPONSE'' section, first column on page 54957, remove ''quarterly'' and add, in its place, ''annually''.

Dated: September 26, 2013.

Crystal Rennie,

VA Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2013–23906 Filed 9–30–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0521]

Proposed Information Collection (Credit Underwriting Standards and Procedures for Processing VA Guaranteed Loans) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to underwrite VA-guaranteed loans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 2, 2013.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email *nancy.kessinger@va.gov*. Please refer to ''OMB Control No. 2900–0521'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–7492 or fax (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501—3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility;

(2) the accuracy of VBA'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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Report and Certification of Loan Disbursement, VA Form 26–1820

b. Request for Verification of Employment, VA Form 26–8497

c. Request for Verification of Deposit, VA Form 26–8497a

OMB Control Number: 2900–0521.

Type of Review: Revision of a currently approved collection.

Abstracts: Lenders must obtain specific information concerning a Veteran's credit history in order to properly underwrite the veteran's loan. VA loans may not be guaranteed unless the Veteran is a satisfactory credit risk. The data collected on the following forms will be used to ensure applications for VA-guaranteed loans are underwritten in a reasonable and prudent manner.

a. VA Form 26–1820 is completed by lenders closing VA guaranteed and insured loans under the automatic or prior approval procedures.

b. VA Form 26–8497 is used by lenders to verify a loan applicant's income and employment information when making guaranteed and insured loans. VA do not require the exclusive use of this form for verification purposes, any alternative verification document would be acceptable provided that all information requested on VA Form 26–8497 is provided.

c. Lenders making guaranteed and insured loans complete VA Form 26–8497a to verify the applicant's deposits in banks and other savings institutions.

Affected Public: Business or other for profit.

Estimated Annual Burden:

a. Report and Certification of Loan Disbursement, VA Form 26–1820—150,000 hours.

b. Request for Verification of Employment, VA Form 26–8497—25,000 hours.

c. Request for Verification of Deposit, VA Form 26–8497a—12,500 hours.

Estimated Average Burden per Respondent:

a. Report and Certification of Loan Disbursement, VA Form 26–1820—15 minutes.

b. Request for Verification of Employment, VA Form 26–8497—10 minutes.

c. Request for Verification of Deposit, VA Form 26–8497a—5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. Report and Certification of Loan Disbursement, VA Form 26–1820—600,000.

b. Request for Verification of Employment, VA Form 26–8497—150,000.

c. Request for Verification of Deposit, VA Form 26–8497a—150,000.

Dated: September 26, 2013.

By direction of the Secretary.

Crystal Rennie,

VA Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2013–23888 Filed 9–30–13; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Bureau of Consumer Financial Protection

12 CFR Parts 1002, 1024, and 1026

Amendments to the 2013 Mortgage Rules Under the Equal Credit Opportunity Act (Regulation B), 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 1002, 1024, and 1026

[Docket No. CFPB–2013–0018]

RIN 3170–AA37

Amendments to the 2013 Mortgage Rules Under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: This final rule amends some of the final mortgage rules issued by the Bureau of Consumer Financial Protection (Bureau) in January 2013. These amendments focus primarily on loss mitigation procedures under Regulation X's servicing provisions, amounts counted as loan originator compensation to retailers of manufactured homes and their employees for purposes of applying points and fees thresholds under the Home Ownership and Equity Protection Act and the Ability-to-Repay rules in Regulation Z, exemptions available to creditors that operate predominantly in ''rural or underserved'' areas for various purposes under the mortgage regulations, application of the loan originator compensation rules to bank tellers and similar staff, and the prohibition on creditor-financed credit insurance. The Bureau also is adjusting the effective dates for certain provisions of the loan originator compensation rules. In addition, the Bureau is adopting technical and wording changes for clarification purposes to Regulations B, X, and Z.

DATES: This final rule is effective January 10, 2014, except for the amendments to §§ 1026.35(b)(2)(iii), 1026.36(a), (b), and (j), and commentary to §§ 1026.25(c)(2), 1026.35, and 1026.36(a), (b), (d), and (f) in Supp. I to part 1026, which are effective January 1, 2014, and the amendments to commentary to § 1002.14(b)(3) in Supplement I to part 1002, which are effective January 18, 2014.

In addition this rule changes the effective date from January 10, 2014, to January 1, 2014, for the amendments to §§ 1026.25(c)(2), 1026.36(a), (b), (d), (e), (f), and (j) and commentary to §§ 1026.25(c)(2) and 1026.36(a), (b), (d), (e), (f), and (j) in Supp. I to part 1026, published February 15, 2013, at 78 FR 11280.

FOR FURTHER INFORMATION CONTACT: Whitney Patross, Attorney; Richard Arculin, William Corbett, Michael Silver, and Daniel Brown, Counsels; Mark Morelli and Nicholas Hluchyj, Senior Counsels, and Paul Ceja, Senior Counsel and Special Advisor, 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).[1] In June 2013, the Bureau proposed several amendments to those final rules (''June 2013 Proposal'').[2] This final rule adopts with some revisions and additional clarifications the June 2013 Proposal. It makes several amendments to the provisions adopted by the 2013 Title XIV Final Rules to clarify or revise regulatory provisions and official interpretations primarily relating to the 2013 Mortgage Servicing Final Rules and the 2013 Loan Originator Compensation Final Rule, as described further below. This final rule also makes modifications to the effective dates for provisions adopted by the 2013 Loan Originator Compensation Final Rule, and certain technical corrections and minor refinements to Regulations B, X, and Z. The specifics of these amendments and modifications are discussed in the following paragraphs.

First, the Bureau is adopting several modifications to provisions of Regulation X adopted by the 2013 Mortgage Servicing Final Rules, including those related to error resolution procedures and information requests (§§ 1024.35 and 1024.36), and loss mitigation (§ 1024.41). With respect to loss mitigation, two of the revisions concern the requirement in § 1024.41(b)(2)(i) that a servicer review a borrower's loss mitigation application within five days and provide a notice to the borrower acknowledging receipt and informing the borrower whether the application is complete or incomplete. If the servicer does not deem the application complete, the servicer's notice must also list the missing items and suggest the borrower provide the information by the earliest remaining of four dates specified in the regulation. The changes replace the four specified dates with a requirement that a servicer give a borrower a reasonable date by which the borrower should in which to provide the missing information. New commentary explains the four dates previously specified in the regulation are now treated as milestones that the servicer should consider in selecting a reasonable date, however the final rule allows servicers more flexibility than the existing rule. The changes also set forth requirements and procedures for a servicer to follow in the event that a facially complete application is later found by the servicer to require additional information or corrections to a previously submitted document in order to be evaluated for loss mitigation options available to the borrower. Another modification provides servicers more flexibility in providing short-term payment forbearance plans based on an evaluation of an incomplete loss mitigation application. Other clarifications and revisions address the content of notices required under § 1024.41(c)(1)(ii) and (h)(4), which inform borrowers of the outcomes of their evaluation for loss mitigation and any appeals filed by the borrowers. In addition, the amendments address how protections are determined to apply where a foreclosure sale has not been scheduled at the time the borrower submits a loss mitigation application or when a foreclosure sale is rescheduled. Finally, the amendments explain what actions constitute the ''first notice or filing'' for purposes of the general ban on proceeding to foreclosure before a

[1] Specifically, on January 10, 2013, the Bureau issued Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 FR 4726 (Jan. 22, 2013) (2013 Escrows Final Rule), High-Cost Mortgage 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), 78 FR 6856 (Jan. 31, 2013) (2013 HOEPA Final Rule), and Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 FR 6407 (Jan. 30, 2013) (2013 ATR Final Rule). The Bureau concurrently issued a proposal to amend the 2013 ATR Final Rule, which was finalized on May 29, 2013. See 78 FR 6621 (Jan. 30, 2013) and 78 FR 35430 (June 12, 2013). On January 17, 2013, the Bureau issued the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules, 78 FR 10901 (Regulation Z) (Feb. 14, 2013) and 78 FR 10695 (Regulation X) (Feb. 14, 2013) (2013 Mortgage Servicing Final Rules). On January 18, 2013, the Bureau issued the Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), 78 FR 7215 (Jan. 31, 2013) (2013 ECOA Final Rule) and, jointly with other agencies, issued Appraisals for Higher-Priced Mortgage Loans, 78 FR 10367 (Feb. 13, 2013). On January 20, 2013, the Bureau issued the Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), 78 FR 11280 (Feb. 15, 2013) (2013 Loan Originator Compensation Final Rule).

[2] Amendments to the 2013 Mortgage Rules Under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z), 78 FR 39902 (July 2, 2013).

borrower is 120 days delinquent, and provide exemptions from the 120-day prohibition for foreclosures for certain reasons other than nonpayment.

Second, the Bureau is clarifying and revising the definition of points and fees for purposes of the qualified mortgage points and fees cap and the high-cost mortgage points and fees threshold, as adopted in the 2013 ATR Final Rule and the 2013 HOEPA Final Rule, respectively. In particular, the Bureau is adding commentary to § 1026.32(b)(1)(ii) to clarify for retailers of manufactured homes and their employees what compensation must be counted as loan originator compensation and thus included in the points and fees thresholds. The Bureau also is adding commentary to clarify the treatment of charges paid by parties other than the consumer, including third parties, for purposes of the points and fees thresholds.

Third, the Bureau is revising two exceptions available under the 2013 Title XIV Final Rules to small creditors operating predominantly in ''rural'' or ''underserved'' areas pending the Bureau's re-examination of the underlying definitions of ''rural'' or ''underserved'' over the next two years, as it recently announced it would do in Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z) (May 2013 ATR Final Rule).[3] The Bureau is extending an exception to the general prohibition on balloon features for high-cost mortgages under § 1026.32(d)(1)(ii)(C) to allow all small creditors, regardless of whether they operate predominantly in ''rural'' or ''underserved'' areas, to continue originating balloon high-cost mortgages if the loans meet the requirements for qualified mortgages under §§ 1026.43(e)(6) or 1026.43(f). In addition, the Bureau is amending an exemption from the requirement to establish escrow accounts for higher-priced mortgage loans under § 1026.35(b)(2)(iii)(A) for small creditors that extend more than 50 percent of their total covered transactions secured by a first lien in ''rural'' or ''underserved'' counties during the preceding calendar year. To prevent creditors that qualified for the exemption in 2013 from losing eligibility in 2014 or 2015 because of changes in which counties are considered rural while the Bureau is re-evaluating the underlying definition of ''rural,'' the Bureau is amending this provision to allow creditors to qualify for the exemption if they extended more than 50 percent of their total covered transactions in rural or underserved counties in any of the previous three calendar years (assuming the other criteria for eligibility are also met).

Fourth, the Bureau is adopting revisions, as well as general technical and wording changes, to various provisions of the 2013 Loan Originator Compensation Final Rule in § 1026.36. These include revising the definition of ''loan originator'' in the regulatory text and commentary, such as provisions addressing when employees of a creditor or loan originator in certain administrative or clerical roles (*e.g.,* tellers or greeters) may become ''loan originators'' and thus subject to the rule, upon providing contact information or credit applications for loan originators or creditors to consumers; further clarification on the meaning of ''credit terms,'' which is used throughout § 1026.36(a); and additional clarifications regarding when employees of manufactured housing retailers may be classified as loan originators. The Bureau also is adopting a number of clarifications to the commentary on prohibited payments to loan originators.

Fifth, the Bureau is clarifying and revising three aspects of the rules implementing the Dodd-Frank Act prohibition on creditors financing credit insurance premiums in connection with certain consumer credit transactions secured by a dwelling. The Bureau is adding new § 1026.36(i)(2)(ii) to clarify what constitutes financing of such premiums by a creditor. The Bureau also is adding new § 1026.36(i)(2)(iii) to clarify when credit insurance premiums are considered to be calculated and paid on a monthly basis, for purposes of the statutory exclusion from the prohibition for certain credit insurance premium calculation and payment arrangements. And, finally, the Bureau is adding new comment 36(i)–1 to clarify when including the credit insurance premium or fee in the amount owed violates the rule.

Sixth, the Bureau is changing the effective date for certain provisions under the 2013 Loan Originator Compensation Final Rule, so they take effect on January 1, 2014, rather than January 10, 2014, as originally provided. The affected provisions are the amendments to or additions of (as applicable) § 1026.25(c)(2) (record retention), § 1026.36(a) (definitions), § 1026.36(b) (scope), § 1026.36(d) (compensation), § 1026.36(e) (anti-steering), § 1026.36(f) (qualifications), and § 1026.36(j) (compliance policies and procedures for depository institutions) and the associated commentary. The Bureau believes that this change will facilitate compliance because these provisions largely focus on compensation plan structures, registration and licensing, and hiring and training requirements that are often structured on an annual basis and typically do not vary from transaction to transaction. After reviewing comments, the Bureau has decided to keep the date for implementation of the ban on financing credit insurance under § 1026.36(i) as January 10, 2014, consistent with the date previously adopted in the Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z); Prohibition on Financing Credit Insurance Premiums; Delay of Effective Date (2013 Effective Date Final Rule).[4]

In addition to the clarifications and amendments to Regulations X and Z discussed above, the Bureau is adopting technical corrections and minor clarifications to wording throughout Regulations B, X, and Z that are generally not substantive in nature.

II. Background

A. Title XIV Rules 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. Public Law 111–203, 124 Stat. 1376 (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 Equal Credit Opportunity Act (ECOA), Truth in Lending Act (TILA), and Real Estate Settlement Procedures Act (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

[3] 78 FR 35430 (June 12, 2013).

[4] 78 FR 32547 (May 31, 2013).

[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.

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, the 2013 Escrows Final Rule, and the 2013 HOEPA Final Rule. 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 [7] (issued jointly with other agencies) and the 2013 ECOA Final Rule. On January 20, 2013, the Bureau issued the 2013 Loan Originator Compensation Final Rule. 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), which the Bureau finalized on May 29, 2013 (May 2013 ATR Final Rule).[8]

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),[9] 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 includes: (1) Coordination with other agencies, including to develop consistent, updated examination procedures; (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.

In the June 2013 proposal, the Bureau proposed amendments to its new mortgage rules. This final rule adopts those proposed amendments with some additional clarifications and revisions. The purpose of these updates is to address important questions raised by industry, consumer groups, or other agencies.

C. Comments on the Proposed Rule

The Bureau received 280 comments on the proposed rule on which the final rule is based. Many of these comments discussed issues on which the proposed rule did not seek comment or address. A number of comments addressed, for example, the small servicer exemption, the general effective dates for the 2013 Title XIV Rules finalized in January 2013, whether the Bureau should reconsider replacing the § 1026.36(a) definition of ''loan originator'' with the definition provided under the SAFE Act, or whether the Bureau should amend the provision of the mortgage servicing rules that deals with second or successive loss mitigation applications. This final rule does not make any changes outside the scope of the proposal. As proposed, it focuses on specific, narrow implementation and interpretive issues, rather than broader policy changes.

The Bureau has examined all comments submitted and discusses 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 ECOA, TILA, RESPA, 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 Board of Governors of the Federal Reserve System (Federal Reserve 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.'' [10] Section 1061 of the Dodd-Frank Act also transferred to the Bureau all of the Department of Housing and Urban Development's (HUD) consumer protection functions relating to RESPA.[11] Title X of the Dodd-Frank Act, including section 1061 of the Dodd-Frank Act, along with ECOA, TILA, RESPA, and certain subtitles and provisions of title XIV of the Dodd-Frank Act, are Federal consumer financial laws.[12]

A. ECOA

Section 703(a) of ECOA authorizes the Bureau to prescribe regulations to carry out the purposes of ECOA. Section 703(a) further states that such regulations may contain—but are not limited to—such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions as, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of ECOA, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance. 15 U.S.C. 1691b(a).

B. 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 ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options.

C. 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 section 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

[6] Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note.

[7] 78 FR 10367 (Feb. 13, 2013).

[8] 78 FR 6622 (Jan. 30, 2013); 78 FR 35430 (June 12, 2013).

[9] Consumer Financial Protection Bureau Lays Out Implementation Plan for New Mortgage Rules. Press Release. Feb. 13, 2013.

[10] 12 U.S.C. 5581(a)(1).

[11] Public Law 111–203, 124 Stat. 1376, section 1061(b)(7); 12 U.S.C. 5581(b)(7).

[12] 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, 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, and 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. Under TILA section 103(bb)(4), the Bureau may adjust the definition of points and fees for purposes of that threshold to include such charges that the Bureau determines to be appropriate.

TILA section 129C(b)(3)(B)(i) 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. 15 U.S.C. 1639c(b)(3)(B)(i). In addition, TILA section 129C(b)(3)(A) requires the Bureau 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. 15 U.S.C. 1639c(b)(3)(A).

D. 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 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 ECOA, RESPA, TILA, title X, and the enumerated subtitles and provisions of title XIV of the Dodd-Frank Act, and prevent evasion of those laws.

Section 1032(a) of the Dodd-Frank Act provides that the Bureau ''may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' 12 U.S.C. 5532(a). The authority granted to the Bureau in Dodd-Frank Act section 1032(a) is broad, and empowers the Bureau to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to Dodd-Frank Act section 1032, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' 12 U.S.C. 5532(c). Accordingly, in amending provisions authorized under Dodd-Frank Act section 1032(a), the Bureau has considered available studies, reports, and other evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.

The Bureau is amending rules finalized in January 2013 that implement certain Dodd-Frank Act provisions. In particular, the Bureau is amending regulatory provisions adopted by the 2013 ECOA Final Rule, the 2013 Mortgage Servicing Final Rules, the 2013 HOEPA Final Rule, the 2013 Escrows Final Rule, the 2013 Loan Originator Compensation Final Rule, and the 2013 ATR Final Rule.

IV. Effective Dates

A. Provisions Other Than Those Related to the 2013 Loan Originator Compensation Final Rule or the 2013 Escrows Final Rule

In enacting the Dodd-Frank Act, Congress significantly amended the statutory requirements governing a number of mortgage practices. Under the Dodd-Frank Act, 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.[13] Where the Bureau was required to prescribe implementing regulations, the Dodd-Frank Act further provided that those regulations must take effect not later than 12 months after the date of the regulations' issuance in final form.[14] The Bureau issued the 2013 Title XIV Final Rules in January 2013 to implement these new statutory provisions and provide for an orderly transition. To allow the mortgage industry sufficient time to comply with the new rules, the Bureau established January 10, 2014—one year after issuance of the earliest of the 2013 Title XIV Final Rules—as the baseline effective date for nearly all of the new requirements. In the preamble to certain of the various 2013 Title XIV Final Rules, the Bureau further specified that the new regulations would apply to transactions for which applications were received on or after January 10, 2014.

Except for the amendments regarding the 2013 Loan Originator Compensation Final Rule and the 2013 Escrows Final Rule discussed below, the Bureau proposed an effective date of January 10, 2014. The Bureau proposed this effective date because it is consistent with the effective dates for the 2013 Title XIV Final Rules, which this final rule clarifies, revises, or amends. Most of the proposed amendments were intended to clarify application of certain aspects of these rules in advance of the January 10, 2014 effective date, or amend them in manners that facilitate compliance. As discussed in the various 2013 Title XIV Final Rules, the Bureau believes that having a consistent effective date across most of the 2013 Title XIV Final Rules will facilitate compliance. This includes any clarifications, revisions, or other amendments made during the implementation period—particularly those amendments designed to facilitate compliance with the overarching 2013 Title XIV Final Rules. Thus, because the clarifications, revisions, and amendments to the 2013 Title XIV Final Rules adopted in this final rule interrelate with or depend on other aspects of the underlying 2013 Title XIV Final Rules and are intended largely to facilitate compliance with those rules,

[13] Dodd-Frank Act section 1400(c)(3), 15 U.S.C. 1601 note.

[14] Dodd-Frank Act section 1400(c)(1)(B), 15 U.S.C. 1601 note.

the Bureau does not believe that the amendments adopted by this final rule should become effective on a different date than the underlying regulations. The Bureau thus proposed an effective date of January 10, 2014 for any amendments adopted by this final rule.

The Bureau received some comments from industry and trade associations that addressed the effective dates, but most of these comments generally requested a delayed effective date across all the rules, which the Bureau did not propose. The Bureau received a handful of comments that asked for staggered effective dates for the amended rules, but none of these comments provided a reasonable means of implementing the proposed amendments at a date later than the underlying regulations the proposal would have amended. Despite these comments, the Bureau remains persuaded that it would be impracticable for these amendments to take effect later than the underlying regulations they amend. Moreover, the Bureau believes that these amendments should help industry participants comply with the other components of the 2013 Title XIV Final Rules, which in most cases also will take effect January 10, 2014. The Bureau thus is adopting the effective date of January 10, 2014, for the amendments in this document other than as discussed in parts IV.B and IV.C below.

B. For Provisions Related to the 2013 Escrows Final Rule

The Bureau proposed an effective date of January 1, 2014 for the amendments to the new provisions in § 1026.35 that govern higher-priced mortgage loan escrow requirements, which took effect on June 1, 2013. While the Bureau established January 10, 2014 as the baseline effective date for most of the 2013 Title XIV Final Rules, it identified certain provisions that it believed did not present significant implementation burdens for industry, including amendments to § 1026.35 adopted by the 2013 Escrows Final Rule. For these provisions, the Bureau set an earlier effective date of June 1, 2013. The proposal would have amended one such provision, § 1026.35(b)(2)(iii)(A), which provides an exemption from the higher-priced mortgage loan escrow requirement to creditors that extend more than 50 percent of their total covered transactions secured by a first lien in ''rural'' or ''underserved'' counties during the preceding calendar year and also meet other small creditor criteria, and do not otherwise maintain escrow accounts for loans serviced by themselves or an affiliate. In light of recent changes to which counties meet the definition of ''rural,'' the Bureau proposed to amend this provision to prevent creditors that qualified for the exemption in 2013 from losing eligibility in 2014 or 2015 because of these changes. The proposal would have allowed creditors to qualify for the exemption if they qualified in any of the previous three calendar years (assuming the other criteria for eligibility are also met). In addition, the proposal would have amended § 1026.35(b)(2)(iii)(D)(*1*) to prevent creditors that were previously ineligible for the exemption, but may now qualify in light of the proposed changes, from losing eligibility because they had established escrow accounts for first-lien higher-priced mortgage loans (for which applications were received after June 1, 2013), as required when the final rule took effect and prior to the proposed amendments taking effect. The Bureau proposed to make this amendment effective for applications received on or after January 1, 2014, because the § 1026.35(b)(2)(iii) exemption applies based on a calendar year and relates to a regulation that is already in effect. The Bureau received no comments addressing the proposed effective date of this provision, other than comments that generally supported the proposal.

As discussed in the section-by-section analysis below, the Bureau is adopting amendments to § 1026.35(b)(2)(iii) as proposed. In addition, the Bureau is adopting amendments to the commentary to this section substantially as proposed with one additional clarification. The Bureau believes it is appropriate to set a January 1, 2014 effective date for these provisions. The Bureau notes that a January 1, 2014 effective date is more beneficial to industry, because the amendment would only expand eligibility for the exemption—thus an effective date of January 1, 2014, as opposed to January 10, 2014, would mean that creditors are able to take advantage of this expanded exemption earlier. Accordingly, the amendments to § 1026.35(b)(2)(iii) and its commentary will apply to applications received on or after January 1, 2014.

C. Provisions Related to the 2013 Loan Originator Compensation Final Rule

The effective date for certain provisions in this final rule related to the 2013 Loan Originator Compensation Final Rule, along with the related provisions of the 2013 Loan Originator Compensation Final Rule, is January 1, 2014, for the reasons discussed below.

V. Effective Date of the 2013 Loan Originator Compensation Rule

A. General

The Proposal

As described in the proposal, the Bureau established January 10, 2014, as the baseline effective date for nearly all of the provisions in the 2013 Title XIV Final Rules, including most provisions of the 2013 Loan Originator Compensation Final Rule. In the proposal, the Bureau stated that it believed that having a consistent effective date across nearly all of the 2013 Title XIV Final Rules would facilitate compliance. However, as explained in the proposal, the Bureau identified a few provisions that it believed did not present significant implementation burdens for industry, including § 1026.36(h) on mandatory arbitration clauses and waivers of certain consumer rights and § 1026.36(i) on financing credit insurance, as adopted by the 2013 Loan Originator Compensation Final Rule. As explained in the proposal, for these provisions (and associated commentary), the Bureau set an earlier effective date of June 1, 2013.[15]

As described in the proposal, since issuing the 2013 Loan Originator Compensation Final Rule in January 2013, the Bureau has received a number of questions about transition issues, particularly with regard to application of provisions under § 1026.36(d) that generally prohibit basing loan originator compensation on transaction terms but permit creditors to award non-deferred profits-based compensation subject to certain limits. For instance, as discussed in the proposal, the Bureau has received inquiries about when creditors and loan originator organizations may begin taking into account transactions for purposes of paying compensation under a non-deferred profits-based compensation plan pursuant to § 1026.36(d)(1)(iv)(B)(*1*) (*i.e.,* the 10-percent total compensation limit, or the 10-percent limit). As the Bureau stated in the proposal, while the profits-based compensation provisions present relatively complicated transition issues, the Bureau is also conscious of the fact that most other provisions in the 2013 Loan Originator Compensation Final

[15] After interpretive issues were raised concerning the credit insurance provision as discussed in the 2013 Loan Originator Compensation Final Rule, the Bureau temporarily delayed and extended the effective date for § 1026.36(i) in the 2013 Effective Date Final Rule until January 10, 2014. 78 FR 32547 (May 31, 2013). In the proposal, the Bureau requested comment on whether the effective date for § 1026.36(i) may be set earlier than January 10, 2014.

Rule are simpler to implement because they largely recodify and clarify existing requirements that were previously adopted by the Federal Reserve Board in 2010 with regard to loan originator compensation, and by various agencies under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. 5106–5116 (SAFE Act), with regard to loan originator qualification requirements. The Bureau also stated in the proposal that these provisions are focused on compensation plan structures, registration and licensing, and hiring and training requirements that are often structured on an annual basis and typically do not vary from transaction to transaction.

For all of these reasons, the Bureau proposed moving the general effective date for most provisions adopted by the 2013 Loan Originator Compensation Final Rule to January 1, 2014. The Bureau stated in the proposal that, although this change would shorten the implementation period by nine days, the Bureau believes that the change would actually facilitate compliance and reduce implementation burden by providing a cleaner transition period that more closely aligns with changes to employers' annual compensation structures and registration, licensing, and training requirements. In addition, the Bureau also stated that, because elements of the 2013 Loan Originator Compensation Final Rule concerning retention of records, definitions, scope, and implementing procedures affect multiple provisions, the Bureau was proposing to make the change with regard to the bulk of the 2013 Loan Originator Compensation Final Rule as described further below, rather than attempting to treat individual provisions in isolation. Finally, the Bureau also proposed changes to the effective date for provisions on financing of credit insurance under § 1026.36(i), in connection with proposing further clarifications and guidance on the Dodd-Frank Act requirements related to that provision.

The Bureau stated in the proposal that it believed these changes would facilitate compliance and help ensure that the 2013 Loan Originator Compensation Final Rule does not have adverse unintended consequences. The Bureau requested public comment on these proposed effective dates, including on any suggested alternatives.

Comments

The Bureau received approximately 30 comments addressing the proposed changes to the effective date for the 2013 Loan Originator Compensation Final Rule other than § 1026.36(i).[16] The comments generally were supportive of these proposed changes. A national association of credit unions and several state credit union associations supported moving up the effective date from January 10, 2014, to January 1, 2014, stating that a January 1 date would result in a cleaner transition period that more closely aligns with changes to employers' annual compensation structures and registration, licensing, and training requirements. A national trade association of banking institutions stated its appreciation for the Bureau's efforts to facilitate compliance and establish effective dates that are better aligned with banker systems. This association wrote that it did not believe a January 1 effective date would constitute a major burden. The association urged the Bureau, however, to enact effective dates that apply to transactions that are *either* consummated on or after January 1, 2014 *or* for which the creditor paid compensation on or after that date. According to the association, allowing for an alternative option would best accommodate the various payment systems and methods that exist across various institutions and would not, in its opinion, give rise to significant difficulties in terms of examinations.[17]

One community bank commented that it would pose unnecessary and wasteful burdens on financial institutions of all sizes to necessitate a separate accounting and reporting for a nine-day period, because accounting periods for compensation generally commence annually each January 1st. A large mortgage company stated that it supported the change because moving the effective date to January 1, 2014, would help lenders update their systems on a consistent basis and avoid any potential lapses in accounting or confusion that could emerge between January 1 and January 10. One community bank stated that it is ''operationally efficient'' to apply rule changes at the beginning of a month and that there would be no real difference in compliance burden because ''most lenders would naturally'' comply as of the earlier date anyway. A state association representing banking institutions wrote that moving up the effective date by nine days aligns more closely with payroll records and tax reporting and may actually be easier to implement from an operational basis than a January 10 effective date. This association did report that its members have indicated that they will not be able to meet either a January 1 or a January 10, 2014, effective date due to the 2013 Loan Originator Compensation Final Rule's complexity and pending amendments.

Final Rule

As discussed in more detail below, the Bureau is finalizing the effective dates for § 1026.36 (and interrelated provisions in § 1026.25(c)(2)) adopted by the 2013 Loan Originator Compensation Final Rule (and associated commentary), and the amendments to and additions to those sections contained in today's final rule, as proposed. The Bureau discusses in turn below the effective dates for different provisions of § 1026.36 (and interrelated provisions in § 1026.25(c)(2)). These clarifications and amendments to the effective date require only minimal revisions to the rule text and commentary and primarily are reflected in the Dates caption and discussion of effective dates in this Supplementary Information. As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. Under Dodd-Frank Act section 1022(b)(1), 15 U.S.C. 5512(b)(1), the Bureau has general authority 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 thereof. The Bureau is changing the effective date of the 2013 Loan Originator Compensation Final Rule with respect to those provisions described above pursuant to its TILA section 105(a) and Dodd-Frank Act section 1022(b)(1) authority.

B. Effective Date for Amendments to § 1026.36(d)

The Proposal

The Bureau proposed three specific changes to the effective date for the amendments to § 1026.36(d) (and associated commentary) contained in

[16] The comments regarding the effective date for § 1026.36(i) are discussed separately below.

[17] The association stated further that, under this approach, an institution would have to abide by whatever effective date methodology it selects.

the 2013 Loan Originator Compensation Final Rule. First, the Bureau proposed that the provisions of the 2013 Loan Originator Compensation Final Rule revising § 1026.36(d) would be effective January 1, 2014, not January 10, 2014. The Bureau discussed its concern that an effective date of January 10, 2014, for the revisions to § 1026.36(d) may result in creditors and loan originator organizations believing that they have to account separately for the period from January 1 through January 9, 2014, when applying the new compensation restrictions under § 1026.36(d). While recognizing that this proposal would mean that creditors and loan originator organizations would have a slightly shorter implementation period, the Bureau stated that on balance it believed the proposed change would have eased compliance burdens for creditors and loan originator organizations by eliminating any concern about a need for separate accountings as described above. As noted above, the Bureau also proposed to change the effective date for the addition of § 1026.25(c)(2) (records retention) (and associated commentary) from January 10, 2014, to January 1, 2014, to dovetail with the proposal to change the effective date of § 1026.36(d) to January 1, 2014, to ensure that records on compensation paid between January 1 and January 10, 2014, are properly maintained.

Second, the Bureau proposed that the revisions to § 1026.36(d) (other than the addition of § 1026.36(d)(1)(iii), as discussed below) would have applied to transactions that are consummated and for which the creditor or loan originator organization paid compensation on or after January 1, 2014. The Bureau stated its belief that applying the effective date for the revisions to § 1026.36(d) based on application receipt, rather than based on transaction consummation and compensation payment, could present compliance challenges. This proposed change, as the Bureau discussed in the proposal, would have permitted transactions to be taken into account for purposes of compensating individual loan originators under the exceptions set forth in § 1026.36(d)(1)(iv) if the transactions were consummated and compensation was paid to the individual loan originator on or after January 1, 2014, even if the applications for those transactions were received prior to January 1, 2014. The Bureau stated that it believes this clarification, in conjunction with the proposed change to the effective date for the revisions to § 1026.36(d) described above, would have reduced compliance burdens on creditors and loan originator organizations by allowing them to take into account all transactions consummated in 2014 (and for which compensation is paid to individual loan originators in 2014) for purposes of paying compensation under § 1026.36(d)(1)(iv) that is earned in 2014. This proposed revision also would have allowed the consumer-paid compensation restrictions and exceptions thereto in the revisions to § 1026.36(d)(2) to be effective upon the consummation of any transaction where such compensation is paid in 2014 even if the application for that transaction was received in 2013.

Third, the Bureau proposed that the provisions of § 1026.36(d)(1)(iii), which pertain to contributions to or benefits under designated tax-advantaged plans for individual loan originators, would apply to transactions for which the creditor or loan originator organization paid compensation on or after January 1, 2014, regardless of when the transactions were consummated or the applications were received. The Bureau explained in the proposal that these changes regarding the effective date for the revisions to § 1026.36(d)(1)(iii) would have more clearly reflected the Bureau's intent to permit payment of compensation related to designated tax-advantaged plans during both 2013 (as explained in CFPB Bulletin 2012–2 clarifying current § 1026.36(d)(1)) [18] and thereafter (under the 2013 Loan Originator Compensation Final Rule).

In addition to the three specific changes to the effective date described above, the Bureau solicited comment generally on whether the proposed changes to the effective date for the amendments to § 1026.36(d) are appropriate or whether other approaches should be considered. In particular, the Bureau solicited comment on whether the amendments to § 1026.36(d) should take effect on January 1, 2014, and apply to all payments of compensation made on or after that date, regardless of the date of consummation of the transactions on whose terms the compensation was based.

Comments

Industry commenters generally supported the proposed changes to the effective date for the amendments to § 1026.36(d) that were added by the 2013 Loan Originator Compensation Final Rule. There were no objections to the Bureau's proposal to delete application receipt as the triggering event for the effective date provisions of § 1026.36 (other than for § 1026.36(g)). One state trade association of banking institutions wrote that applying the effective date for revisions to § 1026.36(d) based on receipt of applications would create ''serious compliance and recordkeeping challenges.'' Moreover, industry commenters generally supported the shift of the effective date for the amendments of § 1026.36(d) from January 10 to January 1, 2014 (see discussion above with regard to the general comments the Bureau received on the changes to the effective dates for the 2013 Loan Originator Compensation Final Rule). Industry commenters also did not raise any objections to the proposed revisions to the effective date for § 1026.36(d)(1)(iii), which would have applied to transactions for which compensation is paid on or after January 1, 2014, without regard to when the transactions were consummated. Nor did industry commenters specifically object to the proposal to change the effective date for the addition of § 1026.25(c)(2) (records retention) from January 10, 2014, to January 1, 2014.

Several commenters expressly supported the Bureau's proposal to apply the effective date for the amendments to § 1026.36(d) (other than the addition of § 1026.36(d)(1)(iii)) to transactions consummated on or after January 1, 2014, *and* where compensation was paid on or after January 1, 2014. A large depository institution wrote that this approach to the effective date would be a ''welcome clarification.'' One industry commenter that specializes in the financing of manufactured housing, in expressing support for proposed changes to the effective date, objected to the alternative on which the Bureau solicited comment (*i.e.,* that the effective date would apply to compensation paid on or after January 1, 2014, regardless of the date of consummation of the transaction).[19]

[18] The Bureau explained in the Supplementary Information to the 2013 Loan Originator Compensation Final Rule that it issued CFPB Bulletin 2012–2 (the Bulletin) to address questions regarding the application of § 1026.36(d)(1) to ''Qualified Plans'' (as defined in the Bulletin). The Bureau noted in that Supplementary Information that until the final rule takes effect, the clarifications in CFPB Bulletin 2012–2 remain in effect. Moreover, as the Bureau stated in the proposal, the Bureau interprets ''Qualified Plan'' as used in the Bulletin to include the designated tax-advantaged plans described in the final rule.

[19] This commenter noted its agreement with the Bureau's statement in the proposal that such an approach could raise complexity about how the new rule would apply to payments under non-deferred profits-based compensation plans made on or after January 1, 2014, where the compensation payments were based on the terms of transactions consummated in 2013. This commenter wrote that such an approach would adversely affect, without

A small number of industry commenters asked that the Bureau provide more flexibility as to the effective date for the amendments to § 1026.36(d). As noted above, one national trade association asked that the effective dates for the various provisions of the 2013 Loan Originator Compensation Final Rule be triggered *either* by the consummation of transactions on or after January 1, 2014, *or* by the payment of compensation on or after January 1, 2014, with the complying parties having the option of selecting the applicable triggering event. A state association representing banking institutions similarly asked for an ''either/or'' approach with regard to the proposed trigger for the effective date. A state association representing banking institutions stated that the proposed formula for the effective date (*i.e.,* considering both the consummation date and the payment date) was unnecessarily complex, and instead recommended that the effective date be tied solely to the payment date. A national trade association of mortgage banking institutions and a mortgage company recommended that the Bureau adopt January 1, 2014, as an optional effective date, with mandatory implementation as of January 10, 2014. The association reasoned that while the earlier effective date may benefit many lenders, there may be some lenders that have already arranged compliance for the later date and would be forced to incur additional expense if compliance were required earlier. The mortgage company stated this change might assist in a small way in regards to payroll systems.

Final Rule

The Bureau is finalizing the effective date and applicability for the amendments to §§ 1026.36(d) and 1026.25(c)(2) (and associated commentary) adopted by the 2013 Loan Originator Compensation Final Rule and the proposed amendments and additions thereto in the June 2013 proposal, as proposed. That is: (1) The amendments to § 1026.36(d) (other than the addition of § 1026.36(d)(1)(iii)) and the provisions of § 1026.25(c)(2) will apply to transactions that are consummated and for which the creditor or loan originator organization paid compensation on or after January 1, 2014; and (2) the provisions of § 1026.36(d)(1)(iii) will apply to transactions for which the creditor or loan originator organization paid compensation on or after January 1, 2014, regardless of when the transactions were consummated or their applications were received. For the reasons stated in the proposal and supported by many of the commenters, the Bureau believes that a January 1, 2014, effective date will ease compliance burden by aligning the effective date for the amendments to § 1026.36(d) with the date on which annual changes to compensation policies are implemented. Moreover, the Bureau believes that tying the application of the effective date for the amendments to § 1026.36(d) (other than the addition of §§ 1026.36(d)(1)(iii) and 1026.25(c)(2)) to conjunctive triggering events on or after January 1, 2014 (*i.e.,* the consummation of transactions *and* the payment of compensation based on the terms of those transactions) best facilitates a smooth transition from one set of compensation rules to another. The Bureau thus disagrees with the commenters that asked for an ''either/or'' approach (*i.e.,* tied to either the consummation date or the payment date) or for the effective date to be tied only to payment of compensation. A rule where the complying party has the option of choosing among two possible triggering events potentially would create confusion for complying parties and examiners about whether compensation earned in 2013 but paid in 2014 is subject to the current compensation rules under § 1026.36(d) or the amendments to § 1026.36(d) added by the 2013 Loan Originator Compensation Final Rule, and as to whether the amended recordkeeping requirements in § 1026.25(c)(2) would apply. Moreover, as one commenter suggested, permitting creditors and loan originator organizations to pay, in 2014, compensation earned in 2013—at which time the current compensation rules were still in effect—might disadvantage creditors or loan originator organizations that relied on the current rules in setting up their 2013 compensation programs in 2012.

The Bureau also believes that providing for an optional compliance date of January 1, 2014—as suggested by a small number of industry commenters—would add complexity which would likely outweigh the benefits of the flexibility that some complying parties might gain from this approach. The Bureau is concerned that this approach to the effective date would lead to unnecessary dispersion of compliance dates over a ten-day period in early 2014, which in turn would be difficult to track by examiners and enforcing parties, and potentially raise other legal and operational questions. It could potentially lead to gaps in recordkeeping as well. Even further confusion could result due to the continued effect of the current compensation rules for an additional nine-day period. The Bureau also notes that the weight of comments it received on the proposed effective date changes supported a mandatory compliance date of January 1, 2014.

C. Effective Dates for Amendments to or Additions of § 1026.36(a), (b), (e), (f), (g), and (j)

The Proposal

Rather than implementing the proposed change in effective dates for § 1026.36(d) in isolation, the Bureau also proposed to make the amendments to or additions of (as applicable) § 1026.36(a) (definitions), § 1026.36(b) (scope), § 1026.36(e) (anti-steering), § 1026.36(f) (qualifications) and § 1026.36(j) (compliance policies and procedures for depository institutions) (and associated commentary) contained in the 2013 Loan Originator Compensation Final Rule take effect on January 1, 2014. The Bureau proposed not to tie the effective date to the receipt of a particular loan application, but rather to a date certain. Because these provisions rely on a common set of definitions and in some cases cross-reference each other,[20] the Bureau proposed to make them effective on January 1, 2014, and without reference to receipt of applications to avoid a potential incongruity among the effective dates of the substantive provisions and the effective dates of the regulatory definitions and scope provisions supporting those substantive provisions. In the proposal, the Bureau stated that it believes this proposed approach would facilitate compliance.

The Bureau did not, however, propose to adjust the effective date for § 1026.36(g) (and associated commentary), which requires that loan originators' names and identifier numbers be provided on certain loan documentation, except to clarify and confirm that the provision takes effect with regard to any application received on or after January 10, 2014, by a creditor or a loan originator organization. Because this provision requires modifications to documentation for individual loans and the systems that generate such documentation, the Bureau stated in the

fair warning, those creditors and their employees for whom 2013 compensation plans were made in mid-2012.

[20] For example, § 1026.36(j) requires that depository institutions establish written policies and procedures reasonably designed to ensure and monitor compliance with § 1026.36(d), (e), (f), and (g).

proposal that it believes it is appropriate to have this provision take effect with the other 2013 Title XIV Final Rules that affect individual loan processing.

Comments

As noted above, the commenters that addressed the proposed changes to the effective dates for the provisions of the 2013 Loan Originator Compensation Final Rule generally expressed support for the proposed changes. In nearly all cases, these comments did not discuss the application of the effective date to specific provisions within § 1026.36, other than the amendments to § 1026.36(d). One national trade association that requested an optional compliance date of January 1, 2014, for the amendments to § 1026.36(d) noted that, if the Bureau were to adopt a mandatory compliance date of January 1, 2014, it nonetheless agreed with the proposal to keep the effective date for the provisions of § 1026.36(g) as January 10, 2014. The association stated that systems changes to revise loan documents scheduled to take effect on January 10 should not be made costlier or less convenient as a result of the Bureau's changes to the effective date provisions.

Final Rule

The Bureau is finalizing the effective date for the amendments to or additions of § 1026.36(a), (b), (e), (f), (g), and (j) (and associated commentary) contained in the 2013 Loan Originator Compensation Final Rule and the proposed amendments and additions thereto in the June 2013 proposal, as proposed. Therefore: (1) The effective date for the amendments to or additions of § 1026.36(a), (b), (e), (f), and (j) as finalized in this rule will be January 1, 2014 (*i.e.,* a date certain that is not tied to a triggering event, such as receipt of an application on or after that date); and (2) the effective date for the addition of § 1026.36(g) will be January 10, 2014, and that section therefore will apply to all transactions for which the creditor or loan originator organization received an application on or after that date.[21]

While the Bureau is not changing the effective date for § 1026.36(g), it has become aware that some uncertainty exists with respect to the application of this provision where more than one loan originator organization is involved in originating the same transaction (*e.g.,* a mortgage broker and a creditor performing origination services with respect to the same transaction). The Bureau understands that some loan originator organizations are planning to comply by including the name and Nationwide Mortgage Licensing System and Registry (NMLSR) ID (where the NMLSR has provided one) for *multiple* loan originator organizations involved in originating the transaction on the loan documents, while others are planning to comply by including the name and NMLSR ID (where the NMLSR has provided one) for just *one* of the loan originator organizations involved in originating the transaction on the loan documents. The Bureau believes that either approach complies with the rule in its current form. However, the Bureau is considering proposing to clarify at some point in the future that the name and NMLSR ID (where the NMLSR has provided one) for *multiple* loan originator organizations involved in originating the transaction must be included on the loan documents. If the Bureau ultimately adopts such a clarification, it will provide adequate time for compliance.

D. Effective Date for § 1026.36(i)

As discussed in the 2013 Effective Date Final Rule and below, the Bureau initially adopted a June 1, 2013 effective date for § 1026.36(i), but later delayed the provision's effective date to January 10, 2014, while the Bureau considered addressing interpretive questions concerning the provision's applicability to transactions other than those in which a lump-sum premium is added to the loan amount at consummation. The Bureau sought comment on whether the January 10, 2014 effective date would be appropriate in light of the proposed changes, or whether an earlier effective date could be set that permits sufficient time for creditors to adjust their insurance premium practices as necessary. The Bureau received comments from trade associations, the credit insurance industry, credit unions and other financial institutions, as well as consumer groups, which addressed the proposed effective date. Industry commenters and trade associations strongly preferred the January 10th date to an earlier date, and stated that system adjustments will be required to implement the final rule. However, these commenters generally supported the January 10, 2014 effective date as reasonable, so long as the final rule does not materially differ from the proposal. Consumer groups suggested that the Bureau set the effective date at January 1, 2014, noting that the consumer benefit derived from the provision has already been delayed from its original effective date of June 1, 2013.

As discussed in the section-by-section analysis below, the Bureau is adopting amendments to § 1026.36(i) substantially as proposed, with some additional clarifications. The Bureau believes that creditors will need time to adjust certain credit insurance premium billing practices to account for the final rule, but believes that the January 10, 2014 effective date adopted in the 2013 Effective Date Final Rule will allow sufficient time for compliance. This approach is consistent with comments from industry and trade associations, as well as the generally applicable effective date for the 2013 Title XIV Final Rules, including for several provisions the Bureau is amending through this notice.

VI. Section-by-Section Analysis

A. Regulation B

Section 1002.14 Rules on Providing Appraisals and Other Valuations

14(b) Definitions

14(b)(3) Valuation

The Proposal

The Bureau proposed to amend commentary to § 1002.14 to clarify the definition of ''valuation'' as adopted by the 2013 ECOA Final Rule. As the Bureau stated in the proposal, the Dodd-Frank Act section 1474 amended ECOA by, among other things, defining ''valuation'' to include any *estimate* of the value of the dwelling developed in connection with a creditor's decisions to provide credit. *See* ECOA section 701(e)(6). Similarly, the 2013 ECOA Final Rule adopted § 1002.14(b)(3), which defines ''valuation'' as any *estimate* of the value of a dwelling developed in connection with an application for credit. Consistent with these provisions, the Bureau intended the term ''valuation'' to refer only to an estimate for purposes of the 2013 ECOA Final Rule's newly adopted provisions. However, the 2013 ECOA Final Rule added two comments that refer to a valuation as an appraiser's estimate or opinion of the value of the property: comment 14(b)(3)–1.i, which gives examples of ''valuations,'' as defined by § 1002.14(b)(3); and comment 14(b)(3)–3.v, which provides examples of documents that discuss or restate a valuation of an applicant's property but nevertheless do not constitute ''valuations'' under § 1002.14(b)(3).

Because the Bureau did not intend by these two comments to alter the meaning of ''valuation'' to become inconsistent with ECOA section 701(e)(6) and § 1002.14(b)(3), the Bureau

[21] While a depository institution must have its policies and procedures under § 1026.36(j) in place by January 1, 2014, including policies and procedures covering § 1026.36(g), the depository institution is, of course, not required to ensure and monitor compliance with § 1026.36(g) until January 10, 2014, the effective date of § 1026.36(g).

proposed to clarify comments 14(b)(3)–1.i and 14(b)(3)–3.v by removing the words ''or opinion'' from their texts, and sought comment on the clarification.

Comments

The Bureau received a few comments from trade associations and credit unions that generally supported the clarification. The Bureau also received one comment from a trade association that suggested the proposed change could cause additional confusion, because the term ''opinion of value'' is commonly used to describe appraisals. This commenter also pointed out that appraisals are generally not considered to be ''estimates,'' and thus the application of the rule to appraisals could be confusing in light of the proposed change. The commenter suggested that, rather than deleting the word ''opinion'' altogether, the Bureau instead clarify that a valuation includes any ''estimate or opinion of value.''

Final Rule

The Bureau is adopting comment 14(b)(3)–1.i as proposed with some additional modifications, and also is adding new comment 14(b)(3)–3.vi based on the trade association comment. In proposing these amendments, the Bureau intended to clarify that the comments referred to appraisals or other valuation models by removing the word ''opinion,'' which could be read broadly to include even speculative opinions not based on an appraisal or other valuation model. However, in light of the trade association's comments the Bureau believes that simply deleting the word ''opinion'' could also cause confusion regarding whether and how the rule applies to appraisals that are commonly described as ''opinions of value.'' Thus, the Bureau is substituting ''opinion of value'' for ''opinion'' rather than deleting the word entirely. The Bureau is adopting revised comment 14(b)(3)–1.i with this change. The Bureau is adopting comment 14(b)(3)–3.v as proposed, and does not believe any additional revisions are necessary in light of this clarification, because the comment deals exclusively with reports reflecting property inspections and not appraisals. However, the Bureau is adding new comment 14(b)(3)–3.vi to clarify that appraisal reviews that do not provide an estimate of value or ''opinion of value'' are included in the list of examples of items that are not considered ''valuations'' for purposes of § 1002.14(b)(3).

B. Regulation X

General—Technical Corrections

In addition to the clarifications and amendments to Regulation X discussed below, the Bureau proposed technical corrections and minor wording adjustments for the purpose of clarity throughout Regulation X that were not substantive in nature. No comments were received on these changes, and the Bureau is finalizing such technical and wording clarifications to regulatory text in §§ 1024.30, 1024.39, and 1024.41; and to commentary to §§ 1024.17, 1024.33 and 1024.41.

Sections 1024.35 and .36 Error Resolution Procedures and Requests for Information

The Bureau proposed minor amendments to the error resolution and request for information provisions of Regulation X, adopted by the 2013 Mortgage Servicing Final Rules. In the areas in which amendments were proposed, the error resolution procedures largely parallel the information request procedures; thus the two sections are discussed together below. Section 1024.35 implements section 6(k)(1)(C) of RESPA, as amended by the Dodd-Frank Act, and § 1024.36 implements section 6(k)(1)(D) of RESPA, as amended by the Dodd-Frank Act. To the extent the requirements under §§ 1024.35 and 1024.36 are applicable to qualified written requests, these provisions also implement sections 6(e) and 6(k)(1)(B) of RESPA. As discussed in part III (Legal Authority), the Bureau is finalizing these amendments pursuant to its authority under RESPA sections 6(j), 6(k)(1)(E) and 19(a). As explained in more detail below, the Bureau believes these provisions are necessary and appropriate to achieve the consumer protection purposes of RESPA, including ensuring responsiveness to consumer requests and complaints and the provision and maintenance of accurate and relevant information.

35(c) and 36(b) Contact Information for Borrowers To Assert Errors and Information Requests

The Proposal

The Bureau proposed to amend the commentary to § 1024.35(c) and § 1024.36(b) with respect to disclosure of the exclusive address (a servicer may designate an exclusive address for the receipt of notifications of errors and requests for information) when a servicer discloses contact information to the borrower for the purpose of assistance from the servicer. Section 1024.35(c), as adopted by the 2013 Mortgage Servicing Final Rules, state that a servicer may, by written notice provided to a borrower, establish an address that a borrower must use to submit a notice of error to a servicer in accordance with the procedures set forth in § 1024.35. Comment 35(c)–2 clarifies that, if a servicer establishes any such exclusive address, the servicer must provide that address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance from the servicer. Similarly, § 1024.36(b) states that a servicer may, by written notice provided to a borrower, establish an address that a borrower must use to submit information requests to a servicer in accordance with the procedures set forth in § 1024.36. Comment 36(b)–2 clarifies that, if a servicer establishes any such exclusive address, the servicer must provide that address to the borrower in any communication in which the servicer provides the borrower with contact information for assistance from the servicer.

In the proposal, the Bureau expressed concern that comments 35(c)–2 and 36(b)–2 could be interpreted more broadly than the Bureau had intended. Section 1024.35(c) and comment 35(c)–2, as well as § 1024.36(b) and comment 36(b)–2, are intended to ensure that servicers inform borrowers of the correct address for the borrower to use for purposes of submitting notices of error or information requests, so that borrowers do not inadvertently send these communications to other non-designated servicer addresses (which would not provide the protections afforded by §§ 1024.35 and 1024.36, respectively). If interpreted literally, the existing comments would require the servicer to include the designated address for notices of error and requests for information when *any* contact information, even just a phone number or web address, for the servicer is given to the borrower. The Bureau did not intend that the servicer be required to inform the borrower of the designated address in all communications with borrowers where any contact information whatsoever for the servicer is provided.

Accordingly, the Bureau proposed to amend comment 35(c)–2 to provide that, if a servicer establishes a designated error resolution address, the servicer must provide that address to a borrower in any communication in which the servicer provides the borrower with an *address* for assistance from the servicer. Similarly, the Bureau proposed to amend comment 36(b)–2 to provide that, if a servicer establishes a

designated information request address, the servicer must provide that address to a borrower in any communication in which the servicer provides the borrower with an *address* for assistance from the servicer.

Comments

The Bureau received comments from industry as well as consumer groups addressing these proposed clarifications. Industry commenters supported limiting the locations where the designated address is required, but asserted that the requirement was still overbroad and unclear as to when the designated address must be provided. These commenters expressed concern that they would have to provide the designated address on every letter that included a return address or an address in the letterhead. The commenters also stated this would be unduly burdensome as it would require significant programming costs. Commenters further stated this would create problems for borrowers by causing cluttered, confusing documents leading borrowers to incorrectly send other things to the designated address (*e.g.,* a borrower may send a payment to the designated address, leading to a delay in payment processing). Finally, commenters stated the proposed clarification could create conflicts with other regulations, such as the force-placed insurance letters, which include an address but do not allow additional information to be included. Industry commenters generally suggested the designated address be required only in a specific subset of contexts: the initial designation letter, the periodic statements and coupon book, the servicer's Web site, and loss mitigation documents.

Consumer group commenters expressed concern that borrowers will not be informed of their rights. Such commenters objected to a decision the Bureau made, in the 2013 Mortgage Servicing Final Rules, to eliminate the requirement that a servicer receiving a transferred loan include information on the error resolution procedures in its notice to the borrower about the transfer. Such commenters suggested that information on the error resolution and information request rights should be included on each periodic statement.

Final Rule

The Bureau is adopting revised versions of proposed comments 35(c)–2 and 36(b)–2. The Bureau notes that the proposal only addressed when the designated address must be provided, and that comments about providing borrowers information about the general procedures to submit error notifications or information requests are beyond the scope of the proposed changes to the rule.

The Bureau is persuaded that the proposed language of ''an address for assistance'' might not have fully addressed the concerns of the provision being overbroad, as the proposed language could have been interpreted to require the designated address on every document from the servicer that contains a return address. The Bureau is further persuaded by the concern that borrowers could have been confused and incorrectly sent items that did not concern error resolution to the designated address. To require the designated address on every piece of written communication that includes a return address would be unduly burdensome and not in the best interests of the borrower. Thus, under the final rule, the designated address need be included in only a specific subset of contexts, specifically (1) the written notice, required by § 1024.35(c) and § 1024.36(b) if a servicer designates an exclusive address; (2) any periodic statement or coupon book required pursuant to 12 CFR 1026.41; (3) any Web site maintained by the servicer in connection with the servicing of the loan; and (4) any notice required pursuant to §§ 1024.39 or 1026.41 that includes contact information for assistance.

While servicers will not specifically be required to provide the designated address in contexts other than those described in the amended comments, the Bureau notes that a servicer remains subject to the requirement in § 1026.38(b)(5) to have policies and procedures reasonably designed to ensure that the servicer informs the borrower of the procedures for submitting written notices of error and information requests. Further, as discussed below in the section-by-section analysis of section 38(b)(5), the Bureau is adopting new comment 38(b)(5)–3 clarifying a servicer's obligation to ensure borrowers are informed of the designated address. The Bureau believes this the final rule will best balance practical considerations with the need to notify borrowers of the designated address.

35(g) and 36(f) Requirements Not Applicable

35(g)(1)(iii)(B) and 36(f)(1)(v)(B)

The Proposal

The Bureau proposed amendments to § 1024.35(g)(1)(iii)(B) (untimely notices of error) and § 1024.36(f)(1)(v)(B) (untimely requests for information). Section 1024.35(g)(1)(iii)(B) provides that a notice of error is untimely if it is delivered to the servicer more than one year after a mortgage loan balance was paid in full. Similarly, current § 1024.36(f)(1)(v)(B) provides that an information request is untimely if it is delivered to the servicer more than one year after a mortgage loan balance was paid in full.

The Bureau proposed to replace the references to ''the date a mortgage loan balance is paid in full'' with ''the date the mortgage loan is discharged.'' The proposal noted that this change would address circumstances in which a loan is terminated without being paid in full, such as a loan that was discharged through foreclosure or deed in lieu of foreclosure without full satisfaction of the underlying contractual obligation. Further, the proposal stated that this change also would align more closely with § 1024.38(c)(1), which requires a servicer to retain records that document actions taken with respect to a borrower's mortgage loan account only until one year after the date a mortgage loan is ''discharged.''

Comments

The Bureau received comments from industry as well as consumer groups addressing the proposed modifications. Commenters were generally supportive of changing the rule to address situations when the loan is not paid in full, but expressed concerns about the use of the word ''discharged,'' stating that this word has a specific meaning in bankruptcy and that there may be some ambiguity as to when a loan is discharged in certain situations. In particular, commenters discussed the foreclosure process, as well as situations in which there is a deficiency balance after a foreclosure sale, and situations in which bankruptcy proceedings may eliminate the debt but leave a lien on the property.

Final Rule

The Bureau is adopting § 1024.35(g)(1)(iii)(B) and § 1024.36(f)(1)(v)(B) as proposed. The Bureau believes the requirement to resolve errors and respond to information requests should last over the same timeframe as the obligation to retain records. The Bureau believes it would be impractical to require a servicer to resolve errors and provide information at a time when Regulation X no longer requires the servicer to retain the relevant records. Conversely, the Bureau believes the servicer should be responsible to correct those records during the period when Regulation X does require a servicer to retain records,

if necessary, and provide borrowers information from the records. Further, the Bureau believes the use of the term ''discharged'' is appropriate, especially given that the term is already used in the timing of the record-retention requirement. For purposes of the Bureau's mortgage servicing rules, as opposed to bankruptcy purposes, a mortgage loan is discharged when both the debt and all corresponding liens have been extinguished or released, as applicable. The Bureau believes a borrower should have the benefit of the error resolution, information request, and record retention provisions so long as a debt *or* lien remains because only after both have been eliminated will there be no further possibility of a borrower needing to seek servicing information or to assert a servicing error. Thus, the Bureau is finalizing this provision as proposed.

Section 1024.38 General Servicing Policies, Procedures and Requirements

38(b) Objectives

38(b)(5) Informing Borrowers of the Written Error Resolution and Information Request

Procedures

As discussed above in the section-by-section discussion of §§ 1024.35(c) and 1024.36(b), the Bureau is amending comments 35(c)–2 and 36(b)–2 to clarify in what contexts the designated address for notices of error or requests for information must be provided. The finalized comments clarify that, if a servicer designates such an address, that address must be provided in any notice required pursuant to §§ 1024.39 or 1024.41 that includes contact information for assistance. The Bureau notes that servicers may provide borrowers in delinquency with different addresses for different purposes. For example, a servicer may provide a borrower with the designated address for asserting errors, and a separate address for submission of loss mitigation applications. To mitigate the risk of a borrower sending a notification of error to the wrong address (and thus not triggering the associated protections), the Bureau is adopting new comment 38(b)(5)–3.

Section 1024.35 sets out certain procedures a servicer must follow when a borrower submits a written notice of error. These procedures provide important protections to borrowers who in are in delinquency (as well as at other times). Specifically, the procedures in § 1024.35(e)(3)(i)(B) require a servicer to take certain actions before a scheduled foreclosure sale if a borrower asserts certain errors.[22] These protections are only triggered if a borrower submits a written notice of error to the designated address (assuming the servicer has designated such an address). Thus, the Bureau believes it is important that borrowers asserting errors send the notice of error to the proper address.

The Bureau notes that existing provisions do address ensuring the borrower is aware of the procedures required to trigger the error resolution protections. Section 1024.38(b)(5) requires a servicer to have policies and procedures reasonably designed to achieve the objective of informing borrowers of the written error resolution and information request procedures. The Bureau acknowledges that a borrower in delinquency who is working with a continuity of contact representative and submitting documents related to loss mitigation may be confused about where to submit notices asserting errors. If such a borrower were to orally report the assertion of the error to the continuity of contact representative, comment 38(b)(5)–2 explains that § 1024.38(b)(s) would require servicers to have policies and procedures reasonably designed to notify a borrower who is not satisfied with the resolution of the complaint of the procedures for submitting a written notice of error. However, the Bureau is concerned that, if borrowers were to submit written assertions of an error to the addresses where they were submitting loss mitigation documents, such borrowers may believe they have properly followed the procedures, but in fact would not have triggered the protections under § 1024.35.

To address this concern, in connection with the clarification above on the contexts in which the designated address must be provided, the Bureau is adopting new comment 38(b)(5)–3. The new comment clarifies a servicer's obligation pursuant to § 1024.38(b)(5) by stating that a servicer's policies and procedures must be reasonably designed to ensure that if a borrower submits a notice of error to an incorrect address that was given to the borrower in connection with submission of a loss mitigation application or the continuity of contact pursuant to § 1024.40, the servicer will ensure the borrower is informed of the procedures for submitting written notices of error set forth in § 1024.35, including the correct address. Alternatively, the servicer could redirect notices of error that were sent to an incorrect address to the designated address established pursuant to § 1024.35(c).

Section 1024.41 Loss Mitigation Procedures

As discussed above in part III (Legal Authority), the Bureau is finalizing amendments to § 1024.41 pursuant to its authority under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA. The Bureau believes that these amendments are necessary and appropriate to achieve the consumer protection purposes of RESPA and in particular of section 6 of RESPA, including to facilitate the evaluation of borrowers for foreclosure avoidance options. Further, the amendments implement, in part, section 6(k)(1)(C) of RESPA, which obligates a servicer to take timely action to correct errors relating to avoiding foreclosure, by establishing servicer duties and procedures that must be followed where appropriate to avoid such errors. In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purpose and objectives under sections 1021(a) and (b) of the Dodd-Frank Act. The Bureau additionally relies on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the terms of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

41(b) Receipt of a Loss Mitigation Application

41(b)(1) Complete Loss Mitigation Application

In connection with the provisions addressing payment forbearance discussed below in the section-by-section analysis of 1024.41(c)(2)(iii), the Bureau is amending comment 41(b)(1)–4 to clarify the obligation of a servicer to use reasonable diligence to

[22] Section 1024.35(e)(3)(i)(B) requires that, if a borrower asserts an error related to a servicer making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j), or related to a servicer moving for foreclosure judgment or order of sale or conducting a foreclosure sale in violation of § 1024.41(g) or (j), the servicer must comply with the requirements of the error resolution procedures prior to the date of a foreclosure sale, or within 30 days (excluding legal public holidays, Saturdays, and Sundays) after the servicer receives the notice of error, whichever is earlier.

complete a loss mitigation application. See the discussion below.

41(b)(2) Review of Loss Mitigation Application Submission

41(b)(2)(i) Requirements

The Proposal

The Bureau proposed to amend the commentary to § 1024.41(b)(2)(i) to clarify servicers' obligations with respect to providing notices to borrowers regarding the review of loss mitigation applications. Section 1024.41(b)(2)(i) requires a servicer that receives a loss mitigation application 45 days or more before a foreclosure sale to review and evaluate the application promptly and determine, based on that review, whether the application is complete or incomplete.[23] The servicer then must notify the borrower within five days (excluding legal public holidays, Saturdays and Sundays) that the servicer acknowledges receipt of the application, and that the servicer has determined that the loss mitigation application is either complete or incomplete. If an application is incomplete, the notice must state the additional documents and information that the borrower must submit to make the loss mitigation application complete. In addition, servicers are obligated under § 1024.41(b)(1) to exercise reasonable diligence in obtaining documents and information necessary to complete an incomplete application, which may require, when appropriate, the servicer to contact the borrower and request such information as illustrated in comment 41(b)(1)–4.i.

Following publication of the 2013 Mortgage Servicing Final Rules, the Bureau received numerous inquiries from industry stakeholders requesting guidance or clarification regarding how this provision may apply in instances where a servicer determines that additional information from the borrower is needed to complete an evaluation of a loss mitigation application after either (1) the servicer has provided notice to the borrower informing the borrower that the loss mitigation application is complete, or (2) the servicer has provided notice to the borrower identifying other specific information or documentation necessary to complete the application and the borrower has furnished that documentation or information. As these stakeholders noted, servicers sometimes must collect additional information from borrowers, the need for which may not have been apparent at the point of initial application, in order to process the application and satisfy the applicable investor requirements. In these situations, a borrower may have submitted the documents and information identified in the initial notice, resulting in an application that is facially complete based on the servicer's initial review, but the servicer, upon further evaluation, determines that additional information is required to evaluate the borrower for a loss mitigation option pursuant to requirements imposed by an investor or guarantor of a mortgage.

The Bureau proposed additional commentary to address these concerns. As the Bureau explained in the June 2013 Proposal, the notice required by § 1024.41(b)(2)(i)(B) is intended to provide the borrower with timely notification that a loss mitigation application was received and either is considered complete by the servicer or is considered incomplete and that the borrower is required to take further action for the servicer to evaluate the loss mitigation application. The Bureau was conscious of concerns that servicers have unnecessarily prolonged loss mitigation processes by incomplete and inadequate document reviews that lead to repeated requests for supplemental information that reasonably could have been requested initially, and so the Bureau designed the rule to ensure an adequate up-front review. At the same time, the Bureau did not believe it would be in the best interest of borrowers or servicers to create a system that leads to borrower applications being denied solely because they contain inadequate information and the servicer believes it may not request the additional information needed.

The Bureau therefore proposed three provisions to address these concerns. First, the Bureau proposed new comment 41(b)(2)(i)(B)–1, which would have clarified that, notwithstanding that a servicer has informed a borrower that an application is complete (or notified the borrower of specific information necessary to complete an incomplete application), a servicer must request additional information from a borrower if the servicer determines, in the course of evaluating the loss mitigation application submitted by the borrower, that additional information is required.

Second, the Bureau proposed new comment 41(b)(2)(i)(B)–2, which would have clarified that, except as provided in § 1024.41(c)(2)(iv) (the Bureau's third proposed new provision, discussed below), the protections triggered by a complete loss mitigation application in § 1024.41 would not be triggered by an incomplete application. An application would have been considered complete only when a servicer has received all the information the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower, even if an inaccurate § 1024.41(b)(2)(i)(B) notice had been sent to the borrower. The Bureau noted that the proposed clarifications would not have allowed servicers deliberately to inform borrowers that incomplete applications are complete or to describe the information necessary to complete an application as something less than all of the necessary information. Servicers are required under § 1024.41(b)(2)(i)(A) to review a loss mitigation application to determine whether it is complete or incomplete. In addition, servicers are subject to the § 1024.38(b)(2)(iv) requirement to have policies and procedures reasonably designed to achieve the objectives of identifying documents and information that a borrower is required to submit to complete an otherwise incomplete loss mitigation application, and servicers are obligated under § 1024.41(b)(1) to exercise reasonable diligence in obtaining documents and information necessary to complete an incomplete application. Thus, the proposed clarifications were intended to address situations where servicers make bona fide mistakes in initially evaluating loss mitigation applications.

Third, as described more fully below, the Bureau proposed new § 1024.41(c)(2)(iv) to require that, if a servicer creates a reasonable expectation that a loss mitigation application is complete, but later discovers information is missing, the servicer must treat the application as complete for certain purposes until the borrower has been given a reasonable opportunity to complete the loss mitigation application. The Bureau believed the proposed rule would mitigate potential risks to consumers that could arise through a loss mitigation process prolonged by incomplete and inadequate document reviews and repeated requests for supplemental information. The Bureau believed these new provisions would provide a mechanism for servicers to correct bona fide mistakes in conducting up-front reviews of loss mitigation applications for completeness, while ensuring that borrowers do not lose the protections under the rule due to such mistakes and that servicers have incentives to

[23] A ''complete loss mitigation application'' is defined in § 1024.41(b)(1) as ''an application in connection with which a servicer has received all the information the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower.''

conduct rigorous up-front review of loss mitigation applications.

Comments

The Bureau received comments from industry as well as consumer groups addressing the proposed provisions addressing a facially complete application. Commenters were generally supportive of the Bureau addressing situations where a servicer later discovers additional information is required to evaluate an application that is complete according to the terms of the notice the servicer sent the borrower. Commenters generally agreed that a strict rule that prevents servicers from seeking additional information when needed would result in unnecessary denials of loss mitigation to the borrower and that encouraging communication from the servicer to the borrower will improve loss mitigation procedures for the borrower. However, some commenters expressed the view that the 2013 Mortgage Servicing Final Rules were sufficient in this regard and that revisions at a date so close to implementation are counterproductive to institutions trying to implement the rule.

Final Rule

As discussed further below in connection with § 1024.41(c)(2)(iv), the Bureau is adopting amendments that achieve largely the same effect as the proposal in addressing situations where a servicer requires additional information to review a facially complete loss mitigation application. The Bureau believes, as it suggested in the proposal, that there is little value in requiring a servicer to evaluate a loss mitigation application when the servicer has determined certain items of information are missing. The Bureau is therefore adopting comment 41(b)(2)(i)(B)–1, which clarifies that if, a servicer determines, in the course of evaluating the loss mitigation application submitted by the borrower, that additional information is required, the servicer must promptly request the additional information from the borrower. The comment also references § 1024.41(c)(2)(iv), a new provision that sets forth requirements and procedures for a servicer to follow in the event that a facially complete application is later found by the servicer to require additional information or documentation to be evaluated. See the discussion of § 1024.41(c)(2)(iv) in the section-by-section analysis below.

The Bureau is not adopting proposed comment 41(b)(2)(i)(B)–2, which would have provided that protections triggered by a ''complete'' loss mitigation application would not be triggered by a facially complete application—*i.e.,* where the servicer informs the borrower that the application is complete, or the borrower provides all the documents and information specified by the servicer in the § 1024.41(b)(2)(i)(B) notice as needed to render the application complete. The Bureau continues to believe that certain protections must be provided to borrowers who have submitted all the missing documents and information requested in the 1026.41(b)(2)(i)(B) notice, even if a servicer later determines additional information is necessary. However, the Bureau has been persuaded by commenters that argued a borrower who submits all the documents requested in the § 1024.41(b)(2)(i)(B) notice (if any) should receive the protection the rule affords to borrowers at the time the borrower submits those documents. In accordance with this approach, proposed comment 41(b)(2)(i)(B)–2 has not been finalized.

41(b)(2)(ii) Time Period Disclosure

The Proposal

The Bureau proposed to amend the § 1024.41(b)(2)(ii) time period disclosure requirement, which requires a servicer to provide a date by which a borrower should submit any missing documents and information necessary to make a loss mitigation application complete. Section 1024.41(b)(2)(ii) requires a servicer to provide in the notice required pursuant to § 1024.41(b)(2)(i)(B) the earliest remaining of four specific dates set forth in § 1024.41(b)(2)(ii). The four dates set forth in § 1024.41(b)(2)(ii) are: (1) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower; (2) the date that is the 120th day of the borrower's delinquency; (3) the date that is 90 days before a foreclosure sale; and (4) the date that is 38 days before a foreclosure sale.

In general, many of the protections afforded to a borrower by § 1024.41 are dependent on a borrower submitting a complete loss mitigation application a certain amount of time before a foreclosure sale. The later a borrower submits a complete application, and the closer in time to a foreclosure sale, the fewer protections the borrower receives under § 1024.41. It is therefore in the interest of borrowers to complete loss mitigation applications as early in the delinquency and foreclosure process as possible. However, even if a borrower does not complete a loss mitigation application sufficiently early in the process to secure *all* the protections possibly available under § 1024.41, that borrower may still benefit from some of the protections afforded. Borrowers should not be discouraged from completing loss mitigation applications merely because they cannot complete a loss mitigation application by the date that would be most advantageous in terms of securing the protections available under § 1024.41. Accordingly, the goal of § 1024.41(b)(2)(ii) is to inform borrowers of the time by which they should complete their loss mitigation applications to receive the greatest set of protections available, without discouraging later efforts if the borrower does not complete the loss mitigation application by the suggested date. The Bureau notes § 1024.41(b)(2)(ii) requires servicers to inform borrowers of the date by which the borrower *should* make the loss mitigation application complete, as opposed to the date by which the borrower *must* make the loss mitigation application complete.

The Bureau believed, based on communications with consumer advocates, servicers, and trade associations, that the requirement in § 1024.41(b)(2)(ii) may be overly prescriptive and may prevent a servicer from having the flexibility to suggest an appropriate date by which a borrower should complete a loss mitigation application. For example, if a borrower submits a loss mitigation application on the 114th day of delinquency, the servicer would have to inform him or her by the 119th day that the borrower should complete the loss mitigation application by the 120th day under the current provision. A borrower is unlikely to be able to assemble the missing information within one day, and would be better served by being advised to complete the loss mitigation application by a reasonable later date that would afford the borrower most of the benefits of the rule as well as enough time to gather the information.

In response to these concerns, and in accordance with the goals of the provision, the Bureau proposed to amend the requirement in § 1024.41(b)(2)(ii). Specifically, the Bureau proposed to replace the requirement that a servicer disclose the earliest remaining date of the four specific dates set forth in § 1024.41(b)(2)(ii) with a more flexible requirement that a servicer determine and disclose a reasonable date by which the borrower should submit the documents and information necessary to

make the loss mitigation application complete. The Bureau proposed to clarify this amendment in proposed comment 41(b)(2)(ii)–1, which would have explained that, in determining a reasonable date, a servicer should select the deadline that preserves the maximum borrower rights under § 1024.41, except when doing so would be impracticable. Proposed comment 41(b)(2)(ii)–1 would have clarified further that a servicer should consider the four deadlines previously set forth in § 1024.41(b)(2)(ii) as factors in selecting a reasonable date. Proposed comment 41(b)(2)(ii)–1 also would have clarified that if a foreclosure sale is not scheduled, for the purposes of determining a reasonable date, a servicer may make a reasonable estimate of when a foreclosure sale may be scheduled. This proposal was intended to provide appropriate flexibility while also requiring that servicers consider the impact of the various times, and the associated protections, set forth in § 1024.41.

Comments

The Bureau received comments from industry as well as consumer groups addressing these proposed provisions. Industry commenters appreciated the extra flexibility offered by the proposal, but expressed concern about the complexity of selecting a date. Such commenters noted that different servicers might have different estimates of what should be a reasonable time for otherwise similarly situated borrowers, and differences in state law might also cause two apparently similar borrowers to receive different notices. Additionally, these commenters expressed concern that ambiguity in what is ''practical'' increases the risk of litigation. These commenters suggested either a simpler rule, under which the application should be complete by the earlier of 30 days after the borrower submitted the incomplete application or the 38th day before a scheduled foreclosure sale (an approach taken by HAMP), or that the Bureau provide additional guidance for determining what is impractical. Finally, commenters expressed concern about borrower confusion, stating that borrowers will not understand the significance of the various dates.

Consumer groups expressed concern that if servicers have discretion about how to inform borrowers when they should complete their applications, servicers will misguide borrowers and cause them to complete applications too late to receive all the protections that could have been available under the rule. Additionally, some consumer groups expressed the view that this whole issue would be avoided if the loss mitigation protections were triggered by an initial application package, defined as a specific subset of documents required for loss mitigation, rather than a complete loss mitigation application.

Final Rule

The Bureau is amending the text of § 1024.41(b)(2)(ii) to require that the related notice must include a reasonable date by which the borrower should submit the missing information. Additionally, the Bureau is adopting an revised version of proposed comment 41(b)(2)(ii)–1 to clarify what is a reasonable date to include in a notice sent pursuant to § 1024.41(b)(2)(i)(B). Similar to the proposal, final comment 41(b)(2)(ii)–1 states that, in determining a reasonable date, a servicer should select the date that preserves the maximum borrower rights possible under § 1024.41 (and provides the four milestones originally in the regulation text), except when doing so would be impracticable to permit the borrower sufficient time to obtain and submit the type of documentation needed. The final comment has been amended to state further that, generally, it would be impracticable for a borrower to obtain and submit documents in less than seven days.

As discussed in the proposed rule, the Bureau has structured this provision so that borrowers receive information that encourages them to submit a complete application in time to receive the most protections possible under the rule, while not discouraging borrowers who miss this time from later submitting an application to receive a subset of the protections. Because some of the protections are triggered by the submission of a complete loss mitigation application when a certain amount of time remains before a scheduled foreclosure sale, the protections decrease the later a borrower submits an application. Thus, the Bureau declines to adopt a rule that simply suggests the borrower complete the application within 30 days because such a rule will not meet the intended purposes of the provision.

The Bureau also understands that a borrower may not understand the significance of certain milestones, and may be confused if presented by a list of different dates. This is the very reason the rule requires the servicer to provide a single date by which the borrower should complete the application—it removes the burden from the borrower of calculating the different timelines and attempting to determine by when they should complete their application.

The Bureau does appreciate the challenges of determining what would be impracticable, thus the Bureau has added language to the commentary explaining that generally it would be impracticable for a borrower to obtain and submit documents in less than seven days. The Bureau notes this is a minimum number of days, and that a servicer may extend this timeline if it believes the borrower would need more time to gather the information. The Bureau believes this approach gives servicers guidance as to what is impracticable, while allowing some flexibility for servicers to address situations where additional time would be required for the borrower to submit particular types of missing information.

Finally, while the final rule does not permit servicers to estimate foreclosure sale dates in other contexts, such as for purposes of determining whether a borrower will be granted an appeal right when no foreclosure sale has actually been scheduled, the Bureau believes it appropriate to allow servicers to estimate a foreclosure sale date for the narrow purpose of this provision. The Bureau notes that servicers may have information about when a foreclosure sale is likely to be scheduled and that allowing a servicer to use this information in determining the time by which a borrower should complete the application would provide the most useful date for borrowers. Thus, the Bureau includes this provision in the comment adopted by this final rule.

The Bureau notes that some consumer groups suggested loss mitigation protections should be triggered by an initial application package, defined as a specific subset of documents required for loss mitigation, rather than a complete loss mitigation application. The Bureau notes that while such an approach has been used in other loss mitigation programs, such a modification to the loss mitigation provisions of § 1024.41 is beyond the scope of the proposed changes to the rule.

41(b)(3) Determining Protections

The Proposal

The Bureau proposed to add new § 1024.41(b)(3) addressing the borrowers' rights in situations in which no foreclosure sale has been scheduled as of the date a complete loss mitigation application is received, or a previously scheduled foreclosure sale is rescheduled after receipt of a complete application. As discussed in the proposal, § 1024.41 is structured to

provide different procedural rights to borrowers and impose different requirements on servicers depending on the number of days remaining until a foreclosure sale is scheduled to occur, as of the time that a complete loss mitigation application is received. However, the provisions of § 1024.41 do not expressly address situations in which a foreclosure sale has not yet been scheduled at the time a complete loss mitigation application is received, or is rescheduled after the application is received. Since issuance of the final rule, the Bureau has received questions about the applicability of the timing provisions in such situations. Specifically, industry stakeholders have asked whether it is appropriate to use estimated dates of foreclosure where a foreclosure sale has not been scheduled at the time a complete loss mitigation application is received. Further, industry stakeholders have requested guidance on how to apply the timelines if no foreclosure is scheduled as of the date a complete loss mitigation application is received, but a foreclosure sale is subsequently scheduled less than 90 days after receipt of such application, or if a foreclosure sale has been scheduled for less than 90 days after a complete application is received, but is then postponed to a date that is 90 days or more after the receipt date.

The Bureau proposed new § 1024.41(b)(3), which stated that, for purposes of § 1024.41, timelines based on the proximity of a foreclosure sale to the receipt of a complete loss mitigation application will be determined as of the date a complete loss mitigation application is received. Proposed comment 41(b)(3)–1 would have clarified that if a foreclosure sale has not yet been scheduled as of the date that a complete loss mitigation application is received, the application shall be treated as if it were received at least 90 days before a foreclosure sale. Proposed comment 41(b)(3)–2 would have clarified that such timelines would remain in effect even if at a later date a foreclosure sale was rescheduled.

The Bureau believed this approach would provide certainty to both servicers and borrowers as well as ensure that borrowers receive the broadest protections available under the rule in situations in which a foreclosure sale has not been scheduled at the time a borrower submits a complete loss mitigation application. In the proposal, the Bureau also discussed alternative modifications to the rule, which the Bureau declined to propose, including having the applicable timelines vary depending on the newly scheduled (or re-scheduled) sale date, or allowing servicers to estimate when a foreclosure sale might be scheduled. On balance, the Bureau believed that a straightforward rule under which the protections that attach are determined as of the date of receipt of a complete loss mitigation application, and a complete loss mitigation application is treated as having been received 90 days or more before a foreclosure sale if no sale is scheduled as of the date the application is received, is preferable because it would provide industry and borrowers with clarity regarding its application, without the unnecessary complexity that other approaches might produce. The Bureau recognized that the proposed rule might in some cases require a servicer to delay a foreclosure sale to allow the specified time for the borrower to respond to a loss mitigation offer and to appeal the servicer's denial of a loan modification option, where applicable, and sought comment and supporting data regarding circumstances in which this may occur.

Comments

The Bureau received comments from industry as well as consumer groups addressing these proposed provisions. Overall, commenters appreciated the clarity and simplicity of the proposed rule. They supported the idea that borrower protection should be clear and certain. One consumer advocate expressed concern that the rule limits, but does not eliminate, dual tracking. This commenter was concerned that a sale may be scheduled with less than 37 days' notice. Another consumer advocate suggested the rule should always adopt the most consumer-friendly timeline. That is, if a sale is postponed, a borrower should receive the benefit of any extra protections that might arise given a longer time between the sale and the submission of a complete application; but if a sale is scheduled to occur on a short timeline, the borrower should not lose the original protections that had attached on the basis of the longer timeline.

Industry commenters expressed concern about the feasibility of the proposed rule. Such commenters were concerned this may inappropriately extend the timeline of a foreclosure sale. These commenters urged the Bureau to limit the appeal right to when a complete application is submitted within 30 days of the first notice or filing required for a foreclosure sale. Alternatively, some commenters urged the Bureau to allow servicers to estimate when a foreclosure sale may occur. For example, one commenter suggested such estimates could be based on estimates provided by nationally recognized sources. Finally, industry commenters expressed concern the proposed provision may not be feasible because a servicer may be unable to move a scheduled foreclosure sale. One commenter recommended the Bureau offer an exemption from liability when an investor or court requires a servicer to continue with a foreclosure sale in violation of the applicable timelines.

Final Rule

The Bureau is finalizing § 1024.41(b)(3) and its related commentary substantially as proposed, but with minor wording changes. For the reasons discussed in the proposal, the Bureau believes the final rule appropriately balances consumer protection and servicer needs. This approach provides certainty to both servicers and borrowers, as well as ensures that borrowers receive the broadest protections available under the rule in situations where a foreclosure sale has not been scheduled at the time a complete loss mitigation application is received.

The Bureau declines to adopt other approaches suggested in comments. The Bureau notes that structuring the rule such that a borrower's rights may be added or removed because a foreclosure sale was moved or rescheduled would not provide the certainty or simplicity created by the proposed rule. Further, the Bureau is concerned that if moving a foreclosure sale to a later date could trigger new protections, such a policy may provide a disincentive for a servicer to reschedule a foreclosure sale for a later date. Finally, the Bureau does not believe it is appropriate to limit the appeal rights to when a complete application is submitted within 30 days of the first notice or filing, because, regardless of when a first notice or filing is made, a servicer should be able to provide a borrower an appeal when there is sufficient time before the scheduled foreclosure sale.

The Bureau does not believe that the rule being finalized, which grants the borrower certain rights if a borrower submits a complete loss mitigation application before a sale has been scheduled, will cause inappropriate delays in the foreclosure process. First, while some States may schedule foreclosure sales to occur in less than 90 days of the scheduling of the sale, completing the process of reviewing a loss mitigation application may not necessitate a delay in the scheduled sale. For example, if the scheduling of a sale occurs 30 days after a complete loss mitigation application is submitted, and the sale is scheduled for 60 days after the scheduling occurs, the servicer

will have sufficient time to follow the complete loss mitigation procedures without having to move the foreclosure sale. Second, servicers control many of the timelines in the process, including the 30-day evaluation window, and the time to process an appeal. If a foreclosure sale is rescheduled to occur in less than 90 days after a borrower submitted a complete application, a servicer does have the option to review the application quickly and, in doing so, the servicer may avoid the need to postpone the foreclosure sale.

In situations where there is a conflict (a later scheduled foreclosure sale that does not allow a servicer or borrower sufficient time to complete the procedures required by the loss mitigation rules), the Bureau expects a servicer to take the necessary steps to avoid having the foreclosure sale occur before the loss mitigation review procedures run their course, including asking a court to move a scheduled foreclosure sale, if necessary. An important objective of the 2013 Mortgage Servicing Final Rules is to ensure that loss mitigation applications receive careful review, so that a servicer does not foreclose on a borrower who would have qualified for a loss mitigation option and who timely submitted a complete application for loss mitigation. Consistent with that objective, once a borrower has submitted an application, a servicer should carry out the procedures prescribed by the rule in light of the timing and content of the application. To permit a later scheduled (or rescheduled) foreclosure sale to cut short those procedures would be inconsistent with the objective just described. For these reasons, the Bureau finalizes the rule substantially as proposed, with minor wording changes.

41(c) Evaluation of Loss Mitigation Applications

41(c)(1) Complete Loss Mitigation Application

41(c)(1)(ii)

The Bureau proposed to amend § 1024.41(c)(1)(ii) to state explicitly that the notice this provision requires must state the deadline for accepting or rejecting a servicer's offer of a loss mitigation option, in addition to the requirements currently in § 1024.41(d)(2) to specify, where applicable, that the borrower may appeal the servicer's denial of a loan modification option, the deadline for doing so, and any requirements for making an appeal. As described in the proposal, the Bureau intended that the § 1024.41(c)(1)(ii) notice would specify the time and procedures for the borrower to accept or to reject the servicer's offer, in accordance with requirements specified in § 1024.41(e). Indeed, § 1024.41(e)(2)(i) provides that the servicer may deem the borrower to have rejected the offer if the borrower does not respond within the timelines specified under § 1024.41(e)(1). Further, under § 1024.41(e)(2)(ii) and that the servicer must give the borrower a reasonable opportunity to complete documentation necessary to accept an offer of a trial loan modification plan if the borrower does not follow the specified procedures but begins making payments in accordance with the offer by the deadline specified in § 1024.41(e)(1). Commenters did not have any objections to the proposed provision, and the Bureau is adopting this provision as proposed.

41(c)(2) Incomplete Loss Mitigation Application Evaluation

41(c)(2)(iii) Payment Forbearance

The Proposal

The Bureau proposed to modify § 1024.41(c)(2) to allow servicers to offer short-term forbearance to borrowers based on a review of an incomplete loss mitigation application, notwithstanding that provision's restriction on servicers offering a loss mitigation option to a borrower based on the review of an incomplete loss mitigation application. In adopting the 2013 Mortgage Servicing Final Rules, the Bureau crafted broad definitions of ''loss mitigation option'' and ''loss mitigation application'' for purposes of § 1024.41, to provide a streamlined process in which a borrower will be evaluated for all available loss mitigation options at the same time, rather than having to apply multiple times to be evaluated for different options one at a time. Since publication of the final rule, however, both industry and consumer advocates have raised questions and concerns about how the rule applies in situations in which a borrower needs and requests only short-term forbearance. For instance, a number of servicers have inquired about whether the rule would prevent them from granting a borrower's request for waiver of late fees or other short-term relief after a natural disaster until the borrower submits all information necessary for evaluation of the borrower for long-term loss mitigation options. Additionally, both consumer advocates and servicers have raised questions about whether a borrower's request for short-term relief would later preclude a borrower from invoking the protections afforded by the rule if the borrower encounters a significant change in circumstances that warrants long-term loss mitigation alternatives.

The Bureau was conscious of the difficulties involved in distinguishing short-term forbearance programs from other types of loss mitigation and of the concern that some servicers may have significantly exacerbated borrowers' financial difficulties by using short-term forbearance programs inappropriately instead of reviewing the borrowers for long-term options. Nevertheless, the Bureau believed that it was possible to revise the rule to facilitate appropriate use of short-term payment forbearance programs without creating undue risk for borrowers who need to be evaluated for a full range of loss mitigation alternatives.

At the outset, the Bureau noted that it does not construe the existing rule to require that servicers obtain a complete loss mitigation application prior to exercising their discretion to waive late fees. Additionally the Bureau noted that, under the rule as adopted, a servicer may offer any borrower any loss mitigation option if the borrower has not submitted a loss mitigation application or if the offer is not based on an evaluation of an incomplete loss mitigation application, as clarified in existing comment 41(c)(2)(i)–1.

With regard to short-term forbearance programs that involve more than simply waiving late fees, such as where a servicer allows a borrower to forgo making a certain number of payments and then to catch up by spreading the unpaid amounts over some subsequent period of time, the Bureau believed that the issues raised by various stakeholders could most appropriately be addressed by providing more flexibility to servicers to provide such relief even if it is based on review of an incomplete loss mitigation application. Thus, the Bureau did not propose to change the current definition of loss mitigation option, which includes all forbearance programs. Rather, the Bureau proposed to relax the anti-evasion restriction in § 1024.41(c)(2)(i), which prohibits a servicer from offering a loss mitigation option based upon an evaluation of an incomplete loss mitigation application.

The Bureau thus proposed § 1024.41(c)(2)(iii), which would have allowed short-term payment forbearance programs to be offered based on a review of an incomplete loss mitigation application. The proposed exemption would have applied only to short-term payment forbearance programs. Proposed comment 41(c)(2)(iii)–1 stated that a payment forbearance program is a loss mitigation option for which a servicer allows a borrower to forgo

making certain payments for a period of time. Short-term payment forbearance programs may be offered when a borrower is having a short-term difficulty brought on, for example, by a natural disaster. In such cases, the servicer offers a short-term payment forbearance arrangement to assist the borrower in managing the hardship. The Bureau explained that, in its view, it is appropriate for servicers to have the flexibility to offer short-term payment forbearance programs prior to receiving a complete loss mitigation application for all available loss mitigation options. Proposed comment 41(c)(2)(iii)–1 also would have explained that a short-term program is one that allows the forbearance of payments due over periods of up to two months.

The Bureau noted that, under the proposed approach, servicers that receive a request for short-term payment forbearance and grant such requests would remain subject to the requirements triggered by the receipt of a loss mitigation application in § 1024.41. Thus, as explained in proposed comment 41(c)(2)(iii)–2, if a servicer offers a payment forbearance program based on an incomplete loss mitigation application, the servicer still would be required to review the application for completeness, to send the § 1024.41(b)(2)(i)(B) notice to inform the borrower whether the application is complete or incomplete, and if incomplete what documents or additional information are required, and to use reasonable diligence to complete the loss mitigation application. If a borrower in this situation submits a complete application, the servicer must evaluate it for all available loss mitigation options. The Bureau believed that maintaining these requirements is important to ensure that borrowers are not inappropriately diverted into short-term forbearance programs without access to the full protections of the regulation. At the same time, if a borrower in fact does not want an evaluation for long-term options, the borrower may simply refrain from providing the additional information necessary to submit a complete application and the servicer will therefore not be required to conduct a full assessment for all options.

To ensure that a borrower who is receiving an offer of short-term payment forbearance understands the options available, proposed § 1024.41(c)(2)(iii) would have required a servicer offering a short-term payment forbearance program to a borrower based on an incomplete loss mitigation application to include in the § 1024.41(b)(2)(i)(B) notice additional information, specifically that: (1) The servicer has received an incomplete loss mitigation application and on the basis of that application the servicer is offering a short-term payment forbearance program; (2) absent further action by the borrower, the servicer will not be reviewing the incomplete application for other loss mitigation options; and (3) if the borrower would like to be considered for other loss mitigation options, he or she must submit the missing documents and information required to complete the loss mitigation application. The Bureau believed that providing borrowers this more specific information is important to ensure that borrowers do not face unwarranted delays and paperwork and that servicers do not misuse short-term forbearance to avoid addressing long-term problems.

Finally, the Bureau proposed comment 41(c)(2)(iii)–3 to clarify servicers' obligations on receipt of a complete loss mitigation application. The proposed comment would have stated that, notwithstanding that a servicer may have offered a borrower a payment forbearance program after an evaluation of an incomplete loss mitigation application, and even if the borrower accepted the payment forbearance offer, a servicer must still comply with all requirements in § 1024.41 on receipt of a borrower's submission of a complete loss mitigation application. This proposed comment was intended to clarify that, even though payment forbearance may be offered as short-term assistance to a borrower, a borrower is still entitled to submit a complete loss mitigation application and receive an evaluation of such application for all available loss mitigation options. Although payment forbearance may assist a borrower with a short-term hardship, a borrower should not be precluded from demonstrating a long-term inability to afford the original mortgage, and being considered for long-term solutions, such as a loan modification, when that may be appropriate.

Comments

The Bureau received comments from both industry and consumer group commenters on this provision. Commenters were generally very supportive of allowing an exclusion from the full loss mitigation procedures for short-term problems, that is, problems that can be quickly resolved (*e.g.,* a borrower needed new tires for his or her car and thus falls a month behind on mortgage payments). They asserted that short-term problems are better resolved quickly and that the full loss mitigation procedures should apply only to consumers with long-term problems. One industry commenter stated that the paperwork of the full procedures would be seen as burdensome when a borrower had a short-term problem, and this would be perceived as poor customer service. Additionally, commenters pointed out that, under § 1024.41(i), a borrower is entitled to the full procedures for only a single complete loss mitigation application, and it would not be in the borrower's best interest to ''waste'' that single evaluation under the full procedures on a simple, short-term problem. Consumer advocate commenters suggested that borrowers should be warned before they use their single evaluation.

Both consumer advocate and industry commenters expressed concern that the two-month forbearance contemplated by the proposed rule was too brief. Such commenters urged the Bureau to permit payment forbearances of as long as six months or a year, to allow borrowers the opportunity to resolve their problems (for example, attempting to find a new job) before using up their opportunities to be evaluated for long-term options, such as a loan modification. Further, commenters expressed that the industry standard for payment forbearance programs was longer than two months—often six months or even a year. Finally, commenters expressed that short-term forbearances were particularly important for addressing two situations, unemployment and natural disasters.

Final Rule

The Bureau is adopting § 1024.41(c)(2)(iii) generally as proposed. However, in light of comments received, the Bureau has made some adjustments to the proposed provisions. As discussed below, the Bureau is clarifying the servicer's reasonable diligence obligation when a borrower has been offered a payment forbearance based on evaluation of an incomplete loss mitigation application, and the Bureau has adjusted the limit on the length of payment forbearances that would be allowed under this provision.

Payment forbearance based on an incomplete application. The Bureau is adopting, with some adjustments, the general exclusion for short-term forbearance from the prohibition on offering loss mitigation based on an incomplete application. The Bureau continues to believe this exclusion is appropriate, because it should provide servicers greater flexibility to address short-term problems quickly and efficiently. Further, because the exclusion applies to decisions based on review of incomplete loss mitigation

applications, it will allow the borrower's short-term problems to be addressed while preserving a borrower's single use of the full § 1024.41 loss mitigation procedures.

The Bureau declines to exclude payment forbearance from the definition of loss mitigation. The final rule provides the same benefits in flexibility that would be achieved by revising the definition of loss mitigation while preserving important consumer protections. If a borrower requests payment forbearance, he or she should be regarded as having requested loss mitigation under the terms of § 1024.41, and the procedures generally required by the rule should take place. Further, the Bureau notes that a borrower always has the option of completing his or her loss mitigation application and receiving a full evaluation for all options. This is reflected in comment 41(c)(2)(iii)–3, which states that even if a servicer offers a borrower a payment forbearance program after an evaluation of an incomplete loss mitigation application, the servicer must still comply with all other requirements in § 1024.41 if the borrower completes his or her loss mitigation application.

The Bureau notes that the new provision addresses only payment forbearance that is offered based on an evaluation of an incomplete application. The Bureau is aware, as some commenters noted, that situations may arise where a borrower completes a loss mitigation application and goes through a full loss mitigation evaluation, and the end result is the borrower being offered a payment forbearance—which would exhaust his or her single use of the § 1024.41 loss mitigation procedures. The Bureau notes that some consumer advocates asked the Bureau to exempt any such loss mitigation evaluation from the successive request provision in § 1024.41(i), or require that such borrowers be warned so they know not to complete their application if they are seeking only payment forbearance.

While the Bureau acknowledges these concerns, the Bureau notes that the proposal was limited to discussing payment forbearance based on *incomplete* applications, and comments addressing payment forbearance based on *complete* applications are beyond the scope of the proposed rule. Further, the Bureau notes that the loss mitigation rules are intended to address only procedures, and leave the substantive decisions on different loss mitigation programs to the discretion of the owner or assignee. Finally, the Bureau notes that any issues related to the second or successive request provision in § 1024.41(i) would more appropriately be addressed in a rulemaking focusing on that provision.

Payment forbearance and reasonable diligence. The proposed provision on payment forbearance included a modification to the § 1024.41(b)(2)(i)(B) notice, which would have required the notice to include additional information when a servicer was offering a borrower payment forbearance based on an incomplete application. While the Bureau believes it is important for borrowers to be informed that they are being offered payment forbearance based on an incomplete loss mitigation application and they may receive a full review for all other options by completing their applications, the Bureau believes that servicers should have flexibility to provide this message at the appropriate time. A servicer may, in some circumstances, need to communicate additional information regarding payment forbearance. For example, a servicer may require additional information—short of a complete loss mitigation application—to offer a borrower a payment forbearance program. Further, the Bureau acknowledges that a servicer may decide to offer a borrower payment forbearance at various stages of the loss mitigation process, and the message should be provided at the appropriate time. For example, if a servicer needs additional information before offering payment forbearance, the servicer might not decide to offer a borrower payment forbearance until after the § 1024.41(b)(2)(i)(B) notice has been sent out. In light of these considerations, the Bureau declines to finalize the provision regarding modification of the § 1024.41(b)(2)(i)(B) notice in the context of payment forbearance. Instead, the Bureau has amended comment 41(b)(1)–4, added paragraph 4.iii, which addresses a servicer's reasonable diligence obligations. The comment explains that, when a servicer offers a borrower payment forbearance based on an incomplete application, the servicer should notify the borrower that the borrower may complete the application to receive a full evaluation of all loss mitigation options available to the borrower.

The Bureau believes a servicer's diligence obligations may vary depending on the facts and circumstances. In some instances, it may be appropriate for servicers to include this additional information in the § 1024.41(b)(2)(i)(B) notice. For example, if a servicer decides to offer a borrower payment forbearance based on the initial submission that establishes the loss mitigation application (*e.g.,* the borrower calls the servicer and, on the basis of that call, the servicer decides to offer the borrower payment forbearance), the servicer might include the message (that the borrower is being offered payment forbearance but may complete the application to receive a full evaluation) in the § 1024.41(b)(2)(i)(B) notice, along with the full list of information and documents necessary to complete the loss mitigation application. Alternatively, if the servicer wanted to offer the borrower a payment forbearance program, but needed a few additional documents to do so, the servicer might send a § 1024.41(b)(2)(i)(B) notice explaining that the borrower has the option of submitting a few items and receiving payment forbearance, or submitting all the missing information and receiving a full evaluation. If the borrower submitted only the items for the payment forbearance and the servicer offered the borrower a payment forbearance program, at that time the servicer could to notify the borrower that he or she has the option of completing the application.

Conversely, if the servicer does not decide to offer a payment forbearance program based on an evaluation of an incomplete loss mitigation application until after the § 1024.41(b)(2)(i)(B) notice has been sent, the servicer would still have the option of offering the borrower payment forbearance at that later time. The servicer would notify the borrower that he or she has the option of completing the application at the time the servicer offered the payment forbearance program.

In addition, the Bureau is adding a new subpart to comment 41(b)(1)–4 to further elaborate on the servicer's reasonable diligence obligation when a borrower is considered for short-term forbearance under this provision. Once a borrower has begun a payment forbearance program, the Bureau believes the servicer need not continue to request missing items from the borrower during the course of the payment forbearance program, unless the borrower fails to comply with the payment forbearance program or the borrower indicates he or she would like to continue completing the application. Thus, comment 41(b)(1)–4.iii states that, once a servicer provides this notification, the servicer could suspend reasonable diligence efforts until near the end of the payment forbearance program, so long as the borrower remains in compliance with the payment forbearance program and does not request any further assistance.

Finally, the Bureau believes that, unless the borrower has brought his or

her loan current, it may be necessary for the servicer to contact the borrower prior to the end of the forbearance period to determine if the borrower wishes to complete the application and proceed with a full loss mitigation evaluation. Thus, comment 41(b)(1)–4.iii states that near the end of the program, and prior to the end of the forbearance period, it may be necessary for the servicer to contact the borrower to determine if the borrower wishes to complete the application and proceed with a full loss mitigation evaluation.

Length of payment forbearance. The Bureau is amending the proposed interpretation of ''short-term'' forbearance, in light of public comments that supported the general exception, but suggested that an exception permitting only two-month forbearances would be of limited benefit to borrowers and servicers. The Bureau is persuaded that a two-month payment forbearance window may not allow the borrower sufficient time to remedy even some short-term problems. As adopted, comment 41(b)(2)(iii)–1 explains that ''short-term'' forbearance means a program that allows the forbearance of payments due over periods of no more than six months, as opposed to two months. The Bureau notes that this six-month period may cover time both before and after the payment forbearance was granted (for example, if a borrower is one month delinquent when a servicer offers a payment forbearance program, the program may only extend 5 months into the future). The Bureau believes the extended timeline allows the servicer sufficient flexibility to address most short-term situations.

As discussed in the proposal, the Bureau was concerned that, if a servicer offered a borrower a payment forbearance of more than two months, the borrower may lose the benefit of the 120-day foreclosure referral prohibition in § 1024.41(f)(1), because the 120 days may run out during the course of the forbearance plan. The Bureau believes that, as part of a payment forbearance program as contemplated by this rule, a servicer should not foreclose on a borrower who is complying with the payment forbearance program. To make explicit that this restriction is an aspect of the payment forbearance programs permissible under the new provision, the Bureau has added a foreclosure protection clause to the payment forbearance provision in § 1024.41(c)(2)(iii).

The Bureau received comments requesting longer payment forbearance programs and noting that existing programs that may be offered through HUD or HAMP, or by the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (collectively ''GSEs''), may offer payment forbearance for periods extending beyond six months to a year, particularly in situations such as natural disaster or unemployment. The Bureau remains convinced that, if a borrower has a long-term problem, such a borrower should, if the borrower chooses, receive a full evaluation for all loss mitigation options. Because forbearance programs under § 1024.41(c)(2)(iii) should only be used for temporary problems, the Bureau believes it is important to reassess a borrower's situation after no more than six months.

However, the new rule does not preclude a servicer from offering multiple successive short-term payment forbearance programs. As discussed below in the Section 1022(b)(2) of the Dodd-Frank Act analysis, the Bureau has sought to ensure that borrowers would receive significant benefits from the additional option without losing protections provided by § 1024.41. Commenters strongly felt that a short forbearance period would not provide much additional benefit to borrowers, and further explained that a payment forbearance of less than a year may interfere with existing programs under HUD, HAMP, and the GSEs. The Bureau acknowledges that a borrower will generate a significant unpaid debt over the course of a long forbearance period. However, the Bureau notes that a borrower who believes the circumstances warrant cutting a long forbearance short can receive a full review for all loss available mitigation options by submitting a complete loss mitigation application. In addition, the Bureau believes that the risk servicers would attempt to evade the full loss mitigation procedures by offering sequential six-month forbearances to delinquent borrowers is low. Thus, the Bureau believes that borrowers benefit more from renewable forbearance agreements than they would benefit from any limit the Bureau might impose at this time on the maximum number of forbearances. The Bureau notes, however, that while the final rule does not prohibit a servicer from offering multiple short-term forbearances under this provision, the Bureau intends to monitor how temporary forbearances are used after this final rule becomes effective and, if it determines servicers are inappropriately offering sequential payment forbearances, may address the issue in a later rulemaking or by other means at a later date.

41(c)(2)(iv) Facially Complete Application

The Proposal

As discussed above, the Bureau proposed new § 1024.41(c)(2)(iv), which stated that if a servicer creates a reasonable expectation that a loss mitigation application is complete but later discovers additional documents or information is needed to evaluate the application, the servicer shall treat the application as complete as of the date the borrower had reason to believe the application was complete, for purposes of applying § 1024.41(f)(2) and (g), until the borrower has been given a reasonable opportunity to complete the loss mitigation application. This provision was designed to work together with proposed new comments 41(b)(2)(i)–1 and –2, as discussed above, to address situations when a servicer determines that an application the servicer previously determined to be complete (or to be missing particular information) is in fact is lacking additional information needed for evaluation.

The Bureau has received questions about the impact of an error in the notice required by § 1024.41(b)(2)(i)(B), particularly in light of the short time the servicer has to review the information submitted by the borrower. As discussed above, the Bureau recognizes that, in certain circumstances, an application may appear to be complete (or to be missing only specific information), but the servicer, upon further evaluation, may determine that additional information is needed before the servicer can evaluate the borrower for all available loss mitigation options. The proposed commentary to § 1024.41(b)(2)(i) was intended to clarify that servicers are required to obtain the missing information in such situations. Proposed § 1024.41(c)(2)(iv) was intended to protect borrowers while a servicer requests the missing information.

Proposed comment 41(c)(2)(iv)–1 would have clarified that a reasonable expectation is created when the borrower submits all the missing items (if any) identified in the § 1024.41(b)(2)(i)(B) notice. When a reasonable expectation that a loss mitigation application is complete is created but the servicer later discovers that the application is incomplete, proposed § 1024.41(c)(2)(iv) would have provided that the servicer shall treat the application as complete for certain purposes until the borrower has been given a reasonable opportunity to supply the missing information necessary to complete the loss

mitigation application. Specifically, under this provision, the servicer would need to treat the application as complete for purposes of the foreclosure referral prohibition in § 1024.41(f)(2) and the foreclosure sale limitations in § 1024.41(g). Proposed § 1024.41(c)(2)(iv) would have ensured that servicers that made bona fide mistakes in making initial determinations of completeness need not be considered in violation of the rule, and that borrowers do not lose protections under the rule due to such mistakes. The Bureau believed that, once a borrower is given reason to believe he or she has the benefit of certain protections (which are triggered by submission of a complete loss mitigation application), if the servicer discovers that an application is incomplete, the borrower should have a reasonable opportunity to complete the application before losing the benefit of such protections.

Proposed comment 41(c)(2)(iv)–2 would have provided guidance on what would be a reasonable opportunity for the borrower to complete a loss mitigation application. The comment states that a reasonable opportunity requires that the borrower be notified of what information is missing and be given sufficient time to gather the information and submit it to the servicer. The amount of time that is sufficient for this purpose would depend on the facts and circumstances.

The Bureau believed that proposed § 1024.41(c)(2)(iv) would preserve servicers' obligation to conduct rigorous up-front reviews, while providing servicers the ability to correct a good-faith mistake or clerical error. Further, servicers seeking relief under the provision need only give borrowers a reasonable opportunity to provide the missing information, thus allowing a servicer to continue the foreclosure process if a borrower does not provide such information.

Comments

As discussed above in the section-by-section analysis of § 1024.41(b)(2)(i), the Bureau received comments from industry as well a consumer groups addressing these proposed provisions. Commenters were generally supportive of the Bureau addressing situations where a servicer later discovers additional documents or information are required to complete a loss mitigation application. However, commenters sought additional clarification on several aspects of the proposed amendment. First, commenters sought clarification on when a borrower's rights or protections are triggered. Commenters also expressed concern that it was unclear when a reasonable expectation had been created. For example, one commenter stated that a servicer may argue a homeowner had no reasonable expectation even if a complete application was submitted. Second, commenters sought clarification as to what would be considered a reasonable amount of time for a borrower to complete an application. Commenters suggested a set number of days should be given. Finally, commenters asked what happens after the missing information is provided or a reasonable time passes and the borrower fails to provide the information. Some commenters stated that the application should be considered complete only as of the date the missing information was provided and the application was actually completed. Other commenters stated the application should be treated as if it were complete when the reasonable expectation was created. One commenter pointed out that the expectation should be created based on the borrower's action (submitting the items requested in the § 1024.41(b)(2)(i)(B) notice), rather than on an action (or inaction) of the servicer. As this commenter noted, if a borrower initially submits a complete application, the related protections of the rule should be triggered when the borrower submits the application, not when the servicer sends the § 1024.41(b)(2)(i)(B) notice. Therefore, this commenter asserted, if a borrower is asked to provide certain items, the protections should be triggered when those items are provided, not when the servicer deems the application to be complete. Finally, some commenters suggested the proposed revisions should go further and require a confirmation notice, as well as provide additional guidance on the timing and content of that notice. For example, one commenter suggested that servicers should be required to explain the reason a particular document does not meet underwriting guidelines, rather than simply requesting the document again.

Final Rule

The Bureau is adopting a final version of § 1024.41(c)(2)(iv) that is similar to the proposed version, but with some modifications. First, the Bureau is not including the ''reasonable expectation'' standard set forth in the proposal. Instead, the provision as adopted states that, if a borrower submits all the missing information listed in the notice required pursuant to § 1026.41(b)(2)(i)(B), or if no additional information is requested in such notice, the application shall be considered ''facially complete'' and will trigger certain borrower protections. Upon further consideration, the Bureau believes the subjective nature of the term ''reasonable expectation'' could have resulted in unnecessary compliance challenges and confusion as to when a reasonable expectation had been established. The Bureau believes the concept of facial completeness, on the other hand, provides greater clarity to servicers and borrowers.

Second, the Bureau is modifying proposed § 1024.41(c)(2)(iv) to enhance borrower protections by providing that servicers are required to treat a ''facially complete'' application as complete for purposes of the § 1026.41(h) appeal right and the borrower response timelines in § 1024.41(e). As discussed above, proposed § 1026.41(c)(2)(iv) would have required servicers to treat the application as complete for purposes of the foreclosure referral ban in § 1024.41(f)(2) and the foreclosure sale limitations in § 1024.41(g) until the borrower had been given a reasonable opportunity to supply the missing information necessary to complete the loss mitigation application. However, for purposes of the appeal right under § 1024.41(h) and the borrower response timelines under § 1024.41(e), the proposal would have treated the application as complete only once the borrower submitted the additional information or documents needed to evaluate the application. Thus, under the proposal, if a servicer gave a borrower a reasonable expectation that he or she had submitted a complete application more than 90 days before a scheduled foreclosure sale but later requested more information pursuant to new § 1024.41(c)(2)(iv), the borrower might not have received the right to an appeal or to a 14-day response time depending on the timing of the supplemental information request and the borrower's response. The Bureau has been persuaded that such a borrower should enjoy the benefit of the appeal right and the 14-day response timeline. Furthermore, the Bureau is persuaded by the comment that suggested that the protections of § 1024.41 should be triggered based on the date when a borrower submits all the documents and information as stated in the § 1024.41(b)(2)(i)(B) notice, rather than when the servicer deems the application to be complete.

Thus, under § 1026.41(c)(2)(iv) as adopted by the final rule, if a borrower submits a facially complete application that is later found by the servicer to require additional information or corrected documents to be evaluated,

and the borrower subsequently provides the corrected documents or information necessary to complete the application, the application is treated as complete, for the purposes of § 1024.41(d), (e), (f)(2), (g), and (h), as of the date it was facially complete. However, the 30-day window during which the servicer must evaluate the borrower for all available loss mitigation options (as required pursuant to § 1026.41(c)) will begin only when the servicer receives the missing information. The Bureau continues to believe there is little value in requiring a servicer to evaluate a loss mitigation application when a servicer has determined certain items of information are missing.

Finally, Bureau has adopted new comment 41(c)(2)(iv)–2 to address situations in which a borrower fails to provide the missing information within a reasonable timeframe as prescribed by the servicer. This comment states that, if the borrower fails to complete the application within the reasonable timeframe, the servicer may treat the application as incomplete.

The Bureau is not addressing in this final rule comments that suggested further protections for borrowers are needed, including additional notice requirements. The Bureau believes these concerns are adequately addressed. Several protections already established by the rule, including the requirement to have polices and procedures reasonable designed to achieve the objective of facilitating compliance with the requirement to send an accurate § 1024.41(b)(2)(i)(B) notice (in § 1024.38(b)(2)(iv); the continuity of contact requirements in § 1024.40, and the obligation on the servicer to use reasonable diligence in completing an application already require that servicers work with borrowers to complete a loss mitigation application. For example, the reasonable diligence obligation requires servicers to promptly seek documents or information necessary to complete a loss mitigation application, which the Bureau believes includes an obligation to work proactively with borrowers when they discover any additional documents or information are needed to complete the application, as well as notify a borrower when a submitted document is insufficient to complete an application—for example, because a signature is missing. Servicers cannot be dilatory in seeking such materials or corrected documents. Given these and other protections and obligations, the Bureau believes borrowers will be adequately protected, because the rules should ensure they receive the benefits of foreclosure protections at the time their applications are facially complete, and will continue to receive those protections once they have submitted the additional materials. The Bureau notes that a servicer that complies with § 1024.41(c)(2)(iv) will be deemed to have satisfied the requirement to provide an accurate § 1024.41(b)(2)(i)(B) notice. The Bureau believes this approach appropriately balances the servicer's need to collect additional pieces of information while still providing protection for the borrower.

41(d) Denial of Loan Modification Options

The Proposal

The Bureau proposed to move the substance of § 1024.41(d)(2), a provision addressing disclosure of information on the borrower's right to appeal, to § 1024.41(c)(1)(ii). As a conforming amendment, the Bureau proposed to re-codify § 1024.41(d)(1) as § 1024.41(d) and to re-designate the corresponding commentary accordingly. The Bureau is finalizing these provisions as proposed.

The Bureau also proposed to clarify the requirement in § 1024.41(d)(1), re-codified as § 1024.41(d), that a servicer must disclose the reasons for the denial of any trial or permanent loan modification option available to the borrower. The Bureau believed it was appropriate to clarify that the requirement to disclose the reasons for denial focuses on only those determinations actually made by the servicer and does not require a servicer to continue evaluating additional factors after the servicer has already decided to deny a borrower for a particular loss mitigation option. Thus, when a servicer's automated system uses a program that considers a borrower for a loan modification by proceeding through a series of questions and ends the process if the consumer is denied, the servicer need not modify the system to continue evaluating the borrower under additional criteria. For example, suppose a borrower must meet qualifications A, B, and C to receive a loan modification, but the borrower does not meet any of these qualifications. A servicer's system may start by asking if the borrower meets qualification A, and on the failure of that qualification end the analysis for that specific loan modification option. If a servicer were required to disclose all potential reasons why the borrower may have been denied for that loan modification option (*i.e.,* A, B, and C), it would need to consider a lengthy series of hypothetical scenarios: for example, if the borrower had met qualification A, would the borrower also have met qualification B? The Bureau did not intend such a requirement, which it believes would be unnecessarily burdensome.

The Bureau instead intended to require only the disclosure of the actual reason or reasons on which the borrower was evaluated and denied. Accordingly, the Bureau proposed to amend § 1024.41(d) to require that a denial notice provided by the servicer must state the ''specific reason or reasons'' for the denial and also, where applicable, disclose that the borrower was not evaluated based on other criteria. The notice would not be required to list such criteria. The Bureau believed that this additional information will help borrowers understand the status of their application and the fact that they were not fully evaluated under all factors (where applicable). The Bureau also proposed new comment 41(d)–4 stating that, if a servicer's system reaches the first issue that causes a denial but does not evaluate borrowers for additional factors, a servicer need only provide the reason or reasons actually considered. The Bureau believed this proposed amendment would appropriately balance potential concerns about compliance challenges with concerns about informing borrowers about the status of their applications and about information that is relevant to potential appeals.

Comments

The Bureau received comments from both industry and consumer groups addressing the proposed modifications. Commenters were generally in favor of this revision to the rule, and agreed it would be unduly burdensome for servicers to construct systems to consider hypothetical scenarios solely for the purpose of compiling a complete list of all potential denial reasons. One industry commenter suggested that the denial reasons disclosed be limited to ''primary'' or ''initial'' reasons. One consumer group expressed concern that the proposed revision would allow servicers to avoid disclosing the factors used in the net present value analysis.

Final Rule

For the reasons discussed in the proposal, the Bureau is finalizing the rule as proposed. The Bureau declines to modify the rule to require only the ''initial'' or ''primary'' reasons as suggested by some commenters because the Bureau believes these terms are unclear. The Bureau also disagrees with commenters that suggested that the modification to the rule allows a servicer to evade disclosure of a factor used in an NPV analysis. The rule

requires servicers to disclose the basis for the denial, so if a servicer denies a borrower for a loan modification option based on an NPV analysis, that servicer must disclose the factors used in the analysis. However, if a servicer denies a borrower a loan modification option on other grounds, it would be unduly burdensome for the servicer to disclose factors that would have been used, had the servicer done a NPV analysis.

41(f) Prohibition on Foreclosure Referral

First Notice or Filing

The Proposal

Section 1024.41(f) prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan is more than 120 days delinquent. A servicer also is prohibited from making such a notice or filing while a borrower's complete loss mitigation application is being evaluated. In response to numerous questions received by the Bureau about the meaning of the phrase ''first notice or filing,'' the Bureau proposed to redesignate comment 41(f)(1)–1 as comment 41(f)–1, and then revise it to clarify what actions § 1024.41(f) would prohibit.

Specifically, the proposed comment would have stated that whether a document is considered the first notice or filing is determined under applicable State law. Under the proposal, a document that would be used as evidence of compliance with foreclosure practices required pursuant to State law would have been considered the first notice or filing. Thus, a servicer would have been prohibited from sending such a notice or filing such a document during the pre-foreclosure review period or during the review period for a complete loss mitigation application. Documents that would not be used in this fashion would not have been considered the first notice or filing. The proposed comment would have stated expressly that this prohibition does not extend to activity such as attempting to collect the debt, sending periodic statements, sending breach letters, or any other activity during the pre-foreclosure review period, so long as such documents would not be used as evidence of complying with requirements applicable pursuant to State law in connection with a foreclosure process.

The Bureau acknowledged that, under the proposed interpretation, if a State law mandates a notice to a borrower of the availability of mediation as a prerequisite to commence foreclosure, such notices would be considered the ''first notice or filing'' for purposes of § 1024.41. The Bureau also recognized that existing State foreclosure processes often can be lengthy. The proposed comment sought to balance protecting consumers and encouraging communication between borrowers and servicers by providing borrowers sufficient time to submit a complete loss mitigation application without the stress and costs of foreclosure, but also permitting servicers to communicate with borrowers to respond promptly to requests. However, recognizing potential practical difficulties for servicers as well as borrower protection concerns that could arise from chilling early communications provided for borrowers under State law, the Bureau sought comment on the best way to establish a workable rule that clearly identifies what is prohibited, while balancing these goals.

Comments

The Bureau received substantial comments from trade associations, individual servicers including credit unions, the GSEs, some State governments, and two consumer advocacy groups, which generally disagreed with the proposed ''evidence of compliance with State law'' standard and asked the Bureau to reconsider the scope of the prohibition. Numerous commenters, including trade organizations, the GSEs, individual servicers and credit unions, asserted that the proposed comment would cause significant delays in the foreclosure process, especially where the first notice or filing would be followed by lengthy periods mandated by State law before actual initiation of court proceedings or establishing a foreclosure sale date. These commenters asserted that the proposal would have prohibited often lengthy processes from starting until after 120 days of delinquency have passed. For example, commenters noted that Massachusetts requires its own notice and opportunity to cure process that may take up to 150 additional days before foreclosure is filed. Thus, if the notice beginning that cure process is deemed the ''first notice'' for purposes of the prohibition on foreclosure referral (as it would have been under the proposal), foreclosure proceedings may be delayed until the 270th day of delinquency. One industry commenter raised concerns that such delays would impact compliance with regulatory capital requirements.

Industry commenters expressed substantial concerns with the proposal's use of the phrase ''evidence of compliance with State law.'' These commenters asserted that the phrase is vague, and that State law may often require proof of compliance with the mortgage contract's terms, which may include the sending of general default notices not expressly required by statute. The commenters indicated servicers would have difficulty understanding what documents were prohibited and likely would be discouraged from sending any early communications to borrowers if they later must use such document to show compliance with applicable State law.

Industry commenters, State governments, and some consumer advocates indicated that the proposal likely would delay notices required under State-mandated pre-foreclosure programs. As these commenters noted, under the proposal such notices likely would constitute ''evidence of compliance with State law'' and thus would be prohibited until after the 120th day of delinquency. These commenters also asserted that such programs complement the Bureau's early intervention rule and that there is substantial benefit to borrowers in receiving these notices early in their delinquencies. For example, many statutory notices require that counseling, legal aid, or other resources be identified to borrowers, and consumer groups agreed that borrowers are more likely to respond and seek loss mitigation when they receive notices clearly informing them that foreclosure is imminent if they do not act. Several commenters pointed to data or experience that indicated many borrowers do not reach out to servicers for loss mitigation assistance until foreclosure notices or notices of default are sent. These commenters believed that borrowers would receive little benefit if these notices were delayed until after the 120th day of delinquency because the likelihood of a successful resolution would be reduced. On the whole, these commenters indicated that delaying State-mandated notices relating to loss mitigation programs or statutory rights to cure delinquencies would frustrate State efforts at avoiding foreclosure by making resolutions more difficult or cure more costly to consumers.

As an alternative to the proposed interpretation of ''first notice or filing,'' many industry commenters recommended that the Bureau adopt an interpretation based on the Federal Housing Administration's (FHA) definition of ''first legal,'' citing familiarity with this concept. In the alternative, some industry commenters suggested a more uniform and objective definition or a State-by-State

determination. These commenters generally stated that a prohibition that extends to documents defined in a manner that closely tracks ''first legal'' would better facilitate compliance for industry, while at the same time would permit and encourage the early notices to borrowers, including those that provide counseling, legal aid, or other resources. A number of commenters suggested that specific notices be expressly permitted, including State-mandated outreach to delinquent borrowers and breach letters required by the GSEs.

Final Rule

The Bureau is adopting a revised version of proposed comment 41(f)–1 that states a document is considered the ''first notice or filing'' on the basis of foreclosure procedure under applicable State law, but adjusts the Bureau's interpretation of what constitutes a ''first notice or filing.'' Rather than relying on the general notion that any evidence of compliance with State foreclosure law constitutes a first notice or filing, the Bureau is revising comment 41(f)–1 and adopting four new subparts that are more specifically addressed to different types of foreclosure procedures. New comment 41(f)–1.i explains that, when the foreclosure procedure under applicable State law requires commencement of a court action or proceeding, a document is considered the first notice or filing if it is the earliest document required to be filed with a court or other judicial body to commence the action or proceeding (*e.g.,* a complaint, petition, order to docket, notice of hearing). The Bureau also is adopting new comment 41(f)–1.ii, which explains that, when the foreclosure procedure under applicable State law does not require a court action or proceeding, a document is considered the first notice or filing if it is the earliest document required to be recorded or published to initiate the foreclosure process. To address situations not already covered by comments (i) and (ii), new comment 41(f)–1.iii provides that, where a foreclosure procedure does not require initiating a court action or proceeding or recording or publishing of any document, a document is considered a ''first notice or filing'' if it is the first document which establishes, sets or schedules the foreclosure sale date.

As noted above, the proposal sought to balance protecting consumers and encouraging communication between servicers and borrowers. The Bureau believed that, under the proposed interpretation of ''first notice or filing,'' borrowers would be ensured sufficient time to submit a complete loss mitigation application, but servicers would still be able to send many of the typical early-default communications, so long as they were not being used as evidence of compliance with State law. The Bureau requested comment on whether the proposal established a workable rule that was clear, in light of varied foreclosure procedures in different states, and the multiple purposes for notices. As noted above, many commenters, including consumer advocate groups and State governments, indicated concerns with the proposed interpretation's impact on communication and its impact on State-mandated loss mitigation programs. Many commenters asserted that the proposal would result in either less or ineffective early default communication and *lessen* the likelihood that borrowers would successfully access loss mitigation resolutions or otherwise avoid foreclosure.

The Bureau is persuaded by these comments that revising the interpretation is necessary to provide greater clarity and also provide for more effective pre-foreclosure outreach. As commenters noted, the proposed interpretation would have prohibited the use of many State-mandated notices that do not initiate foreclosure proceedings and are intended to provide borrowers with information about counseling and other loss mitigation resources as a means of avoiding foreclosure. In addition, the Bureau is persuaded by comments that the proposed interpretation would have chilled other servicer communications, such as cure notices or breach letters, based on confusion over whether such communications were ''evidence of compliance'' and thus prohibited by § 1024.41.

The Bureau believes the interpretation of first notice or filing adopted by this final rule provides an objective basis for determining compliance with the prohibition on foreclosure referral. In addition, it addresses the concerns raised in comments that the proposal would restrict communications informing borrowers of assistance and statutory rights to cure. The Bureau agrees with commenters that permitting communication about cure rights or pre-foreclosure loss mitigation assistance or procedures available under State law, even within the first 120 days of a borrower's delinquency, furthers the objective of § 1024.41's loss mitigation procedures. The Bureau believes early communication to borrowers about resources such as housing counseling, emergency loan programs, and pre-foreclosure mediation will increase the likelihood that borrowers will submit complete applications in time to benefit from the full loss mitigation procedures under § 1024.41. The Bureau appreciates that, under this modified interpretation, some borrowers who have not yet submitted loss mitigation applications may face shorter foreclosure timeframes after the 120th day of delinquency than under the proposed interpretation. However, the Bureau believes the adopted interpretation provides sufficient opportunity for borrowers to seek loss mitigation assistance without the pressure of pending litigation or foreclosure proceedings. The Bureau also believes a borrower's ability to exercise a statutory or contractual right to cure a default likely will be greater where notice of the cure rights is provided before several months of arrearages have accumulated. While the proposed interpretation was not intended to prohibit sending any such notice, only one that would be used as evidence of compliance with applicable law, the modified interpretation provides greater clarity.

The Bureau acknowledges that its interpretation of ''first notice or filing'' may prohibit, during the 120-day period, initiation of State-mandated loss mitigation efforts or opportunities to cure in those jurisdictions where the applicable foreclosure procedure requires such information to appear first in a court filing, or a document that is recorded or published. However, were the Bureau to adopt an interpretation that excluded such notices from the definition of first filing, based on their inclusion of information related to cure rights or loss mitigation assistance, this likely would create significant confusion and frustrate the purposes of the rule, by permitting certain foreclosure actions within the 120-day period.

Finally, the Bureau is adding new comment 41(f)–1.iv to clarify that a document provided to a borrower that initially is not required to be filed, recorded or published is not considered the first notice or filing solely on the basis that the foreclosure procedure requires a copy of the document to be included as an attachment to a subsequent document required to be filed or recorded to carry out the foreclosure process. The Bureau is aware through comments that, in many states, letters or notices (including breach letters, notices of rights to cure) that are required to be sent to the borrower, *but do not initiate formal foreclosure proceedings,* nonetheless are required to be included in later filings, *i.e.,* as part of a complaint or subsequent

pleading. Such letters or notices may be sent during the pre-foreclosure review period without violating the foreclosure referral ban.

The interpretation of ''first notice or filing'' adopted by this final rule closely tracks, but may not be identical in all jurisdictions, to the FHA's ''first legal action necessary to initiate foreclosure'' or ''first legal'' or ''first public'' action, as some commenters requested.[24] However, the Bureau believes to the extent there are jurisdictions where ''first notice or filing'' of § 1024.41(f) is inconsistent with the FHA standard, it will not hinder servicers' compliance with obligations under the FHA or investor requirements based upon the FHA's standard. The Bureau notes that the ''first legal'' standard primarily serves to inform mortgagees of their contractual obligations as servicers of FHA-insured mortgages. In light of the fact that § 1024.41(f) is enforceable by private right of action, the Bureau is adopting this interpretation of ''first notice or filing'' in order to provide sufficient clarity to borrowers, servicers, and courts. The Bureau also believes this interpretation provides States with clarity of the application of § 1024.41(f), not just as to present State foreclosure procedure but with respect to future modifications of State law.

Exceptions to the Prohibition of Early Foreclosure Referrals

The Proposal

The Bureau also proposed to amend § 1024.41(f)(1) so that the prohibition on referral to foreclosure until after the 120th day of delinquency would not apply in two situations: (1) When the foreclosure is based on a borrower's violation of a due-on-sale clause, and (2) when the servicer is joining the foreclosure action of a subordinate lienholder. As discussed in the proposal, the Bureau is aware that there may be some circumstances when a foreclosure is not based upon a borrower's delinquency, and thus protections designed to provide delinquent borrowers time to bring their mortgages current or apply for loss mitigation (such as the 120-day ban on foreclosure referral) may not be appropriate or necessary. The Bureau proposed amending § 1024.41(f)(1) to provide the two exemptions for foreclosures based upon due-on-sale clauses and for joining a subordinate lienholder's foreclosure, but also recognized that other situations may exist that also warrant exclusion. Thus, in addition to the two situations described above, the Bureau sought comment on what other situations may be appropriate to exempt, or whether the proposed exemptions were appropriate in situations in which a borrower has submitted a complete loss mitigation application.

Comments

The Bureau received substantial comments from trade associations, individual servicers including credit unions, and the GSEs, which generally supported the added exemptions to § 1024.41(f)(1). Industry commenters generally supported the proposed exemptions, citing a need to provide relief from the foreclosure referral ban where default is based upon a non-monetary provision of a mortgage. With respect to the Bureau's request for comment on other situations that may warrant exclusion, numerous commenters suggested the Bureau provide guidance or add exemptions for foreclosure based upon a determination that the property was abandoned or vacant. Some commenters advocated an exemption for abandoned properties and suggested the Bureau provide a list of factors to be considered in determining whether the property was abandoned. Consumer groups, however, expressed concerns that, because abandonment or vacancy status is necessarily a fact-specific determination, an exemption may facilitate evasion.

In addition, some commenters suggested the Bureau exempt situations where the borrower is deceased without heirs or in other cases. Some industry commenters requested that the rule permit foreclosure within the 120-day period where borrowers have failed to maintain insurance or property tax payments or where the borrower had failed to pay late fees. Finally, some commenters requested an exemption for other situations including where borrowers commit waste, are non-responsive to the servicer's attempts to maintain live contact, or state a desire to surrender the property.

Consumer groups acknowledged that situations may exist that warrant exclusion from the 120-day prohibition, such as the proposed exemptions, but raised concerns about their breadth. Specifically, these commenters expressed concerns that an exemption for all foreclosures based on violation of a due-on-sale clause may be overly broad, and could be construed to allow foreclosure where the transfer is to a deceased borrowers' family member or where a transfer occurs as a result of State divorce decree or probate order, or other transfer to a borrower's family member. Many of these commenters suggested that the exemption expressly exclude such transfers to the extent they were protected under the Garn-St. Germain Act.[25] Consumer advocate commenters also suggested that the exemption for joining a foreclosure action of a subordinate lienholder should be limited to situations where all of the servicers and lienholders with respect to the property are separate entities.

Final Rule

The Bureau is adopting the amendments to § 1024.41(f)(1) as proposed, without adopting additional exemptions. The Bureau appreciates comments that suggested the 120-day prohibition was designed to protect delinquent borrowers, but should not extend to non-monetary defaults or breaches of the underlying mortgage agreement. However, the Bureau remains mindful of consumer protection concerns that could arise from a broader set of exemptions. For example, industry commenters suggested that foreclosure based on a borrower's failure to maintain insurance or pay property taxes should be excluded, but, as some of these commenters acknowledged, those and other examples provided are likely to coincide with borrower delinquency. The Bureau does not believe that servicers should be allowed to sidestep the borrower protections set forth in § 1024.41 for delinquent borrowers simply because borrowers may have breached other components of the underlying mortgage, such as requirements to pay property taxes, maintain insurance, or pay late fees. The Bureau believes that additional exemptions would create uncertainty and could potentially be construed in a manner that permits evasion of the requirements of § 1024.41(f). Moreover, the Bureau does not believe exemption from the pre-foreclosure review period is appropriate merely because foreclosure is based upon an obligation other than the borrower's monthly payment. In many instances, these borrowers are likely experiencing financial distress and thus may benefit from time to seek loss mitigation.

For similar reasons, the Bureau does not believe it is appropriate to adopt an exemption from the 120-day prohibition for situations where a borrower may be deemed to commit ''waste'' in violation of an underlying mortgage agreement.

[24] See Department of Housing and Urban Development, Mortgagee Letter 2005–30, July 12, 2005.

[25] Garn-St. Germain Depository Institutions Act, Public Law 97–320 (1982) (codified in various sections). The Act generally prohibits the exercise of due-on-sale clauses with respect to certain protected transfers. See 12 U.S.C. 1701j–3.

As noted above, the Bureau is concerned that such an exemption could be used to circumvent the 120-day prohibition for borrowers who are also delinquent. However, the Bureau also notes that what constitutes waste is very fact-specific and the few commenters who suggested an exemption provided no precise definition of the term. Furthermore, while mortgages typically permit foreclosure in the event of waste, they also frequently provide other non-foreclosure remedies. In light of the absence of evidence suggesting waste that would necessitate rapid foreclosure is a significant problem, the Bureau is convinced that no such exemption is necessary.

In addition, the Bureau does not believe any further narrowing or clarifying revisions to the due-on-sale clause exemption in § 1024.41(f)(1)(i), to protect transfers to family members or transfers ordered by divorce decree or probate proceedings, are necessary. The Bureau notes that, to the extent the Garn-St. Germain Act prohibits the exercise of due-on-sale clauses, the exemption from the 120-day period would not apply. The exemption does not alter limitations or obligations imposed on a servicer by another Federal or State law with respect to whether a due-on-sale clause validly may be exercised. Rather it merely provides an exception to the 120-day pre-foreclosure review period where the basis for foreclosure is a due-on-sale clause. The Bureau notes that servicers may not avail themselves of the due-on-sale clause exemption and make the first notice or filing before the 120th day of delinquency unless such a clause is validly enforceable.

The Bureau is also not adopting any limitation on the exemption for joining a foreclosure initiated by a subordinate lienholder. The Bureau does not believe it is appropriate to limit the exemption application to only those situations where the senior and junior liens are held or serviced by separate entities, as was requested. In the case where an entity services both a first and a second lien, the servicer will be required to complete the pre-foreclosure review for the second lien, and will be required to respond to a borrower's loss mitigation application with respect to the first mortgage as well. Furthermore, the comments did not provide an adequate explanation to persuade the Bureau that servicers are more likely to pursue foreclosure in a manner that evades the 120-day pre-foreclosure review period when the senior and junior lien are held and serviced by the same entity.

Finally, the Bureau notes that several commenters requested that the Bureau exempt vacant or abandoned properties from the 120-day prohibition. However, while many commenters asserted that there is a limited benefit to prohibiting foreclosure referral where a property is ''vacant'' or ''abandoned'', they also generally agreed that such a determination depends on the individual facts and circumstances, and may vary according applicable State law. While some commenters suggested the Bureau adopt a multiple-factor test to determine whether a property was ''abandoned,'' the Bureau believes any such test would inherently rely on a holistic determination based on individual facts and circumstances, and would not provide the clear guideline that the Bureau believes is appropriate with respect to the prohibition on foreclosure referral. Moreover, as noted by consumer groups, a number of borrower protection concerns could arise from affording servicers too much discretion in determining whether a property is abandoned or vacant. In addition, some industry commenters conceded that it would be rare for a property to be determined abandoned or vacant earlier than the 120th day of delinquency.

For these reasons, the Bureau is not adopting an exclusion from the 120-day prohibition for vacant or abandoned properties. However, the Bureau notes that the provisions of §§ 1024.39 through 1024.41 apply only to a mortgage loan secured by property that is a borrower's principal residence. *See* 12 CFR 1024.30(c)(2). Thus, depending on the facts and circumstances, it is possible that some foreclosures against vacant or abandoned properties will not be subject to § 1024.41(f).

41(h) Appeal Process

41(h)(4) Appeal Determination

The Bureau proposed to amend § 1024.41(h)(4) to provide expressly that the notice informing a borrower of the determination of his or her appeal must also state the amount of time the borrower has to accept or reject an offer of a loss mitigation option after the notice is provided to the borrower. The Bureau did not receive any comments on this provision and is finalizing it as proposed.

41(j) Prohibition on Foreclosure Referral

As discussed above, the Bureau is adopting, as proposed, amendments to § 1024.41(f)(1) that exempt two situations from the prohibition on referral to foreclosure until after the 120th day of delinquency: When the foreclosure is based on a borrower's violation of a due-on-sale clause and when the servicer is joining the foreclosure action of a subordinate lienholder. The Bureau also proposed corresponding amendments to the provision in § 1024.41(j), which provides the same prohibition with respect to small servicers. While the Bureau received a number of comments regarding the proposed amendments to § 1024.41(f)(1) as discussed above, the Bureau received no comments addressing the corresponding amendments to § 1024.41(j). Accordingly, the Bureau is adopting, as proposed, the amendments to § 1024.41(j) to allow foreclosure before the 120th day of delinquency when the foreclosure is based on a borrower's violation of a due-on-sale clause and when the servicer is joining the foreclosure action of a subordinate lienholder, by incorporating a cross-reference to § 10124.41(f)(1).

C. Regulation Z

General—Technical Corrections

In addition to the clarifications and amendments to Regulation Z discussed below, the Bureau proposed technical corrections and minor clarifications to wording throughout Regulation Z that are not substantive in nature. The Bureau is adopting such technical and wording clarifications as proposed to regulatory text in §§ 1026.23, 1026.31, 1026.32, 1026.35, and 1026.36 and to commentary to §§ 1026.25, 1026.32, 1026.34, 1026.36, and 1026.41. In addition, the Bureau is adding additional technical corrections to regulation text in § 1026.43 and commentary to §§ 1026.25, 1026.32, and 1026.43. The Bureau also is making one correction to an amendatory instruction that relates to FR Doc. 2013–16962, published on Wednesday July 24, 2013.

Section 1026.23 Right of Rescission

23(a) Consumer's Right To Rescind

23(a)(3)(ii)

The Bureau proposed to amend § 1026.23(a)(3)(ii) to update a cross-reference within that section from § 1026.35(e)(2), as adopted by the Bureau's Amendments to the 2013 Escrows Final Rule under the Truth in Lending Act (Regulation Z) (May 2013 Escrows Final Rule),[26] to § 1026.43(g). The cross-reference in the May 2013 Escrows Final Rule is the correct cross-reference during the time period that rule will be in effect for transactions where applications are received on or after June 1, 2013, but prior to January

[26] 78 FR 30739 (May 23, 2013).

10, 2014. For transactions where applications are received on or after January 10, 2014, the correct cross-reference will be to § 1026.43(g). For this reason, the Bureau proposed to remove the cross-reference to § 1026.35(e)(2) and replace it with a cross-reference to § 1026.43(g). The Bureau received no comments addressing this change and is finalizing this amendment as proposed.

Section 1026.32 Requirements for High-Cost Mortgages

32(b) Definitions

The Bureau's 2013 ATR Final Rule and 2013 HOEPA Final Rule contain provisions that relate to a transaction's ''points and fees.'' [27] As adopted by the 2013 ATR Final Rule, § 1026.43(e)(2)(iii) sets forth a cap on points and fees for a closed-end credit transaction to acquire qualified mortgage status. As adopted by the 2013 HOEPA Final Rule, § 1026.32(a)(1)(ii), sets forth a points and fees coverage threshold for both closed- and open-end credit transactions. Definitions of points and fees for closed- and open-end credit transactions were also provided by these two final rules.

For purposes of both the qualified mortgage points and fees cap and the high-cost mortgage coverage threshold, § 1026.32(b)(1) defines ''points and fees'' for closed-end credit transactions.[28] Section 1026.32(b)(1)(i) defines points and fees for closed-end credit transactions to include all items included in the finance charge as specified under § 1026.4(a) and (b), with the exception of certain items specifically excluded under § 1026.32(b)(1)(i)(A) through (F). These excluded items include interest or time-price differential; certain types and amounts of mortgage insurance premiums; certain bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either; and certain bona fide discount points paid by the consumer. Section 1026.32(b)(1)(ii) through (vi) lists (as clarified by this final rule) certain other items that are specifically included in points and fees, including compensation paid directly or indirectly by a consumer or creditor to a loan originator; certain real-estate related items listed in § 1026.4(c)(7) unless certain conditions are met; premiums for various forms of credit insurance, including credit life, credit disability, credit unemployment and credit property insurance; the maximum prepayment penalty, as defined in § 1026.32(b)(6)(i), that may be charged or collected under the terms of the mortgage loan; and the total prepayment penalty as defined in § 1026.32(b)(6)(i) or (ii) incurred by the consumer if the consumer refinances an existing mortgage loan or terminates an existing open-end credit plan in connection with obtaining a new mortgage loan with the current holder of the existing loan or plan (or a servicer acting on behalf of the current holder, or an affiliate of either).

Points and fees for open-end credit plans for purposes of the high-cost mortgage thresholds is defined in section 1026.32(b)(2), which essentially follows the inclusions and exclusions set out in § 1026.32(b)(1) for closed-end transactions, with several modifications and additional inclusions related to fees charged for open-end credit plans.

32(b)(1)

The Proposal

Prior to the Dodd-Frank Act, TILA section 103(aa)(1)(B) provided that a mortgage is subject to the restrictions and requirements of HOEPA if the total points and fees ''payable *by the consumer* at or before closing'' (emphasis added) exceed the threshold amount. However, section 1431(a) of the Dodd-Frank Act amended the points and fees coverage test to provide in TILA section 103(bb)(1)(A)(ii) that a mortgage is a high-cost mortgage if the total points and fees ''payable *in connection with the transaction''* (emphasis added) exceed newly established thresholds. Similarly, TILA section 129C(b)(2)(A)(vii) provides that points and fees ''payable *in connection with the loan''* (emphasis added) are included in the points and fees calculation for qualified mortgages. As adopted by the 2013 ATR and HOEPA Final Rules, which implemented these changes, the definition of points and fees includes certain charges not paid by the consumer.

Following publication of the Bureau's ATR and HOEPA Final Rules, the Bureau received numerous questions from industry seeking guidance regarding the treatment of third party-paid charges and creditor-paid charges for purposes of the points and fees calculation. Based on these questions, the Bureau determined that additional clarification concerning the treatment of charges paid by parties other than the consumer, including third parties, for purposes of inclusion in or exclusion from points and fees would be beneficial to consumers and creditors and facilitate compliance with the final rules. The Bureau therefore proposed to add new commentary to § 1026.32(b)(1) to clarify when charges paid by parties other than the consumer, including third parties, are included in points and fees. Specifically, the Bureau proposed to add new comment 32(b)(1)–2 to clarify the treatment of charges imposed in connection with a closed-end credit transaction that are paid by a party to the transaction other than the consumer, for purposes of determining whether that charge is included in points and fees as defined in § 1026.32(b)(1). The proposed comment would have stated that charges paid by third parties that fall within the definition of points and fees set forth in § 1026.32(b)(1)(i) through (vi) are included in points and fees, and would have provided examples of third-party payments that are included and excluded. In discussing included charges, the proposed comment noted that a third-party payment of an item excluded from the finance charge under a provision of § 1026.4, while not included in points and fees under § 1026.32(b)(1)(i), may be included under § 1026.32(b)(1)(ii) through (vi). In discussing excluded charges, the proposed comment stated that a charge paid by a third party is not included in points and fees under § 1026.32(b)(1)(i) as a component of the finance charge if any of the exclusions from points and fees in § 1026.32(b)(1)(i)(A) through (F) applies.

The proposed comment also discussed the treatment of ''seller's points,'' as described in § 1026.4(c)(5) and commentary. The proposed comment would have stated that seller's points are excluded from the finance charge and thus are not included in points and fees under § 1026.32(b)(1)(i), but also would have noted that charges paid by the seller may be included in points and fees if the charges are for items in § 1026.32(b)(1)(ii) through (vi).

Finally the proposed comment would have restated for clarification purposes that, pursuant to § 1026.32(b)(1)(i)(A) and (ii), charges that are paid by the creditor, other than loan originator compensation paid by the creditor that is required to be included in points and fees under § 1026.32(b)(1)(ii), are excluded from points and fees. In proposing this clarification, the Bureau noted that, to the extent that the creditor recovers the cost of such charges from the consumer, the cost is recovered through the interest rate, which is excluded from points and fees under § 1026.32(b)(1)(i)(A). Specifically, the Bureau noted, § 1026.32(b)(1)(i) and

[27] *See* 78 FR 6407 (Jan. 30, 2013); 78 FR 6856 (Jan. 31, 2013). The Bureau also addressed points and fees in the May 2013 ATR Final Rule. *See* 78 FR 35430 (June 12, 2013).

[28] Section 1026.43(b)(9) provides that, for the qualified mortgage points and fees cap, ''points and fees'' has the same meaning as in § 1026.32(b)(1).

(b)(1)(i)(A) implements section 103(bb)(4)(A) of TILA to include in points and fees ''[a]ll items included in the finance charge under § 1026.4(a) and (b)'' but specifically excludes ''interest and time-price differential.'' However, the Bureau noted further, under § 1026.32(b)(1)(ii) compensation paid by the creditor to loan originators, other than employees of the creditor, is included in points and fees.

In proposing this comment, the Bureau stated its belief that the proposed comment's clarification of the treatment of charges paid by parties other than the consumer for points and fees purposes was consistent with the amendment to TILA made by section 1431(a) of the Dodd-Frank Act, discussed above.

Comments

The Bureau received comments on this aspect of the proposal from industry trade associations, banks, mortgage companies, and a manufactured housing lender. Many of these comments expressed general concerns or disagreements with the points and fees thresholds or other aspects of points and fees that were not at issue in the proposal, or expressed general support or disagreement with the treatment of charges paid by parties other than the consumer for purposes of the points and fees determination, particularly with respect to charges paid to creditor affiliates. The Bureau notes that it proposed commentary clarifying only the application of § 1026.32(b)(1) and (2) to charges paid by parties other than the consumer, and does not consider these comments responsive to the proposal.

Other commenters suggested further revisions to the Bureau's comment with regard to its discussion of third-party-paid charges, and seller's points. Some industry commenters expressed particular concern about the impact of the proposed comment on certain employer payments of employee relocation expenses, for example employer payment of discount points on behalf of their employees to encourage them to relocate. These commenters generally raised concerns that inclusion in points and fees could discourage relocation incentives, and requested that the Bureau exclude employer-paid charges from points and fees.

Most industry commenters expressed support for the clarifications that seller's points are generally excluded from points and fees (as they are not included as a finance charge under § 1026.4(c)(5)), but some commenters expressed concern about the possible inclusion of some seller-paid charges in points and fees. For example, some industry commenters also expressed concern that the possible inclusion of some seller-paid charges would create difficulties for creditors in determining which seller payments are included in points and fees and which are not. Specifically, some commenters noted that creditors may have difficulty in determining how seller assistance is allocated in the transaction, because a seller-paid amount is often provided as a flat dollar amount or a percentage of the purchase price that allows the borrower to determine how it should be applied, or the allocation changes at the closing table. As a proposed solution, one financial institution recommended that the Bureau's final comment allow creditors to rely on any written statement provided by the borrower, third party, or seller regarding the purpose of the payment.

Industry commenters were generally supportive of the Bureau's proposed comment with regard to creditor-paid charges. Commenters generally stated that the Bureau's proposed comment provided helpful language that clarified that creditor-paid amounts are excluded from points and fees (other than loan originator compensation). Some suggested, however, that it would be additionally helpful if further comments were added to state explicitly that such charges are excluded from the finance charge, and that it is not material to this calculation that a creditor either absorbs the charges or provides a credit to pay them in return for a higher rate.

Final Rule

The Bureau is adopting comment 32(b)(1)–2 as proposed, with several modifications. The Bureau believes that the comment as proposed, with several modifications, provides needed clarification to creditors to assist them in determining what is included in points and fees. The comment specifically describes when third-party-paid charges, including seller's points, are to be included in points and fees and when they are to be excluded, and provides examples. In addition, the comment treats third-party-paid charges consistently with the treatment of consumer-paid charges under § 1026.32(b)(1) and current commentary (*i.e.,* comment 32(b)(1)(i)–1)). Specifically, it provides that a third-party payment of a charge is included in points and fees if it falls within the definition of points and fees set forth in § 1026.32(b)(1)(i) through (vi)—which includes items included in the finance charge under § 1026.4(a) and (b). It also provides that, while a third-party paid charge may be excluded from the finance charge under § 1026.4, it may be included in the points and fees calculation under § 1026.32(b)(1)(ii) through (vi) such as, for example, if the third-party payment is for items such as compensation to a loan originator, certain real estate related items listed in § 1026.4(c)(7), premiums for certain credit insurance, and a prepayment penalty incurred by the consumer in some circumstances. The comment also specifically describes the treatment of seller's points, which, like other items excluded from the finance charge, are not included in points and fees under § 1026.32(b)(1)(i) but nevertheless may be included in points and fees if listed in § 1026.32(b)(1)(ii) through (vi). In addition, the comment specifically addresses the treatment of creditor-paid charges and excludes them from points and fees with the exception of a payment for loan originator compensation.

The Bureau further notes that the comment treats seller's points consistently with the definition of points and fees in Regulation Z by excluding them from the points and fees calculation (as they are excluded from the finance charge), except in certain instances specified in Regulation Z. Section 1026.32(b)(1) defines points and fees to include all items included in the finance charge under § 1026.4(a) and (b), except for certain specified exclusions. This includes the § 1026.4(c)(5) exclusion of seller's points from the finance charge.

The Bureau notes that some commenters expressed concern about the ability of creditors to determine what third-party paid charges, including seller's payments, should be included in points and fees—specifically that creditors may be aware that a lump-sum amount was advanced by the seller, but not aware of the breakdown of what exactly was paid for by the advance. The Bureau appreciates this concern and does believe creditors could be confronted with situations where they are unsure how they should account for the seller or third-party amount in points and fees, particularly as relates to the specific fee breakdown. For example, the Bureau agrees that, if a seller paid $1000 in excluded seller's points, $500 in fees that would be included in points and fees, and another $500 in fees that would be excluded, all the creditor may be aware of is that $2,000 was advanced. Absent additional information, the creditor may have difficulty in determining what, if any, portion of the seller-paid amount needs to be included in points and fees (in the example above, $500). To facilitate compliance, the Bureau is modifying the final comment to clarify that creditors

may rely on written statements from the borrower or third party, including the seller, as to the source of the funds and the purpose of the payment in calculating the points and fees involving third-party payments.

As discussed, some commenters expressed concern that the Bureau's treatment of third-party paid charges as provided in its proposed comment would adversely affect employer relocation assistance arrangements for employees that include assistance to the employee in financing the purchase of a home. The Bureau does not believe that the issues raised by these commenters provide sufficient justification to warrant the exercise of the Bureau's exception authority under TILA section 105(a) to provide a blanket exclusion of such payments from the calculation of points and fees. In addition, employers continue to have flexibility with regard to such arrangements. For example, commenters who raised this issue focused, in particular, on the impact of the Bureau's proposed comment on arrangements where the employer pays an employee's discount points in a transaction. However § 1026.32(b)(1)(i)(E) provides for an exclusion from points and fees of certain bona fide discount points, which would extend to any such discount points paid by a third-party employer.

With regard to creditor-paid charges, the Bureau is finalizing comment 32(b)(1)–2, which makes clear that ''[c]harges that are paid by the creditor, other than loan originator compensation paid by the creditor that is required to be included in points and fees under § 1026.32(b)(1)(ii), are excluded from points and fees.'' This exclusion of creditor-paid charges therefore covers charges under § 1026.32(b)(1)(iii)–(vi). The Bureau also believes that existing § 1026.4 and supporting commentary already address the treatment of creditor-paid charges for purposes of the finance charge under § 1026.32(b)(1)(i). For example, comment 4(a)–2 states that ''[c]harges absorbed by the creditor as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining the interest rate to be charged.'' The Bureau disagrees with commenters that suggested additional guidance is needed regarding creditor-paid charges beyond what already exists in Regulation Z and new comment 32(b)(1)–2, but for convenience is adding an express reference to comment 4(a)–2 to the Bureau's final 32(b)(1)–2 comment.

32(b)(1)(ii) and 32(b)(2)(ii)

A. Background

Section 1431(c)(1)(A) of the Dodd-Frank Act requires that points and fees include ''all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source . . .'' TILA section 103(bb)(4). The 2013 ATR Final Rule implemented this statutory provision in amended § 1026.32(b)(1)(ii), which provides that, for both the qualified mortgage points and fees limits and the high-cost mortgage points and fees threshold, points and fees include all compensation paid directly or indirectly by a consumer or creditor to a loan originator, as defined in § 1026.36(a)(1), that can be attributed to the transaction at the time the interest rate is set. The 2013 HOEPA Final Rule implemented § 1026.32(b)(2)(ii), which provides the same standard for including loan originator compensation in points and fees for open-end credit plans (*i.e.,* a home equity line of credit, or HELOC). Concurrent with the 2013 ATR Final Rule, the Bureau also issued the 2013 ATR Concurrent Proposal, which, among other things, proposed certain clarifications for calculating loan originator compensation for points and fees. The Bureau finalized the 2013 ATR Concurrent Proposal in the May 2013 ATR Final Rule, which further amended § 1026.32(b)(1)(ii) to exclude certain types of loan originator compensation from points and fees. In particular, the May 2013 ATR Final Rule excludes from points and fees loan originator compensation paid by a consumer to a mortgage broker when that payment has already been counted toward the points and fees thresholds as part of the finance charge under § 1026.32(b)(1)(i). *See* § 1026.32(b)(1)(ii)(A). It also excludes from points and fees compensation paid by a mortgage broker to an employee of the mortgage broker because that compensation is already included in points and fees as loan originator compensation paid by the consumer or the creditor to the mortgage broker. *See* § 1026.32(b)(1)(ii)(B). In addition, the May 2013 ATR Final Rule excludes from points and fees compensation paid by a creditor to its loan officers. *See* § 1026.32(b)(1)(ii)(C).

The 2013 ATR Concurrent Proposal had requested comment on whether additional adjustment of the rules or additional commentary is necessary to clarify any overlapping definitions between the points and fees provisions in the 2013 ATR Final Rule and the 2013 HOEPA Final Rule and the provisions adopted by the 2013 Loan Originator Compensation Final Rule. In particular, the Bureau sought comment on whether additional guidance would be useful regarding persons who are ''loan originators'' under § 1026.36(a)(1) but are not employed by a creditor or mortgage broker, such as employees of a retailer of manufactured homes.

In response to the 2013 ATR Concurrent Proposal, several industry and nonprofit commenters requested clarification of what compensation must be included in points and fees in connection with transactions involving manufactured homes. First, they requested additional guidance on what activities would cause a manufactured home retailer and its employees to qualify as loan originators. This issue is addressed below in the section-by-section analysis of § 1026.36(a)(1).[29] Second, they requested additional guidance on what compensation paid to manufactured home retailers and their employees would be counted as loan originator compensation and included in points and fees. Industry commenters responding to the 2013 ATR Concurrent Proposal argued that it is not clear whether the sales price received by the retailer or the sales commission received by the retailer's employee should be considered, at least in part, loan originator compensation. They urged the Bureau to clarify that compensation paid to a retailer and its employees in connection with the sale of a manufactured home should not be counted as loan originator compensation. Rather than provide additional guidance in the May 2013 ATR Final Rule, the Bureau instead decided to propose and seek comment on additional guidance.

B. Sections 32(b)(1)(ii)(D) and 32(b)(2)(ii)(D)

The Proposal

The Bureau proposed new § 1026.32(b)(1)(ii)(D), which would have excluded from points and fees all compensation paid by manufactured home retailers to their employees. The Bureau also proposed new § 1026.32(b)(2)(ii)(D), which would have provided that, for open-end credit plans, compensation paid by manufactured home retailers to their employees is

[29] As discussed below, the Bureau is clarifying what compensation must be included in points and fees. As discussed in the Supplementary Information describing revisions and clarifications to the rule text and commentary defining ''loan originator,'' the Bureau is also clarifying the circumstances in which employees of manufactured home retailers are loan originators. In addition, the Bureau will continue to conduct outreach with the manufactured home industry and other interested parties to address concerns about what activities are permissible for a retailer and its employees without causing them to qualify as loan originators.

excluded from points and fees for purposes of the high-cost mortgage points and fees threshold.

The Bureau noted that the May 2013 ATR Final Rule added § 1026.32(b)(1)(ii)(B), which excludes from points and fees compensation paid by mortgage brokers to their loan originator employees. The Bureau noted that it appeared that when an employee of a retailer would qualify as a loan originator, the retailer also would qualify as a loan originator and therefore would qualify as a mortgage broker. If the retailer qualifies as a mortgage broker, any compensation paid by the retailer to the employee would be excluded from points and fees under § 1026.32(b)(1)(ii)(B). The Bureau noted, however, that if there were instances in which an employee of a manufactured home retailer would qualify as a loan originator but the retailer would not, the exclusion from points and fees in § 1026.32(b)(1)(ii)(B) for compensation paid to an employee of a mortgage broker would not apply because the retailer would not be a mortgage broker. The Bureau suggested that it may still be appropriate to exclude such compensation paid to an employee of a manufactured home retailer because it may be difficult for creditors to determine whether employees of a manufactured home retailer have engaged in loan origination activities and, if so, what compensation they received for doing so. The Bureau noted that a retailer typically pays a sales commission to its employees, so it may be difficult for a creditor to know whether a retailer has paid any compensation to its employees for loan origination activities, as distinct from compensation for sales activities. To prevent any such uncertainty, the Bureau proposed new § 1026.32(b)(1)(ii)(D), to exclude from points and fees all compensation paid by manufactured home retailers to their employees. The Bureau requested comment on this proposed exclusion and on whether there are instances in which an employee of a manufactured home retailer would qualify as a loan originator but the retailer would not qualify as a loan originator.

In addition, to provide additional guidance on what compensation would be included in loan originator compensation that must be counted in points and fees for manufactured home transactions, the Bureau also proposed new comment 32(b)(1)(ii)–5. Proposed comment 32(b)(1)(ii)–5.i would have provided that, if a manufactured home retailer receives compensation for loan origination activities and such compensation can be attributed to the transaction at the time the interest rate is set, then such compensation is loan originator compensation that is included in points and fees. As noted in the May 2013 ATR Final Rule, the Bureau does not believe it is appropriate to use its exception authority to exclude from points and fees all compensation that may be paid to a manufactured home retailer. As a general matter, to the extent that the consumer or creditor is paying the retailer for loan origination activities, the retailer is functioning as a mortgage broker and compensation for the retailer's loan origination activities should be captured in points and fees. Commenters did not address this proposed guidance, and the Bureau is therefore adopting it as proposed.[30]

Proposed comment 32(b)(1)(ii)–5.ii would have specified that the sales price of a manufactured home does not include loan originator compensation that can be attributed to the transaction at the time the interest rate is set and therefore is not included in points and fees.[31]

In proposing in comment 32(b)(1)(ii)–5.ii that the sales price of a manufactured home would not include compensation that must be included in points and fees, the Bureau indicated that it did not believe that the sales price would include compensation that is paid for loan origination activities and that can be attributed to a specific transaction. The Bureau noted that if a retailer does not increase the price to obtain compensation for loan origination activities, then it does not appear that the sales price would include loan originator compensation that could be attributed to that particular transaction.

The Bureau acknowledged that it is possible that the sales price could include loan originator compensation that could be attributed to a particular transaction at the time the interest rate is set and that therefore should be included in points and fees. The Bureau noted that one approach for calculating loan originator compensation for manufactured home transactions would be to compare the sales price in a transaction in which the retailer engaged in loan origination activities and the sales prices in transactions in which the retailer did not do so (such as in cash transactions or in transactions in which the consumer arranged credit through another party). To the extent that there is a higher sales price in the transaction in which the retailer engaged in loan origination activities, then the difference in sales prices could be counted as loan originator compensation that can be attributed to that transaction and that therefore should be included in points and fees.

However, the Bureau stated that it did not believe that it would be workable to use this comparative sales price approach to determine whether the sales price includes loan originator compensation that must be included in points and fees. The creditor is responsible for calculating loan originator compensation to be included in points and fees for the qualified mortgage and high-cost mortgage points and fees thresholds. The Bureau noted that, under the comparative sales price approach, the creditor would have to analyze a manufactured home retailer's prices to determine if there were differences in the prices that would have to be included in points and fees as loan originator compensation. This would appear to be an extremely difficult analysis for the creditor to perform. Not only would the creditor have to compare the sales prices from numerous transactions, it would have to determine whether any differences between the sales prices could be attributed to the loan origination activities of the retailer and not to other factors.

The Bureau requested comment on the proposed guidance specifying that the sales price does not include loan originator compensation that can be attributed to the transaction at the time the interest rate is set. In addition, the Bureau requested comment on whether the sales price of a manufactured home does in fact include loan originator compensation that can be attributed to the transaction at the time the interest rate is set, and, if so, whether there are practicable ways for a creditor to measure that compensation so that it could be included in points and fees.

Comments

The Bureau received few comments that addressed proposed § 1026.32(b)(1)(ii)(D). Two industry commenters generally supported the proposal. Consumer advocates did not comment on this issue.

With respect to new comment 32(b)(1)(ii)–5, industry commenters supported the Bureau's proposed guidance. They maintained that the sales price of a manufactured home does

[30] As addressed below in the discussion of § 1026.36(a), several industry commenters argued that the Bureau should clarify and narrow the scope of activities that would cause a manufactured home retailer and its employees to qualify as loan originators.

[31] As noted above, the Bureau is adopting as proposed comment 32(b)(1)(ii)–5.iii, which specifies that, consistent with new § 1026.32(b)(1)(ii)(D), compensation paid by a manufactured home retailer to its employees is not included in points and fees.

not include loan originator compensation and that, in any event, it would not be possible for the creditor to determine if the sales price did include any such compensation.

Consumer advocates, however, opposed the proposed comment. They argued that retailers could easily conceal loan originator compensation in the sales price by inflating the price above what a cash customer would pay. They contended that it is difficult to determine the equivalent cash price for manufactured homes because most sales are on credit and, because of the variety of options, there are not standard cash prices for particular models. They stated that the Manufacturer's Suggested Retail Price (MSRP) is not a reliable measure because it often does not include many options that are included with the sale and because the close relationships between many lenders, dealers, and manufacturers create an incentive to inflate MSRPs. They recommended that the commentary should instead provide that any originator compensation concealed in the sales price should be included in points and fees.

Final Rule

For the reasons noted above, the Bureau is adopting new § 1026.32(b)(1)(ii)(D) and (b)(2)(ii)(D) as proposed. As discussed below, the Bureau is also adopting, with revisions, comment 32(b)(1)(ii)–5, which, among other things, explains in comment 32(b)(1)(ii)–5.iii, that consistent with § 1026.32(b)(1)(ii)(D), compensation paid by a manufactured home retailer to its employees is not included in points and fees. The Bureau notes, however, that it does not acknowledge that situations exist where a manufactured housing retailer's employee is considered a loan originator, but the retailer itself is not.

As discussed in the proposal, the Bureau is using its exception authority to adopt new § 1026.32(b)(1)(ii)(D) and (b)(2)(ii)(D) pursuant to its authority under TILA section 105(a) to make such adjustments and exceptions for any class of transactions as the Bureau finds necessary or proper to facilitate compliance with TILA and to effectuate the purposes of TILA, including the purposes of TILA section 129C of ensuring that consumers are offered and receive residential mortgage loans that reasonably reflect their ability to repay the loans. The Bureau's understanding of this purpose is informed by the findings related to the purposes of section 129C of ensuring that responsible, affordable mortgage credit remains available to consumers. The Bureau believes that using its TILA exception authorities will facilitate compliance with the points and fees regulatory regime by not requiring creditors to investigate the manufactured housing retailer's employee compensation practices, and by making sure that all creditors apply the provision consistently. It will also effectuate the purposes of TILA by helping to keep mortgage loans available and affordable by ensuring that they are subject to the appropriate regulatory framework with respect to qualified mortgages and the high-cost mortgage threshold. The Bureau is also invoking its authority under TILA section 129C(b)(3)(B) to revise, add to, or subtract from the criteria that define a qualified mortgage consistent with applicable standards. For the reasons explained above, the Bureau has determined that it is necessary and proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C and necessary and appropriate to effectuate the purposes of this section and to facilitate compliance with section 129C. With respect to its use of TILA section 129C(b)(3)(B), the Bureau believes this authority includes adjustments and exceptions to the definitions of the criteria for qualified mortgages and that it is consistent with the purpose of facilitating compliance to extend use of this authority to the points and fees definitions for high-cost mortgage in order to preserve the consistency of the qualified mortgage and high-cost mortgage definitions. As noted above, by helping to ensure that the points and fees calculation is not artificially inflated, the Bureau is helping to ensure that responsible, affordable mortgage credit remains available to consumers.

The Bureau also has considered the factors in TILA section 105(f) and has concluded that, for the reasons discussed above, the exemption is appropriate under that provision. Pursuant to TILA section 105(f), the Bureau may exempt by regulation from all or part of this title all or any class of transactions for which in the determination of the Bureau coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. In determining which classes of transactions to exempt, the Bureau must consider certain statutory factors. For the reasons discussed above, the Bureau is excluding from points and fees compensation paid by a retailer of manufactured homes to its employees because including such compensation in points and fees does not provide a meaningful benefit to consumers. The Bureau believes that the exemption is appropriate for all affected consumers to which the exemption applies, regardless of their other financial arrangements and financial sophistication and the importance of the loan to them. Similarly, the Bureau believes that the exemption is appropriate for all affected loans covered under the exemption, regardless of the amount of the loan and whether the loan is secured by the principal residence of the consumer. Furthermore, the Bureau believes that, on balance, the exemption will simplify the credit process without undermining the goal of consumer protection, denying important benefits to consumers, or increasing the expense of the credit process.

The Bureau notes that it is permitting creditors to exclude from points and fees compensation paid to a manufactured home retailer's employees only where that compensation is paid by the retailer. To the extent that an employee of a manufactured home retailer receives from another source (such as the creditor) loan originator compensation that can be attributed to the transaction at the time the interest rate is set, then that compensation must be included in points and fees.

The Bureau is adopting a modified version of comment 32(b)(1)(ii)–5 in light of comments from consumer groups. The Bureau is concerned that, as noted by consumer advocates, it is possible that the sales price of a manufactured home could include loan originator compensation. In particular, the Bureau is concerned that creditors and manufactured home retailers could work together to conceal loan originator compensation in the sales price. As a result, the Bureau does not believe that it can determine by rule that the sales price of a manufactured home does not include loan originator compensation that must be included in points and fees.

However, no commenters proposed a practicable method for creditors to determine whether the sales price of a manufactured home does in fact include loan originator compensation that can be attributed to the transaction at the time the interest rate is set. As the Bureau noted in the proposal, the Bureau does not believe that it is workable for the creditor to attempt to compare sales prices in different transactions to try to determine if the sales price includes loan originator compensation that must be included in points and fees.

Because the Bureau's primary concern is that creditors and manufactured home

retailers could work together to conceal loan originator compensation in the sales price, the Bureau is adopting new guidance that focuses on the knowledge of the creditor. Specifically, the Bureau is revising proposed comment 32(b)(1)(ii)–5.ii to provide that, if the creditor has knowledge that the sales price of a manufactured home includes loan originator compensation, then that compensation must be included in points and fees. The creditor does not, however, have an obligation to investigate the retailer's sales prices to determine if the sales price includes such compensation.

This approach is consistent with the current rules for calculating points and fees and the amount of loan originator compensation that must be included in points and fees. Under § 1026.32(b)(1), amounts must be included in points and fees only if they are ''known at or before consummation.'' Under § 1026.32(b)(1)(ii), loan originator compensation is included in points and fees only if it can be attributed to the transaction at the time the interest rate is set. In general, the Bureau does not believe that many creditors will know whether the sales price of a manufactured home includes loan originator compensation, and therefore would not be able to attribute any such compensation to the transaction at the time the interest rate is set. However, to the extent that, for example, a creditor and a retailer establish an arrangement in which the sales price of a manufactured home includes loan originator compensation, then the creditor would have knowledge that the sales price includes loan originator compensation and would have to include such compensation in points and fees. The Bureau believes that this approach will balance the goals of ensuring that creditors and retailers not evade the points and fees limits by working together to conceal loan originator compensation in the sales price and of avoiding a standard that would impose an unreasonable burden on creditors to investigate the pricing of manufactured home retailers.

32(b)(1)(vi) and 32(b)(2)(vi)

The Proposal

The Bureau proposed clarifying changes to § 1026.32(b)(1)(vi) and (b)(2)(vi) to better harmonize the definitions of ''total prepayment penalty'' adopted in these two sections more fully with the statutory requirement implemented by them. Sections 1026.32(b)(1)(vi) and (2)(vi) implement TILA section 103(bb)(4)(F), as added by section 1431(c) of the Dodd-Frank Act. That provision requires that points and fees include ''all prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor.'' Section 1026.32(b)(1)(vi), as adopted by the 2013 ATR Final Rule, implemented this provision as it related to closed-end credit transactions, and provided that points and fees must include ''[t]he total prepayment penalty, as defined in paragraph (b)(6)(i) of this section, incurred by the consumer if the consumer refinances the existing mortgage loan with the current holder of the existing loan, a servicer acting on behalf of the current holder, or an affiliate of either.'' Section 1026.32(b)(2)(vi), as adopted by the 2013 HOEPA Final Rule, implemented this provision as it related to open-end credit plans (*i.e.,* a home equity line of credit, or HELOC), and provided that points and fees must include ''[t]he total prepayment penalty, as defined in paragraph (b)(6)(ii) of this section, incurred by the consumer if the consumer refinances an existing closed-end credit transaction with an open-end credit plan, or terminates an existing open-end credit plan in connection with obtaining a new closed- or open-end credit transaction, with the current holder of the existing plan, a servicer acting on behalf of the current holder, or an affiliate of either.''

The Bureau proposed changes to § 1026.32(b)(1)(vi) and (2)(vi) to clarify both provisions' application. In doing so the Bureau stated that it intended these provisions to work in the same manner for closed-end and open-end credit transactions—*i.e.,* to include in points and fees any prepayment charges triggered by the refinancing of an existing loan or termination of a HELOC by obtaining a new credit transaction with the current holder of the existing closed-end mortgage loan or open-end credit plan. The Bureau, therefore, proposed to state expressly that § 1026.32(b)(1)(vi) applies to instances where the consumer takes out a closed-end mortgage loan to pay off and terminate an existing open-end credit plan held by the same creditor and the plan imposes a prepayment penalty (as defined in § 1026.32(b)(6)(ii)) on the consumer. The Bureau also proposed to strike from the existing § 1026.32(b)(2)(vi) the reference to obtaining a new closed-end credit transaction because § 1026.32(b)(2)(vi) relates to points and fees only for open-end credit plans and § 1026.32(b)(1)(vi) would apply instead. The Bureau also proposed to insert in § 1026.32(b)(2)(vi) a reference to § 1026.32(b)(6)(i), the definition of prepayment penalties for closed-end credit transactions, to clarify that the § 1026.32(b)(6)(i) definition applies in calculating the prepayment penalties included where a consumer refinances a closed-end mortgage loan with a HELOC with the creditor holding the closed-end mortgage loan (*i.e.,* the closed-end mortgage loan's prepayment penalties are included in calculating points and fees for the HELOC).

Comments

The Bureau did not receive comments specific to these proposed changes.

Final Rule

The Bureau is adopting the changes to § 1026.32(b)(1)(vi) and (2)(vi) as proposed. The Bureau believes that these changes are consistent with the statutory provision implemented by this section and provide needed clarification to the Bureau's intended application of § 1026.32(b)(1)(vi) and (2)(vi). In addition, the Bureau also is adopting as proposed comment 32(b)(2)–1, which directs readers for further guidance on the inclusion of charges paid by parties other than the consumer in points and fees for open-end credit plans to proposed comment 32(b)(1)–2 on closed-end credit transactions.

32(d) Limitations

32(d)(1)

32(d)(1)(ii) Exceptions

32(d)(1)(ii)(C)

The Proposal

The Bureau proposed to revise the exception to the prohibition on balloon payments for high-cost mortgages in § 1026.32(d)(1)(ii)(c) for transactions that satisfy the criteria set forth in § 1026.43(f), which implements TILA section 129C(b)(2)(E) as added by the Dodd-Frank Act provision, allows certain balloon-payment mortgages made by small creditors operating predominantly in ''rural or underserved areas'' to be accorded status as qualified mortgages under § 1026.43(f). The HOEPA balloon exception is based on the same statutory provision, which appears to have been designed to promote access to credit. TILA section 129C as added by the Dodd-Frank Act generally prohibits balloon-payment loans from being accorded qualified mortgage status, but Congress appears to have been concerned that small creditors in rural areas might have sufficient difficulty converting from balloon-payment loans to adjustable rate mortgages that they would curtail mortgage lending if they could not

obtain qualified mortgage status for their balloon-payment loans. As adopted in § 1026.43(f) by the 2013 ATR Final Rule, the exemption is available to creditors that extended more than 50 percent of their total covered transactions secured by a first lien in ''rural'' or ''underserved'' counties during the preceding calendar year, as those terms are defined in § 1026.35(b)(2)(iv)(A) and (B), respectively.

Because commenters raised similar concerns about the prohibition in HOEPA on high-cost mortgages having balloon-payment features, the Bureau decided in the 2013 HOEPA Final Rule to adopt § 1026.32(d)(1)(ii)(C) to allow balloon-payment features on loans that met the qualified mortgage requirements. The Bureau stated that, in its view, (1) allowing creditors in certain rural or underserved areas to extend high-cost mortgages with balloon payments will benefit consumers by expanding access to credit in these areas, and also will facilitate compliance for creditors who make these loans; and (2) allowing creditors that make high-cost mortgages in rural or underserved areas to originate loans with balloon payments if they satisfy the same criteria promotes consistency between the 2013 HOEPA Final Rule and the 2013 ATR Final Rule, and thereby facilitates compliance for creditors that operate in these areas.

Since publication of the 2013 HOEPA Final Rule and the 2013 ATR Final Rule, the Bureau received extensive comment on the definitions of ''rural'' and ''underserved'' that it adopted for purposes of § 1026.43(f) and certain other purposes in the 2013 Title XIV Final Rules, including § 1026.32(d)(1)(ii)(C). In light of these comments, the Bureau added § 1026.43(e)(6) to allow small creditors during the period from January 10, 2014, to January 10, 2016, to make balloon-payment qualified mortgages even if they do not operate predominantly in rural or underserved areas.[32] In addition, the Bureau announced that it would reexamine those definitions over the next two years to determine whether further adjustments are appropriate particularly in light of access to credit concerns.[33]

In light of the Bureau's decision to allow small creditors an additional two years to transition from balloon-payment loans to other products while it reevaluates the definitions of ''rural'' and ''underserved,'' the Bureau also proposed revisions to § 1026.32(d)(1)(ii)(c) to also allow small creditors to carry over the flexibility provided by the revised May 2013 ATR Final Rule into the HOEPA balloon loan provisions. The proposal would have revised § 1026.32(d)(1)(ii)(C) to expand the exception to the prohibition on balloon payments for high-cost mortgages for transactions that satisfy the criteria in either § 1026.43(f) or § 1026.43(e)(6). The Bureau sought comment on this aspect of the proposal.

Comments

The Bureau received substantial comments from trade associations, credit unions, and other industry advocates supporting the proposed amendments. Specifically, many of these commenters commended the Bureau for facilitating compliance with the balloon payment restrictions adopted by the 2013 HOEPA Final Rule, especially with respect to small creditors whose communities technically fail to meet the Bureau's definition of ''rural'' because they lie within the boundaries of micropolitan statistical areas. These commenters noted that the ability to originate mortgages with balloons is important to small creditors, who often have unique product pricing risks and also commonly do not have adequate staff or training to produce the additional disclosures required by adjustable-rate mortgages. The Bureau received one comment from a housing counseling organization that disagreed with the proposed expansion of the exemption, but the commenter raised no specific issues with the proposal. Rather the commenter disagreed in general with the original exception adopted by the 2013 HOEPA Final Rule on the premise that it believes balloon high-cost mortgages should never be permitted under any circumstances.

Final Rule

The Bureau is adopting revised § 1026.32(d)(1)(ii)(c) as proposed. The Bureau is expanding this exception pursuant to its authority under TILA section 129(p)(1), which grants it authority to exempt specific mortgage products or categories from any or all of the prohibitions specified in TILA section 129(c) through (i) if the Bureau finds that the exemption is in the interest of the borrowing public and will apply only to products that maintain and strengthen homeownership and equity protections.

The Bureau believes expanding the balloon-payment exception for high-cost mortgages to allow certain small creditors operating in areas that do not qualify as ''rural'' or ''underserved'' to continue to originate high-cost mortgages with balloon payments is in the interest of the borrowing public and will strengthen homeownership and equity protection. The Bureau believes allowing greater access to credit in remote areas that nevertheless may not meet the definitions of ''rural'' or ''underserved'' while creditors transition to adjustable-rate mortgages (or the Bureau reconsiders those definitions) will help those consumers who otherwise may be able to obtain credit only from a limited number of creditors. Further, it will do so in a manner that balances consumer protections with access to credit. In the Bureau's view, concerns about potentially abusive practices that may accompany balloon payments will be curtailed by the additional requirements set forth in § 1026.43(e)(6) and (f). Creditors that make these high-cost mortgages will be required to verify that the loans also satisfy the additional criteria discussed above, including some specific criteria required for qualified mortgages. Further, creditors that make balloon-payment high-cost mortgages under this exception will be required to hold the high-cost mortgages in portfolio for a specified time, which the Bureau believes also decreases the risk of abusive lending practices. Accordingly, for these reasons and for the purpose of consistency between the two rules, the Bureau is adopting an exception to the § 1026.32(d)(1) balloon-payment restriction for high-cost mortgages where the creditor satisfies the conditions set forth in §§ 1026.43(f) or the conditions set forth in § 1026.43(e)(6).

[32] Specifically, in the May 2013 ATR Final Rule, the Bureau adopted § 1026.43(e)(6), which provided for a temporary balloon-payment qualified mortgage that requires all of the same criteria be satisfied as the balloon-payment qualified mortgage definition in § 1026.43(f) except the requirement that the creditor extend more than 50 percent of its total first-lien covered transactions in counties that are ''rural'' or ''underserved.'' This temporary balloon-payment qualified mortgage would sunset, however, after January 10, 2016. As discussed in the section-by-section analysis of § 1026.43(e)(6) in the May 2013 ATR Final Rule, the Bureau adopted this two-year transition period for small creditors to roll over existing balloon-payment loans as qualified mortgages, even if they do not operate predominantly in rural or underserved areas, because the Bureau believes it is necessary to preserve access to responsible, affordable mortgage credit for some consumers. The Bureau also noted that, during the two-year period for which § 1026.43(e)(6) is in place, the Bureau intends to review whether the definitions of ''rural'' and ''underserved'' should be adjusted further and to explore how it can best facilitate the transition of small creditors that do not operate predominantly in rural or underserved areas from balloon-payment loans to adjustable-rate mortgages. 78 FR 35430 (June 12, 2013).

[33] *See, e.g.,* U.S Consumer Fin Prot. Bureau, *Clarification of the 2013 Escrows Final Rule* (May 16, 2013), *available at http://www.consumerfinance.gov/blog/clarification-of-the-2013-escrows-final-rule/.*

Section 1026.35 Requirements for Higher-Priced Mortgage Loans

35(b) Escrow Accounts

35(b)(2) Exemptions

35(b)(2)(iii)

35(b)(2)(iii)(A)

The Proposal

In addition to the HOEPA and ATR balloon provisions discussed above, the definitions of ''rural'' and ''underserved'' also relate to the § 1026.35(b)(2)(iii) exemption from the requirement that creditors establish escrow accounts for certain higher-priced mortgage loans available to small creditors that operate predominantly in ''rural'' or ''underserved'' areas. The exemption in § 1026.35(b)(2)(iii) was designed to promote access to credit by exempting small creditors in rural or underserved areas that might have sufficient difficulty maintaining escrow accounts that they would curtail making higher-priced mortgage loans rather than trigger the escrow account requirement. As adopted in the 2013 Escrows Final Rule, and as amended by the May 2013 Escrows Final Rule,[34] the exemption is available to creditors that extended more than 50 percent of their total covered transactions secured by a first lien on properties that are located in ''rural'' or ''underserved'' counties during the preceding calendar year. In general, a county's status as ''rural'' is defined in relation to Urban Influence Codes (UICs) established by the United States Department of Agriculture's Economic Research Service.

Because of updated information from the 2010 Census, however, numerous counties' status under the Bureau's definition will change between 2013 and 2014, with a small number of new counties meeting the definition of ''rural'' and approximately 82 counties no longer meeting that definition. The Bureau estimates that approximately 200–300 otherwise eligible creditors during 2013 could lose their eligibility for 2014 solely because of changes in the status of the counties in which they operate (assuming the geographical distribution of their mortgage originations does not change significantly over the relevant period).[35]

In light of the Bureau's intent to review whether the definitions of ''rural'' and ''underserved'' should be adjusted further during the two-year transition period for balloon-payment mortgages discussed above, the Bureau proposed to revise the exemption provided by § 1026.35(b)(2)(iii) to the general requirement that creditors establish an escrow account for first lien higher-priced mortgage loans where a small creditor operates predominantly in rural or underserved areas and meets various other criteria. The proposal would have revised § 1026.35(b) and its commentary to minimize volatility in the definitions while they are being re-evaluated. The proposal also would have amended § 1026.35(b)(2)(iii)(D)(*1*) and its commentary to conform to the expansion of the exemption to creditors that may meet the § 1026.35(b)(2)(iii)(A) criteria for calendar year 2014 based on loans made in ''rural'' or ''underserved'' counties in calendar year 2011, but not 2012 or 2013.

The Bureau sought comment on these proposed amendments and also proposed an effective date for the amendments that would apply to transactions where applications were received on or after January 1, 2014, in light of the proposed change to the calendar year exemption under § 1026.35(b)(2)(iii).

Comments

The Bureau received substantial comments from trade associations, credit unions, and other industry advocates supporting the proposed amendments. Many of the comments relating to the amendments to § 1026.32(d)(1)(ii)(A) discussed above also discussed the amendments to § 1026.35(b)(2)(iii) and offered similar or identical comments commending the Bureau for facilitating compliance with the requirements adopted by the 2013 Escrow Final Rule, particularly in light of changes to ''rural'' status for certain counties based on the last available Census data that would have caused certain creditors to lose eligibility for the exemption. The same housing counseling organization that disagreed with the balloon exception adopted by the 2013 HOEPA Final Rule also disagreed with the original exemption from the escrows requirement and thus also the proposed expansion. As before, this commenter did not raise any specific issues related to the proposal, but rather stated that all higher-priced mortgage loans should be escrowed, without exception. As discussed in part V above, while nearly all comments supported the proposal in general, no comments expressly addressed the January 1, 2014 effective date.

Final Rule

The Bureau is adopting revised § 1026.35(b)(2)(iii)(A) as proposed. The amended provision provides that, to qualify for the exemption, a creditor must have extended more than 50 percent of its total covered transactions secured by a first lien on properties located in ''rural'' or ''underserved'' counties during any of the preceding three calendar years. The provision thus prevents a creditor from losing eligibility for the exemption under the ''rural or underserved'' element of the test unless it has failed to exceed the 50-percent threshold three years in a row.

As discussed above in the section-by-section analysis of § 1026.32(d)(1)(ii)(C), the Bureau also is modifying the exception from the prohibition on balloon payments for high-cost mortgages in that section. Section 1026.32(d)(1)(ii)(C) provides an exception to the general prohibition on balloon payments for high-cost mortgages for balloon-payment qualified mortgages made by certain creditors operating predominantly in ''rural'' or ''underserved'' areas. Believing that the same rationale for allowing balloon-payment qualified mortgages made by creditors in rural or underserved areas applies to high-cost mortgages, the Bureau adopted the § 1026.32(d)(1)(ii)(C) exception in the 2013 HOEPA Final Rule. As explained above, the Bureau believes the same underlying rationale for the two-year transition period for balloon-payment qualified mortgages described above applies equally to the § 1026.32(d)(1)(ii)(C) exception from the high-cost mortgage balloon prohibition. Accordingly, the Bureau believes it is appropriate to extend this temporary framework to § 1026.32(d)(1)(ii)(C) and therefore is amending § 1026.32(d)(1)(ii)(C) to include loans meeting the criteria under § 1026.43(e)(6). Thus, for both balloon-payment qualified mortgages and for the high-cost mortgage balloon prohibition, the Bureau has adopted a two-year transition period during which the special treatment of balloon-payment loans does not depend on the creditor operating predominantly in rural or underserved areas.

The Bureau considered taking the same approach with regard to the

[34] 78 FR 30739 (May 23, 2013).

[35] The extent of such volatility in the transition from 2012 rural/non-rural status (for purposes of eligibility for the exemption during 2013) to 2013 rural/non-rural status (for purposes of eligibility for the exemption during 2014) is likely far greater than during other year-to-year transitions. This is due to the fact that this first year-to-year transition under the Bureau's ''rural'' definition happens to coincide with the redesignation by the USDA's Economic Research Service of U.S. counties' urban influence codes, on which the ''rural'' definition is generally based. This redesignation occurs only decennially, based on the most recent census data. Nevertheless, for purposes of eligibility for the exemption during 2013 and 2014, the volatility is significant—just as creditors are first attempting to apply the exemption's criteria.

escrow requirement but concluded ultimately that a smaller adjustment was appropriate. Because higher-priced mortgage loans are already subject to an escrow requirement, all creditors are currently required to maintain escrow accounts for such loans. Implementation of the amendments to the exemption will thus reduce burden for some creditors, but does not impose different requirements than the status quo except as to the length of time that an escrow account must be maintained. This is fundamentally different than the ability-to-repay and high-cost mortgage requirements, which would prohibit new balloon-payment loans from being accorded qualified mortgage status or from being made going forward absent implementation of the special exemptions. In addition, the Bureau may change the definitions of rural or underserved areas as the result of its re-examination process but does not anticipate lifting the requirement that creditors operate predominantly in rural or underserved areas to qualify for the exemption because Congress specifically contemplated that limitation on the escrows exemption. Accordingly, the Bureau believes it is appropriate to leave the definition in place, but to prevent volatility in the definition from negatively affecting creditors while the Bureau re-evaluates the underlying definitions. The Bureau believes that, as with the two balloon-payment provisions for which the Bureau believes two-year transition periods are appropriate, this amendment will benefit consumers by expanding access to credit in certain areas that met the definitions of ''rural'' or ''underserved'' at some time in the preceding three calendar years and also will facilitate compliance for creditors that make these loans. The Bureau also believes that the amendment will promote additional consistency between the regulatory provisions adopted by the 2013 HOEPA Final Rule, the 2013 ATR Final Rule, and the 2013 Escrows Final Rule, thereby facilitating compliance for affected creditors.

The Bureau notes that the mechanics of § 1026.35(b)(2)(iii)(A) differ slightly from the express transition period ending on January 10, 2016, under § 1026.43(e)(6). Thus, this amendment does not parallel the same transition period precisely, as does revised § 1026.32(d)(1)(ii)(C), which simply incorporates § 1026.43(e)(6)'s conditions by cross-reference. Instead, revised § 1026.35(b)(2)(iii)(A) approximates a two-year transition period by extending from one to three years the time for which a creditor, once eligible for the exemption, cannot lose that eligibility because of changes in the rural (or underserved) status of the counties in which the creditor operates. Because the 2013 Escrows Final Rule took effect on June 1, 2013, the escrows provisions already have begun operating over seven months earlier than the provisions adopted by the 2013 HOEPA and ATR Final Rules (which take effect on January 10, 2014). Thus, whereas the two balloon-payment provisions specifically last through January 10, 2016, the escrows-requirement exemption will guarantee eligibility (for a creditor that is eligible during 2013 with respect to operating predominantly in rural or underserved areas, and meets the other applicable criteria) through 2015. Thus, the revised § 1026.35(b)(2)(iii) exemption will approximately, though not exactly, track the extension of the balloon exemption for qualified mortgages under § 1026.43(e)(6), and the extension of the HOEPA balloon exemption under revised § 1026.32(d)(1)(ii)(C).

In addition to the changes discussed above, the Bureau also is amending § 1026.35(b)(2)(iii)(D)(*1*) and its commentary to conform to the expansion of the exemption to creditors that may meet the section 35(b)(2)(iii)(A) criteria for calendar year 2014 based on loans made in ''rural'' or ''underserved'' counties in calendar year 2011, but not 2012 or 2013. Section § 1026.35(b)(2)(iii)(D)(*1*) currently prohibits any creditor from availing itself of the exemption if it maintains escrow accounts for any extensions of consumer credit secured by real property or a dwelling that it or its affiliate currently service, unless the escrow accounts were established for first-lien higher-priced mortgage loans on or after April 1, 2010, and before June 1, 2013, or were established after consummation as an accommodation for distressed consumers. With respect to loans where escrows were established on or after April 1, 2010, and before June 1, 2013, the Supplementary Information to the 2013 Escrows Final Rule explained that the Bureau believes creditors should not be penalized for compliance with the then current regulation, which would have required any such loans to be escrowed after April 1, 2010, and prior to June 1, 2013—the date the exemption took effect. The Bureau understands that creditors that did not make more than 50 percent of their first-lien higher-priced mortgage loans in ''rural'' or ''underserved'' counties in calendar year 2012 would have been ineligible for the exemption for calendar year 2013, and thus would have been required under § 1026.35(a) to establish escrow accounts for any higher-priced mortgage loans those creditors made after June 1, 2013. However, it is possible in light of the amendments the Bureau is adopting that some of these same creditors may have met this criteria during calendar year 2011—and thus, because the Bureau is finalizing the proposal and allowing creditors to qualify for the exemption (assuming they satisfy the other conditions set forth in § 1026.35(b)(2)(iii)(B), (C), and (D))—such creditors will qualify for the exemption in 2014. However, absent additional clarification, there would be one barrier: For applications received on or after June 1, 2013, but before the date the proposed amendment takes effect (as proposed, January 1, 2014), such a creditor that made a first-lien higher-priced mortgage loan would have been required to escrow for that loan, and thus would be deemed ineligible under § 1026.35(b)(2)(iii)(D). The Bureau does not believe that such creditors should lose the exemption because they were ineligible prior to the proposed amendment taking effect and thus made loans with escrows from June 1, 2013, through December 31, 2013. As the Bureau discussed in the Supplementary Information to the 2013 Escrows Final Rule, the Bureau believes creditors should not be penalized for compliance with the current regulation. The Bureau thus believes it is appropriate to amend § 1026.35(b)(2)(iii)(D)(*1*) and comment 35(b)(2)(iii)(D)(*1*)–1.iv to exclude escrow accounts established after April 1, 2010 and before January 1, 2014.

In addition, the Bureau is revising comment 35(b)(2)(iii)(D)(*1*)–1.iv to clarify that the date ranges provided in § 1026.35(b)(2)(iii)(D)(*1*) apply to transactions for which creditors received applications on or after April 1, 2010, and before January 1, 2014. As discussed above, the Bureau believes such creditors should still qualify for the exemption provided under § 1026.35(b)(2)(iii) so long as they do not establish new escrow accounts for transactions for which they received applications on or after January 1, 2014, other than those described in § 1026.35(b)(2)(iii)(D)(*2*), and they otherwise qualify under § 1026.35(b)(2)(iii). The Bureau believes this clarification reflects both the manner in which the 2013 Escrows Rule originally applied to transactions and the applicability of this final rule.

Section 1026.36 Loan Originator Compensation

36(a) Definitions

Section 1026.36(a) defines the term ''loan originator'' for purposes of § 1026.36 as a person[36] who, for or in expectation of direct or indirect compensation or other monetary gain, engages in a defined set of activities or services (unless otherwise excluded). Section 1026.36(a) describes these activities broadly to include any such person who ''takes an application, offers, arranges, assists a consumer in obtaining or applying to obtain, negotiates, or otherwise obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such person can or will perform any of these activities.'' Commentary to § 1026.36(a) further describes and provides illustrations of these activities, including how the practice of ''referring'' consumers to creditors or loan originators, may affect one's status under the section.

Following publication of the 2013 Loan Originator Compensation Final Rule, the Bureau received numerous inquiries from industry regarding the activities that, if done for compensation or gain, would cause a person to be classified as a ''loan originator'' under § 1026.36. As discussed below, many of these inquiries sought clarification regarding specific terms used throughout the section, such as ''credit terms,'' or guidance on how the provision may apply to certain loan originator or creditor employees, agents or contractors such as tellers and greeters, as well as other interpretive questions. In response, the Bureau proposed several amendments to § 1026.36(a) and associated commentary adopted by the 2013 Loan Originator Compensation Final Rule to resolve inconsistencies in wording, to conform the comments to the intended operation of the regulation text, and to address issues raised during the regulatory implementation process. The Bureau proposed these changes pursuant to its TILA section 105(a) and Dodd-Frank Act section 1022(b)(1) authority. As discussed below, the Bureau is adopting most of these amendments as proposed with some revisions and additional clarifying amendments.

The Bureau also proposed to revise comments 36(a)–4.i and 36(a)–4.ii.B to clarify those provisions' application to loan originator or creditor agents and contractors as well as employees. The Bureau is not adopting this aspect of the proposal. As discussed below, comments 36(a)–4.i and 36(a)–4.ii.B illustrate two situations where an employee of a creditor or loan originator is conducting ''in house'' activity for his or her employer that is not considered to be ''referring'': (1) Handing applications from the employer to a consumer; and (2) providing loan originator or creditor contact information for the loan originator or creditor entity for which the person works, or a person that works for the same entity. The Bureau proposed to clarify that comments 36(a)–4.i and 36(a)–4.ii.B may be available to certain persons who work for creditors or loan originators, but may not technically be ''employed'' by the loan originator or creditor organization—*i.e.,* contract employees, temporary employees, interns, or other persons who may be working on a voluntary basis or being paid by another entity. However, upon further consideration, the Bureau believes the terms ''agent'' and ''contractor'' could be interpreted more broadly than the Bureau intended to include independent contractors or agents used by loan originators or creditors to refer customers to that loan originator or creditor. The Bureau did not intend these provisions to be applied this broadly, and also is concerned that such a reading could be inconsistent with other applicable laws, such as RESPA's prohibition on referral fees for federally related mortgages. Accordingly, the Bureau is limiting the scope of this comment to employees of loan originators or creditors.

The Bureau notes, however, that this does not mean these provisions may never be available to certain persons who may possibly be considered agents or contractors, such as temps or contract employees. While these provisions are limited to employees of creditors or loan originators, § 1026.2(b)(3) states that any terms not defined by Regulation Z is given the meanings given to them by State law or contract. The Bureau believes the term ''employee''—which is not defined under Regulation Z—is commonly defined under State law as well as employment contracts, and may extend to such persons in appropriate circumstances.

A. References to Credit Terms

The Proposal

The Bureau proposed to amend § 1026.36(a) and its commentary to clarify the meaning of ''credit terms,'' which is used in defining some of the exclusions to the general definition of ''loan originator,'' thereby further delineating the general definition. For example, as adopted by the 2013 Loan Originator Compensation Final Rule, § 1026.36(a)(1)(i)(A) allows persons who act as assistants to loan originators to perform clerical or administrative tasks on a loan originator's behalf without becoming loan originators themselves. To be eligible for the exclusion, however, the person must not, among other things, offer or negotiate ''credit terms available from a creditor.''

Similarly, comment 36(a)–4.i. explains when providing a consumer with a credit application, an activity that would otherwise be a referral, does not cause a person to be classified as a loan originator. This comment provides an exception to certain persons who, among other things, do not discuss ''specific credit terms or products available from a creditor with the consumer.''

In addition, comment 36(a)–4.ii.B explains when a loan originator's or creditor's employee, such as a teller or greeter, may engage in providing loan originator contact information to consumers, an activity that would otherwise be a referral, without being classified as a loan originator. This comment provides that the definition of loan originator does not include a creditor's or loan originator's employee who provides loan originator or creditor contact information to a consumer, provided the employee does not, among other things, ''discuss particular credit terms available from a creditor.'' *See also* § 1026.36(a)(1)(i)(B) and comments 36(a)–1.i.A.*2* through–1.i.A.*4* (other similar references to credit terms). This exclusion also assists in defining persons who are loan originators in the sense that it implies persons who do discuss specific or particular credit terms, as this activity is further clarified in this rule, would be included in the definition.

Following publication of the 2013 Loan Originator Compensation Final Rule, the Bureau received numerous inquiries from loan originators and creditors seeking guidance on the meaning of ''credit terms'' in these various contexts. In light of these inquiries, the Bureau was concerned that the term ''credit terms'' could have been construed too broadly and in a manner that could render any person that provides such general information a loan originator, which was not the Bureau's intent. Rather, the Bureau generally intended the references to ''credit terms'' throughout § 1026.36(a) to refer to particular credit terms that

[36] ''Person'' is defined in § 1026.2(a)(22) to mean, ''a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.''

are or may be made available *to the consumer* selected based on the consumer's financial characteristics. Distinct from such particular credit terms are general credit terms that a loan originator or creditor makes available and advertises to the public at large, such as where such person merely states: ''We offer rates as low as 3% to qualified consumers.''

To address these questions, the Bureau proposed to clarify usage of the term ''credit terms'' throughout the section in several ways. First, the Bureau noted that the definition of ''credit terms,'' which explains the term includes rate, fees, and other costs, had been provided only by a parenthetical clause in § 1026.36(a)(1)(i)(B) (a single exclusion that relates to retailers of manufactured homes) rather than in a separate, definitional provision. Thus, the definition appears to be limited to that single provision, even though the term is used in multiple places throughout § 1026.36(a). For clarification purposes, the Bureau proposed to move this definition from § 1026.36(a)(1)(i)(B), to new § 1026.36(a)(6), which explicitly makes the definition applicable to the entire section. The Bureau solicited comment on whether additional guidance concerning the meaning of particular credit terms that are or may be made available to the consumer in light of the consumer's financial characteristics is necessary, and if so, what clarifications would be helpful.

Second, the Bureau proposed to revise § 1026.36(a)(1)(i)(A) and (B), and comments 36(a)–1 and –4 to address inconsistencies regarding the meaning of ''credit terms,'' and to clarify that an activity involving credit terms for purposes of determining when a person is a loan originator must relate to ''particular credit terms that are or may be available from a creditor to that consumer selected based on the consumer's financial characteristics,'' not credit terms generally. The proposal would have clarified that a person who discusses with a consumer that, based on the consumer's financial characteristics, a creditor should be able to offer the consumer an interest rate of 3%, would be considered a loan originator. However, a person who merely states general information such as ''we offer rates as low as 3% to qualified consumers'' would not have been considered a loan originator because the person is not offering particular credit terms that are or may be available to that consumer selected based on the consumer's financial characteristics.

Comments

The Bureau received comments from trade associations, industry, and consumer groups that addressed this clarification. Most commenters generally supported the proposed clarification that ''credit terms'' refers to ''credit terms that are or may be made available from a creditor to that consumer selected based on the consumer's financial characteristics,'' as well as the proposed explanation that ''credit terms'' includes rates, fees, and other costs. Some commenters requested additional clarification regarding the meaning and application of ''the consumer's financial characteristics.'' A few industry commenters suggested that ''financial characteristics'' be limited to traditional factors that influence a credit decision, such as income and credit score. These commenters also asked the Bureau to clarify that an assessment of a consumer's financial characteristics does not include a person simply having general knowledge of the consumer's account or finances, but requires an actual assessment of the consumer's financial characteristics that form the basis for selection of credit terms. Consumer groups generally supported the clarification, but suggested that an assessment of a consumer's financial characteristics should include steering based on other factors such as race, ethnicity, or zip code.

Final Rule

The Bureau is adopting the clarifications to references to ''credit terms'' in § 1026.36(a)(1)(i)(A) and comments 36(a)–1 and –4 as proposed, and new § 1026.36(a)(6) (which states the definition of ''credit terms'' for purposes of the section) as proposed with an additional clarification. In response to public comments requesting additional clarification, the Bureau is modifying proposed § 1026.36(a)(6) to clarify that credit terms are selected based on a consumer's financial characteristics when those terms are selected based on factors that may influence a credit decision, such as the consumer's debts, income, assets, or credit history. The Bureau intends this language to capture situations where credit terms are offered or discussed as available or potentially available to a consumer based on that consumer's ability to obtain such credit. This would include examining the consumer's credit history (which could include a credit score), income, debts, or assets and then selecting credit terms that are either available or potentially available to the consumer based on those factors. The Bureau does not intend this language to cover situations where, for example, an employee of a loan originator or creditor may be aware of a consumer's assets, income, or other factors but does not select credit terms based on those factors.

The Bureau is not providing additional commentary to address potential referral concerns based on race, gender, ethnicity, or other non-financial factors. The Bureau intends this provision only to provide clarification on when a person may be considered a ''loan originator'' by discussing credit terms—*i.e.,* when the terms have been selected based on the consumer's financial characteristics. To the extent that inappropriate non-financial characteristics such as race, gender, or ethnicity may factor into the selection of credit terms, the Bureau believes such situations would be addressed by other applicable laws such as ECOA and the Fair Housing Act. In any event, the Bureau did not intend this clarification to define the appropriate means of evaluating consumers for credit; rather it only intended to clarify when a person may be considered a loan originator by virtue of discussing credit terms with a consumer. The Bureau believes these changes better align the scope of the loan originator definition with the intended scope of § 1026.36.

Finally, as explained below in the section that discusses applicability of § 1026.36(a)(1) to employees of manufactured home retailers, the Bureau is not adopting the proposed clarification to § 1026.36(a)(1)(i)(B) except for removing the parenthetical reference defining credit terms.

B. Application-Related Administrative and Clerical Tasks

The Proposal

Comment 36(a)–4 and its subparts explain certain activities that, for purposes of § 1026.36(a), do not constitute ''referring'' as defined in comment 36(a)–1, when done (in the absence of other loan originator activities defined in § 1026.36(a)(1)) by certain managers, administrative or clerical staff, or similar employees of a loan originator or creditor. One such comment, 36(a)–4.i, provides guidance regarding when such persons engage in application-related administrative and clerical tasks. Specifically, this comment provides that persons do not act as loan originators when they (1) at the request of the consumer, provide an application form to the consumer; (2) accept a completed application form from the consumer; or (3) without assisting the consumer in completing

the application, processing or analyzing the information, or discussing specific credit terms or products available from a creditor with the consumer, deliver the application to a loan originator or creditor.

After publication of the final rule, the Bureau received inquiries regarding the scope of this comment, specifically if the Bureau intended this comment to allow such persons only to provide applications from the entity for which they work to consumers without that constituting a ''referral,'' or if the exception is broader and would allow any such person to influence consumers' decisions and refer them to a particular creditor or set of creditors without being considered loan originators. The Bureau proposed revisions to comment 36(a)–4.i to clarify when providing a consumer with a credit application amounts to acting as a loan originator, as opposed to falling under the exclusion provided in comment 36(a)–4.i for application-related administrative and clerical tasks. Specifically, the Bureau proposed to revise this comment to clarify that the exclusion only extends to a loan originator or creditor employee (or agent or contractor) that provides a credit application form from the entity for which the person works to the consumer for the consumer to complete.

Comments

The Bureau received a number of comments from industry and trade associations that supported these clarifications. Most of these comments did not identify any additional need for clarification or suggestions. The Bureau also received a few comments from the manufactured housing industry, which are addressed separately in the discussion of § 1026.36(a)(1)(i)(B) below.

Final Rule

For the reasons discussed above, the Bureau is adopting comment 36(a)–4.i mostly as proposed, with some conforming changes for purposes of consistency with comment 36(a)–4.ii.B. While generally any person, including a loan originator employee would be acting as a loan originator for purposes of § 1026.36(a)(1) if he or she refers consumers to a particular creditor by providing an application from that creditor, the Bureau does not believe that a loan originator or creditor employee should be considered a loan originator for simply providing an application from the loan originator or creditor entity for which he or she works. The Bureau believes that, in such a case, provided that the person does not assist the consumer in completing the application or otherwise influence his or her decision, the person is performing an administrative task on behalf of the entity for which he or she works. Thus, in the Bureau's view, there would be little appreciable benefit for consumers for the rule to regard such persons as loan originators.

Also, as discussed below with respect to employees who provide creditor or loan originator contact information under comment 36(a)–4.ii.B, the Bureau believes ambiguity regarding the meaning of ''in response to a consumer's request''—a factor included in both comments 36(a)–4.i and 36(a)–4.ii.B—could cause unnecessary compliance challenges. Moreover, the Bureau notes that classifying such individuals as loan originators for providing an application without first waiting for an express request from the consumer would subject them to the requirements applicable to loan originators. Again, in the Bureau's view, there would be little appreciable benefit for consumers for the rule to regard such persons as loan originators where the person is simply providing a credit application from the entity for whom the person works. Accordingly, the Bureau is adopting comment 36(a)–4.i as proposed, including removing the condition that the provision of the application must be ''at the request of the consumer'' and making a conforming change to the comment to only apply to employees of the loan originator or creditor, not all persons. However, the Bureau is making some wording changes for purposes of consistency with comment 36(a)–4.ii.B. The Bureau also is removing a reference to ''credit products'' which also is inconsistent with comment 36(a)–4.ii.B. The Bureau believes in both instances the rule should consider employees to be loan originators when such persons discuss credit terms that are or may be made available by a creditor or loan originator to that consumer selected based on the consumer's financial characteristics, not when they simply discuss particular categories of credit products generally, such as mortgages or home equity loans. Also as discussed above, the Bureau is not adopting proposed language that expressly would have extended this comment to agents or contractors of loan originators or creditors.

C. Responding to Consumer Inquiries and Providing General Information

1. Employees of a Creditor or Loan Originator Who Provide Loan Originator or Creditor Contact Information

The Proposal

Comment 36(a)–4.ii.B provides that the definition of loan originator does not include persons who, as employees of a creditor or loan originator, provide loan originator or creditor contact information to a consumer in response to the consumer's request, provided that the employee does not discuss particular credit terms available from a creditor and does not direct the consumer, based on the employee's assessment of the consumer's financial characteristics, to a particular loan originator or creditor seeking to originate particular credit transactions to consumers with those financial characteristics. Prior to issuing the proposal, the Bureau received many inquiries on this topic from stakeholders expressing concern that, absent a clarifying amendment, the rule could be interpreted to require tellers, greeters, or other such employees to be classified as loan originators for merely providing contact information to a consumer who did not clearly or explicitly ask for it. Stakeholders further asserted that such persons should not be considered loan originators when their conduct is limited to following a script prompting them to ask whether the consumer is interested in a mortgage loan and the tellers are not able to engage in any independent assessment of the consumer. Moreover, stakeholders have asserted it would be very costly to implement the training and certification requirements under Regulation Z as amended by the 2013 Loan Originator Compensation Final Rule for employers with large numbers of administrative staff who interact with consumers on a day-to-day basis in the manner described.

The proposal would have addressed these concerns by removing the requirement that creditor or loan originator contact information must be provided ''in response to the consumer's request'' for the exclusion to apply. In addition, and similar to the clarifications regarding credit terms discussed above, the Bureau also proposed to clarify that comment 36(a)–4.ii.B applies to loan originator or creditor agents and contractors as well as employees.

Comments

The Bureau received substantial comments from trade associations and

industry, including credit unions and other small creditors, supporting the proposal. Consumer advocates also generally supported the proposal and did not raise specific objections to the revised comment. As discussed above, some consumer advocates and trade associations asked for additional clarification on what constitutes an ''assessment of a consumer's financial characteristics,'' but most comments did not make specific suggestions other than to note that they support the proposal and welcome the change. The Bureau also received a few comments from the manufactured housing industry requesting additional clarification regarding how the proposed comment would apply to retailers, who, according to these commenters, may not be employees, agents, or contractors of a loan originator or creditor. Specifically, these commenters requested that the Bureau expressly include employees, agents, or contractors of manufactured housing retailers as covered by the provision, even if such person does not work for a loan originator or creditor, but provides loan originator contact information to consumers in the same manner described in the proposal.

Final Rule

The Bureau is adopting comment 36(a)–4.ii.B as proposed with two modifications. First, as discussed above with respect to comment 36(a)–4.i, the Bureau is not adopting proposed language that would have extended the scope of the comment to agents or contractors of loan originators or creditors. Second, the Bureau is clarifying that the exclusion is only available to employees of a loan originator or creditor that provide the contact information of the loan originator or creditor entity for which he or she works, or of a person who works for that same entity. As proposed, the Bureau is removing the qualifying phrase ''in response to the consumer's request.'' The Bureau believes ambiguity regarding the meaning of ''in response to a consumer's request'' could have caused unnecessary compliance challenges. In such instances, the Bureau does not believe tellers or other such staff should be considered loan originators for merely providing loan originator or creditor contact information to the consumer (which would consist of such an employee directing a consumer to a loan originator who works for the same entity, or a creditor that is the same entity, as made explicit to conform the language in comments 4.i and 4.ii.B). The Bureau also notes that classifying such individuals as loan originators would subject them to the requirements applicable to loan originators with, in the Bureau's view, little appreciable benefit for consumers. However, the Bureau is retaining language, with some conforming changes, that would cover within the definition of ''loan originator'' any such employee of a creditor or loan originator organization who, in the course of providing loan originator or creditor contact information to the consumer, directs that consumer to a particular loan originator or particular creditor based on his or her assessment of the consumer's financial characteristics or discusses particular credit terms that are or may be available from a creditor or loan originator to the consumer selected based on consumer's financial characteristics. The Bureau believes these actions can influence the credit terms that the consumer ultimately obtains, and continues to believe these actions should result in application of the requirements imposed by the rule on loan originators. The Bureau believes this amendment should enable creditors and loan originators to implement the rule with respect to persons acting under the controlled circumstances specified by the comment while maintaining stronger protections in situations where significant steering could occur.

As noted above, the Bureau is making one adjustment to the comment to clarify that the exclusion only is available to an employee of a loan originator or creditor who provides the contact information of the loan originator or creditor entity for which he or she works, or of a person who works for that same entity. The Bureau recognizes that the proposed amendments did not expressly limit the exclusion in this way. However, the Bureau intended that the exclusion be subject to this limitation and believes it was strongly implied, given that the language of the exclusion begins with the qualification that the definition of loan originator does not include persons who,'' as employees of a creditor or loan originator,'' engage in certain activities. The fact that the exclusion only applies to persons in their capacity as employees of creditors or loan originators signals that they are only providing loan originator or creditor contract information for the entity for which they work. The Bureau did not contemplate that such persons would provide contact information, as employees of a creditor or loan originator, to loan originators or creditors that were not their employers and no comments indicating a different understanding of this provision were received. However, to better clarify application of the provision, the Bureau is modifying comment 36(a)–4.ii.B to state that the exclusion only extends to employees providing the contact information of ''the entity for which he or she works or of a person who works for that same entity.'' The Bureau believes this will eliminate any ambiguity in the proposed comment that may have led such employees to believe the exclusion would extend to providing contact information for loan originators or creditors outside the entity for which they work. Accordingly, the Bureau is adopting this revised comment as proposed with this modification.

Finally, as discussed in greater detail below in the section that addresses employees of manufactured housing retailers, the Bureau also received some comments that suggested manufactured housing retailer employees should be exempt from the loan originator definition altogether for ''referring,'' or otherwise should fall under this particular exclusion, regardless of whether they are employees, agents, or contractors of a loan originator or creditor. As discussed below in the discussion of § 1026.36(a)(1)(i)(B), the Bureau does not believe that any additional amendments to this comment are necessary that relate to manufactured housing retailer employees.

2. Describing Other Product-Related Service.

Comment 36(a)–4.ii.C provides that the definition of loan originator does not include persons who describe other product-related services. The Bureau proposed to amend this comment to provide examples of persons who describe other product-related services. The proposed new examples would have included persons who describe optional monthly payment methods via telephone or via automatic account withdrawals, the availability and features of online account access, the availability of 24-hour customer support, or free mobile applications to access account information. In addition, the proposed amendment to comment 36(a)–4.iii.C would have clarified that persons who perform the administrative task of coordinating the closing process are excluded, whereas persons who arrange credit transactions are not excluded. The Bureau received comments that generally supported the proposed clarifications, but did not receive comments specifically addressing this clarification in isolation. Accordingly, the Bureau is adopting

revised comments 36(a)–4.ii.C and 36(a)–4.iii.C as proposed.

3. Amounts for Charges for Services That Are Not Loan Origination Activities

Comment 36(a)–5.iv.B provides that compensation includes any salaries, commissions, and any financial or similar incentive, regardless of whether it is labeled as payment for services that are not loan origination activities. The Bureau proposed to revise this comment to provide that compensation includes any salaries, commissions, and any financial or similar incentive ''to an individual loan originator,'' regardless of whether it is labeled as payment for services that are not loan origination activities. The proposed wording change conforms this provision to the other provisions in comment 36(a)–5.iv that permit compensation paid to a loan originator organization under certain circumstances for services it performs that are not loan originator activities. The Bureau received comments that generally supported the proposed clarifications, but did not receive comments specifically addressing this clarification in isolation. Accordingly, the Bureau is adopting revised comment 36(a)–5 as proposed.

D. Clarification of Exclusion for Employees of Retailers of Manufactured Homes

The Proposal

As discussed above, the Bureau proposed to revise both §§ 1026.36(a)(1)(i)(A) and 1026.36(a)(1)(i)(B) to address several inconsistencies regarding the meaning of ''credit terms'' and to clarify that any such activity must relate to ''particular credit terms that are or may be available from a creditor to that consumer selected based on the consumer's financial characteristics,'' not credit terms generally. The proposed rule preamble also provided examples of how the proposed revisions to comment 36(a)–4.i would affect such employees of manufactured home retailers. As a result of these proposed revisions, employees (or agents or contractors) of manufactured home retailers who provide a credit application form from one particular creditor or loan originator organization that is not the entity for which they work would not have qualified for the exclusions in § 1026.36(a)(1)(i)(A) or § 1026.36(a)(1)(i)(B) and comment 36(a)–4.i. would not apply. In contrast, an employee of a manufactured home retailer who simply provides a credit application form from one particular creditor or loan originator organization that is his or her employer potentially would have been eligible for the exclusions in § 1026.36(a)(1)(i)(A) and § 1026.36(a)(1)(B) and comment 36(a)–4.i potentially would have applied. An agent or contractor of a manufactured home retailer who simply provides a credit application form from one particular creditor or loan originator organization it works for as agent or contractor potentially would have been eligible for the exclusion in § 1026.36(a)(1)(i)(A) and comment 36(a)–4.i. potentially would have applied. The proposed revisions also would have clarified that comment 36(a)–4.i. would apply to someone who merely delivers a completed credit application form from the consumer to a creditor or loan originator if other conditions are met, but would have removed language that could have been misinterpreted to suggest that comment 36(a)–4.i. would apply to someone who accepts an application in the sense of taking or helping the consumer complete an application could be eligible for the exclusion.

Comments

The Bureau received comments from the manufactured housing industry that sought additional clarification on how the proposed amendments would apply to employees of manufactured housing retailers. Specifically, these comments relate to the illustrations of the proposed amendments the Bureau provided in the preamble indicating that comment 36(a)–4.i would only apply to manufactured housing retailer employees who also are employees (or agents or contractors) of the creditor or loan originator. Commenters expressed concern that manufactured housing retailer employees are typically not employees, agents, or contractors of a loan originator or creditor, and thus would only be able to take advantage of this particular exclusion in the case where the retailer itself provides financing or acts as the loan originator. These commenters suggested that retailer employees should be allowed to ''refer'' customers to particular loan originators or creditors other than the retailer itself without being considered loan originators, so long as the other conditions set forth in comment 36(a)–4.i are met. In addition, these commenters also suggested that their employees should not be covered by the loan originator rules at all to the extent that they do not receive compensation from any creditor for such activity. No other commenters focused on application of the rules to manufactured home retailer employees.

Final Rule

As discussed below, the Bureau is adopting several clarifying amendments and additional commentary to address comments from the manufactured housing industry that questioned the applicability to manufactured home retailer employees of commentary that describes ''referral'' as loan originator activity and of various exclusions set forth in § 1026.36(a)(1)(i)(A), § 1026.36(a)(1)(i)(B), and discussed in comment 36(a)–4 and its subparts.

Background. As an initial interpretive matter, the Bureau believes it is helpful to outline the statutory provision implemented by § 1026.36(a)(1)(i)(B), and how it relates to other provisions implemented by the 2013 Loan Originator Compensation Final Rule. TILA section 103(cc)(2)(A) provides a three-part test for determining if a person is a loan originator, namely that, for or in expectation of direct or indirect compensation or gain, a person (1) Takes a mortgage application, (2) assists a consumer in obtaining or applying to obtain a mortgage loan, or (3) offers or negotiates terms of a mortgage loan. The language of TILA section 103(cc) that defines a ''mortgage originator'' does not specifically include the term ''refer'' or its variants. However, the Bureau has interpreted both ''assists a consumer in obtaining or applying to obtain a residential mortgage loan'' under section 103(cc)(2)(A)(ii) and ''offers'' under section 103(cc)(2)(A)(iii) to include a referral of a consumer to a loan originator or creditor.[37]

This definition, which forms the basis for the definition of loan originator adopted in § 1026.36(a)(1)(i), applies generally to all persons, unless one of a limited number of exclusions applies. One such exclusion exists for manufactured home retailer employees in TILA section 103(cc)(2)(C)(ii), and provides that the second part of the three-part test described above—assisting a consumer in obtaining or applying to obtain a mortgage loan—does not render a retailer employee a loan originator provided the employee does not engage in either of the other two steps (taking an application or offering or negotiating terms) and also does not advise a consumer on loan terms (including rates, fees, and other costs). Thus, a retailer employee who merely assists without offering, negotiating, taking an application, or advising, is not a loan originator (while one who offers or negotiates, takes an

[37] *See* 78 FR at 11300, including footnote 62 (Supplemental Information to the 2013 Loan Originator Compensation Final Rule, discussing ''offers'').

application, or advises on loan terms would be a loan originator).

This statutory provision was implemented by § 1026.36(a)(1)(i)(B), which is based on, and largely tracks, the statutory language. Consistent with this statutory structure, § 1026.36(a)(1)(i)(B) provides an exclusion for ''An employee of a manufactured home retailer who does not take a consumer credit application, offer or negotiate credit terms available from a creditor, or advise a consumer on credit terms (including rates, fees, and other costs) available from a creditor.'' The effect of this exclusion is that retailer employees are loan originators if they do anything in the general, core definition in § 1026.36(a)(1)(i) other than ''assist'' in a manner that doesn't constitute taking, advising, offering or negotiating, or advising on credit terms. Because both ''assisting'' and ''offering'' include the activity of referring, a retailer employee who makes a referral is ''offering'' and therefore is a loan originator.[38]

The Bureau believes these provisions make clear how employees of manufactured housing retailers fit within the § 1026.36(a)(1)(i) definition of loan originator, including with respect to referrals as described in comment 36(a)–1.i.A.*1*. The Bureau also provided some additional explanation in the Supplementary Information to the proposed rule, which sought to clarify further the application of comment 36(a)–4.i to such employees. However, the Bureau continues to receive inquiries from industry, including comments received in connection with the June 2013 Proposal, that indicate there is still substantial confusion regarding the application of these provisions and comments to employees of manufactured housing retailers. For this reason, the Bureau is adopting additional commentary to provide further guidance and codify explanations previously set forth in the Supplementary Information to the 2013 Loan Originator Compensation Final Rule and the June 2013 Proposal.

Proposed amendments to § 1026.36(a)(1)(i)(B). The Bureau is not adopting in this final rule proposed amendments to § 1026.36(a)(1)(i)(B) other than moving the definition of ''credit terms'' to § 1026.36(a)(6). As discussed above related to ''credit terms,'' the Bureau proposed to modify the reference to ''credit terms'' in §§ 1026.36(a)(1)(i)(A) and 1026.36(a)(1)(i)(B), as well as comments 36(a)–4.i and 36(a)–4.ii.B, to be limited to ''credit terms available from a creditor to that consumer selected based on the consumer's financial characteristics.'' As discussed above, the Bureau believes this limitation is appropriate in the context of § 1026.36(a)(1)(i)(A) and comments 36(a)–4.i and 36(a)–4.ii.B. Each of these provisions addresses situations where employees of a loan originator or creditor may, absent exception, be considered loan originators for conducting activity within the entities for which they work. For example, § 1026.36(a)(1)(i)(A) relates to persons who perform purely administrative or clerical tasks on behalf of a person who is classified as a loan originator or creditor, while comments 36(a)–4.i and 36(a)–4.ii.B relate to determining whether an employee of a loan originator or creditor engages in ''referring'' by providing an application from the entity for which such person works, or providing loan originator or creditor contact information for a loan originator or creditor that is or works for the same entity. Each of these situations applies to persons who may be assisting loan originators within the same entity or otherwise technically ''referring'' consumers to loan originators or creditors that are or work for the same entity. However, upon further consideration the Bureau believes the limitation is not appropriate in the context of § 1026.36(a)(1)(i)(B), which states that a manufactured home retailer employee would not be considered a loan originator if that person does not, among other things, ''offer or negotiate credit terms'' or ''advise a consumer on credit terms.'' The limitation is only intended to apply in the context of an employee of a loan originator or creditor assisting a loan originator or making a referral to the loan originator or creditor entity for which such person works. To the extent a retailer of manufactured housing is also a loan originator or creditor, the exclusions under § 1026.36(a)(1)(i)(A) and comments 36(a)–4.i and 36(a)–4.ii.B may be available for its employees. However, the limitation has no applicability outside of the loan originator or creditor employer/employee context and, accordingly, is not being included as the Bureau proposed in § 1026.36(a)(1)(i)(B), which addresses a different employer/employee context.

Accordingly, the Bureau is not adopting this proposed change to § 1026.36(a)(1)(i)(B).

Referrals. The Bureau is amending comment 36(a)–1.i.A.*1* to explain further the underlying statutory and regulatory bases for including ''referrals'' as loan originator activity. As adopted by the 2013 Loan Originator Compensation Final Rule, comment 36(a)–1.i.A.*1* explains what actions constitute '' referring'' for purposes of § 1026.36(a)(1)(i), while comment 36(a)–4 and its subparts provide guidance on certain activities that do not constitute referring. The Bureau is amending this comment to explain that referring is an activity included under each of the activities of offering, arranging, or assisting a consumer in obtaining or applying to obtain an extension of credit. Accordingly, the Bureau believes this amendment makes clear that, while a referral may be considered ''assisting,'' it also falls within other statutory and regulatory categories of loan originator activity not excluded from the loan originator definition for manufactured housing retailer employees. The Bureau believes the discussion above and the conforming revision to comment 36(a)–1.i.A.*1* better clarify what activities, when done by an employee of a retailer of manufactured homes, will cause such an employee to be classified as a loan originator for purposes of § 1026.36. The Bureau further notes this revision is consistent with the 2013 Loan Originator Compensation Final Rule, which provides an extensive discussion of the activities covered by TILA section 103(cc)(2)(A)(ii).[39] As noted above in this preamble, the retailer employee exclusion allows such an employee to engage in ''assisting'' activities in a manner that doesn't constitute taking, advising, offering or negotiating, or advising on credit terms.

New commentary. In addition, the Bureau is adding new commentary to provide further guidance on what activities may be considered ''assisting,'' but not other loan originator activities such as offering, arranging, or taking an application. In the Bureau's view, these activities, when engaged in by employees of manufactured housing retailers (in the absence of other activities), do not render such employees loan originators for purposes of § 1026.36. Accordingly, to provide greater clarity concerning the retailer employee exclusion consistent with these conclusions, a new comment

[38] This aspect of the retailer employee exclusion was implemented by § 1026.36(a) as adopted by the 2013 Loan Originator Compensation Final Rule, and explicitly addressed in the preamble to that rule, where the Bureau responded to similar comments from the manufactured housing industry. One of those comments asserted that, under the proposed exclusion for employees of a manufactured home retailer, employees could be compensated, in effect, for referring a consumer to a creditor without becoming a loan originator. The Bureau made clear that this was not a correct reading of the exclusion, and explained its basis for disagreeing. *See* 78 FR at 11305.

[39] See 78 FR at 11301 through 11303.

36(a)(1)(i)(B) is added by this final rule. The comment states that engaging in certain listed activities, as described below, does not make such an employee a loan originator.

The Bureau is adding new comment 36(a)(1)(i)(B)–1.i to explain that a retailer employee may generally describe the credit application process to a consumer and that this activity, standing alone, would not cause the employee to be considered a loan originator.[40] However, the retailer employee would be considered a loan originator if he or she advises on credit terms available from a creditor.

The Bureau is adding new comment 36(a)(1)(i)(B)–1.ii to explain that a retailer employee may prepare residential mortgage loan packages without being considered a loan originator.[41] Thus, a retailer employee may compile and process application materials and supporting documentation and, further consistent with the Final Rule, provide general application instruction to consumers so consumers can complete an application, but without interacting or communicating with the consumer regarding specific transaction terms.

The Bureau notes that this comment is consistent with the Supplementary Information to the 2013 Loan Originator Compensation Final Rule, which states:

> The Bureau agrees that persons generally engaged in loan processing or who compile and process application materials and supporting documentation and do not take an application, collect information on behalf of the consumer, or communicate or interact with consumers regarding specific transaction terms or products are not loan originators (see the separate discussion above on taking an application and collecting information on behalf of the consumer).[42]

In contrast, however, the Supplementary Information to the 2013 Loan Originator Compensation Final Rule also noted that ''filling out a consumer's application, inputting the information into an online application or other automated system, and taking information from the consumer over the phone to complete the application should be considered 'tak[ing] an application' for the purposes of the rule.'' [43] Because the retailer employee exclusion does not apply if the employee engages in taking an application, filling out a consumer's application, inputting the information into an online application or other automated system, and taking information from the consumer over the phone to complete the application would make the employee a loan originator.

The Bureau is adding new comment 36(a)(1)(i)(B)–1.iii to explain that a retailer employee may collect information on behalf of the consumer with regard to a residential mortgage loan.[44] This activity is not included in the activities covered by taking or offering or assisting that would make a retailer employee a loan originator. Comment 36(a)–1.i.*3.* and the Supplementary Information to the 2013 Loan Originator Compensation Final Rule describe the activity of collecting information on behalf of the consumer as including gathering information or supporting documentation from third parties on behalf of the consumer to provide to the consumer, for the consumer then to provide in the application or for the consumer to submit to the loan originator or creditor.[45]

The Bureau is adding new comment 36(a)(1)(i)(B)–1.iv to explain that a retailer employee may provide or make available general information about creditors that may offer financing for manufactured homes in the consumer's general area, when doing so does not otherwise amount to ''referring'' as defined in comment 36(a)–1.i.A.*1.* Comment 36(a)–1.i.A.*1* provides in part that referring ''includes any oral or written action directed to a consumer that can affirmatively influence the consumer to select a particular loan originator or creditor to obtain an extension of credit when the consumer will pay for such credit.'' Although this statement hardly covers the range of activities that may constitute referring, it does provide a basis for addressing the relatively unique circumstances of manufactured home retailer employees, who are covered by a limited statutory exclusion from the definition of loan originator.

The Bureau believes that most consumers purchasing a manufactured home will need financing, and that a limited set of options may be available. As public commenters have noted, only a small number of creditors make loans secured by manufactured homes, and it is beneficial to consumers for that information to be made available to them by a retailer. To facilitate consumer access to credit in this situation, new comment 36(a)(1)(i)(B)–.1.iv allows a retailer employee to make general information about creditors or loan originators available, which includes making available, in a neutral manner, general brochures or information about the different creditors or loan originators that may offer financing to a consumer, but does not include recommending a particular creditor or loan originator or otherwise influencing the consumer's decision. The Bureau believes this comment falls within the purview of the quoted portion of comment 36(a)–1.i.A.*1* above, taking into consideration the unique circumstances and the limited statutory exclusion.

Finally, the Bureau notes that the comment extends to providing general information about loan originators (*i.e.,* mortgage brokers) as well as creditors. Based on public comments, the Bureau believes that under current market conditions only a small number of specialized creditors currently operate in this market, and the Bureau is not aware of any mortgage brokers or similar loan originators that currently operate in this space. Nevertheless, the Bureau recognizes that circumstances may change and brokers or other loan originators may decide to offer loans secured by manufactured homes, and if that were to occur the Bureau believes the same logic that applies to creditors described above would apply with respect to these persons or organizations. Accordingly, the comment includes loan originators as well as creditors.

36(b) Scope

The Proposal

The Bureau proposed to revise the scope of provisions in § 1026.36(b) to reflect the applicability of the servicing provisions in § 1026.36(c) regarding payment processing, pyramiding late fees, and payoff statements as modified by the 2013 TILA Servicing Final Rule.[46] Current § 1026.36(b) and comment 36(b)–1 (relocated from § 1026.36(f) and comment 36–1, respectively, by the 2013 Loan Originator Compensation Final Rule)

[40] *See* 78 FR at 11302.

[41] *See* TILA section 103(cc)(4) (definition of ''assists'').

[42] 78 FR at 11303

[43] 78 FR at 11299. *See also* comment 36(a)–1.i.A.*3.,* 78 FR at 11415.

[44] *See* TILA section 103(cc)(4) (definition of ''assists a consumer in obtaining or applying to obtain a residential mortgage loan'').

[45] 78 FR at 11303, 11415.

[46] Among other things, the 2013 TILA Servicing Final Rule implemented TILA sections 129F and 129G added by section 1464 of the Dodd-Frank Act. The requirements in TILA section 129F concerning prompt crediting of payments apply to consumer credit transactions secured by a consumer's principal dwelling. The requirements in TILA section 129G concerning payoff statements apply to creditors or servicers of a home loan. The 2013 TILA Servicing Final Rule, however, did not substantively revise the existing late fee pyramiding requirement in § 1026.36(c) but instead redesignated the requirement as new paragraph 36(c)(2) to accommodate the regulatory provisions implementing TILA sections 129F and 129G.

provide that § 1026.36(c) applies to closed-end consumer credit transactions secured by a consumer's principal dwelling. The new payment processing provisions in § 1026.36(c)(1) and the restrictions on pyramiding late fees in § 1026.36(c)(2) both apply to consumer credit transactions secured by a consumer's principal dwelling. The new payoff statement provisions in § 1026.36(c)(3), however, apply more broadly to consumer credit transactions secured by a dwelling.

The proposal would have revised § 1026.36(b) and comment 36(b)–1 to state that § 1026.36(c)(1) and (c)(2) apply to consumer credit transactions secured by a consumer's principal dwelling. The proposed revisions also would have provided that § 1026.36(c)(3) applies to a consumer credit transaction secured by a dwelling (even if it is not the consumer's principal dwelling). The Bureau sought comment on these proposed revisions generally. The Bureau also invited comment on whether additional revisions to § 1026.36(b) and comment 36(b)–1 should be considered to clarify further the applicability of the provisions in § 1026.36(c) as modified by the 2013 Servicing Final Rules.

Comments

The Bureau received one comment that generally supported this clarification.

Final Rule

The Bureau is adopting these revisions to § 1026.36(b) and comment 36(b)–1 as proposed, to conform them to modifications made to § 1026.36(c) by the 2013 Servicing Final Rules that changed the applicability of certain provisions in § 1026.36(c). The Bureau believes the revisions are necessary to reflect the applicability of the provisions in § 1026.36(c) as modified by the 2013 Servicing Final Rules.

36(d) Prohibited Payments to Loan Originators

36(d)(1) Payments Based on a Term of the Transaction

36(d)(1)(i)

The Bureau proposed to revise comments 36(d)(1)–1.ii and 36(d)(1)–1.iii.D, which interpret § 1026.36(d)(1)(i)–(ii), to improve the consistency of the wording across the regulatory text and commentary, and provide further interpretation of the intended meaning of the regulatory text. The Bureau did not receive any comments pertaining to these particular proposed changes. As described below in the section-by-section analysis for § 1026.36(d)(1)(iv), the Bureau received a small number of comments expressing general support for the proposed clarifications to § 1026.36(d) and its commentary. The Bureau is finalizing the revisions to comments 36(d)(1)–1.ii and –1.iii.D as proposed. As it stated in the proposal, the Bureau believes these changes facilitate compliance.

36(d)(1)(iii)

The Bureau proposed to revise the portions of comment 36(d)(1)–3 that interpret § 1026.36(d)(1)(iii) to improve the consistency of the wording across the regulatory text and commentary, and provide further interpretation of the intended meaning of the regulatory text. The Bureau did not receive any comments pertaining to these particular proposed changes. As described below in the section-by-section analysis for § 1026.36(d)(1)(iv), the Bureau received a small number of comments expressing general support for the proposed clarifications to § 1026.36(d) and its commentary. The Bureau is finalizing the revisions to the portions of comment 36(d)(1)–3 that interpret § 1026.36(d)(1)(iii) as proposed. As it stated in the proposal, the Bureau believes these changes facilitate compliance.

36(d)(1)(iv)

The Bureau proposed revisions to the portions of comment 36(d)(1)–3 that interpret § 1026.36(d)(1)(iv). Section 1026.36(d)(1)(iv) permits, under certain circumstances, the payment of compensation under a non-deferred profits-based compensation plan to an individual loan originator even if the compensation is directly or indirectly based on the terms of multiple transactions by multiple individual loan originators. Section 1026.36(d)(1)(iv)(B)(*1*) permits this compensation if it does not exceed 10 percent of the individual loan originator's total compensation corresponding to the time period for which the compensation under a non-deferred profits-based compensation plan is paid. Comments 36(d)(1)–3.ii through –3.v further interpret § 1026.36(d)(1)(iv)(B)(*1*). Section 1026.36(d)(1)(iv)(B)(*2*) permits this compensation if the individual loan originator is a loan originator for ten or fewer consummated transactions during the 12-month period preceding the compensation determination. Comment 36(d)(1)–3.vi further interprets § 1026.36(d)(1)(iv)(B)(*2*). The Bureau proposed to amend comment 36(d)(1)–3 to improve the consistency of the wording across the regulatory text and commentary, provide further interpretation as to the intended meaning of the regulatory text in § 1026.36(d)(1)(iv), and ensure that the examples included in the commentary accurately reflect the interpretations of the regulatory text contained elsewhere in the commentary. As the Bureau explained in the proposal, nearly all of the proposed revisions address the commentary sections that interpret the meaning of § 1026.36(d)(1)(iv)(B)(*1*) (*i.e.,* setting forth the 10-percent total compensation limit) and not § 1026.36(d)(1)(iv)(B)(*2*). In the proposal, the Bureau explained that it was proposing more extensive clarifications to two comments interpreting § 1026.36(d)(1), comment 36(d)(1)–3.v.A, which clarifies the meaning of ''total compensation'' as used in § 1026.36(d)(1)(iv)(B)(*1*), and comment 36(d)(1)–3.v.C, to clarify the meaning of ''time period'' in § 1026.36(d)(1)(iv)(B)(*1*). The Bureau stated in the proposal that these proposed revisions were collectively intended to clarify that, while the time period used to determine both elements of the 10-percent limit ratio is the same: (1) the non-deferred profits-based compensation for the time period is whatever such compensation was earned during that time period, regardless of when it was actually paid; and (2) compensation that is actually paid during the time period, regardless of when it was earned, generally will be included in the amount of total compensation for that time period, but whether the compensation is included ultimately depends on the type of compensation.

Of the institutions and individuals who submitted comments on the proposed changes to the 2013 Loan Originator Compensation Final Rule, very few specifically discussed the proposed clarifications and amendments to § 1026.36(d) and its commentary. One large depository institution first highlighted some of the proposed changes to the § 1026.36(d) commentary and then stated that it generally agreed with the Bureau's proposed amendments and clarifications. Some consumer groups expressed general disagreement with elements of § 1026.36(d) adopted by the 2013 Loan Originator Compensation Final Rule, which they believe the proposed revisions would amplify, but did not address any specific issues with the proposal itself.

The Bureau is finalizing the changes to § 1026.36(d) and the portions of comment 36(d)(1)–3 that interpret § 1026.36(d)(1)(iv) as proposed. As it stated in the proposal, the Bureau

believes these changes would facilitate compliance.

36(i) Prohibition on Financing Credit Insurance

The Bureau proposed to amend § 1026.36(i) to clarify the scope of the prohibition on a creditor financing, directly or indirectly, any premiums for credit insurance in connection with a consumer credit transaction secured by a dwelling. Dodd-Frank Act section 1414 added TILA section 129C(d), which generally prohibits a creditor from financing premiums or fees for credit insurance in connection with a closed-end consumer credit transaction secured by a dwelling, or an extension of open-end consumer credit secured by the consumer's principal dwelling. The prohibition applies to credit life, credit disability, credit unemployment, credit property insurance, and other similar products, including debt cancellation and debt suspension contracts (defined collectively as ''credit insurance'' for purposes of this discussion). The same provision, however, excludes from the prohibition credit insurance premiums or fees that are ''calculated and paid in full on a monthly basis.'' As discussed below, the Bureau is adopting amended § 1026.36(i) as proposed with some modifications.

A. Background

1. Section 1026.36(i) as Adopted in the 2013 Loan Originator Compensation Final Rule

In the 2013 Loan Originator Compensation Final Rule, the Bureau implemented this prohibition by adopting the statutory provision without substantive change, in § 1026.36(i). The final rule provided an effective date of June 1, 2013, for § 1026.36(i) and clarified that the provision applies to transactions for which a creditor received an application on or after that date.[47]

In the preamble to the final rule, the Bureau responded to public comments on the regulatory text that the Bureau had included in its proposal. The public comments included requests from consumer groups for clarification on the applicability of the regulatory prohibition to certain factual scenarios where credit insurance premiums are charged periodically, rather than as a lump-sum that is added to the loan amount at consummation. In particular, they requested clarification on the meaning of the exclusion from the prohibition for credit insurance premiums or fees that are ''calculated and paid in full on a monthly basis.'' The Bureau did not receive any public comments from the credit insurance industry. The Bureau received a limited number of comments from creditors concerning the general prohibition, but these comments did not address specifically the applicability of the exclusion from the prohibition for premiums that are calculated and paid in full on a monthly basis.

In their comments, the consumer groups described two practices that they believed should be prohibited by the regulatory provision. First, they described a practice in which some creditors charge credit insurance premiums on a monthly basis but add those premiums to the consumer's outstanding principal. They stated that this practice does not meet the requirement that, to be excluded from the prohibition, premiums must be ''paid in full on a monthly basis.'' They also stated that this practice constitutes ''financing'' of credit insurance premiums, which is prohibited by the provision. Second, the consumer groups described a practice in which credit insurance premiums are charged to the consumer on a ''levelized'' basis, meaning that the premiums remain the same each month, even as the consumer pays down the outstanding balance of the loan. They stated that this practice does not meet the condition of the exclusion that premiums must be ''calculated . . . on a monthly basis,'' and therefore violates the statutory prohibition. In the preamble of the final rule, the Bureau stated that it agreed that these practices do not meet the condition of the exclusion and violate the prohibition on creditors financing credit insurance premiums.

2. Outreach During Implementation Period Following Publication of the Final Rule

After publication of the final rule, representatives of credit unions and credit insurers expressed concern to the Bureau about these statements in the preamble of the final rule. Credit union representatives questioned whether adding monthly premiums to a consumer's loan balance should necessarily be considered prohibited ''financing'' of the credit insurance premiums and indicated that, if it is considered financing and therefore is prohibited, they would not be able to adjust their data processing systems to comply before the June 1, 2013 effective date.

Credit insurance company representatives stated that level and levelized credit insurance premiums are in fact ''calculated . . . on a monthly basis.'' (These representatives explained that industry uses the term ''levelized'' premiums to refer to a flat monthly payment that is derived from a decreasing monthly premium payment arrangement and use the term ''level'' premium to refer to premiums for which there is no decreasing monthly premium payment arrangement available, such as for level mortgage life insurance.) These representatives further asserted that levelized premiums are, in fact, ''calculated . . . on a monthly basis'' because an actuarially derived rate is multiplied by a fixed monthly principal and interest payment to derive the monthly insurance premium. They also asserted that level premiums are ''calculated . . . on a monthly basis'' because an actuarially derived rate is multiplied by the consumer's original loan amount to derive the monthly insurance premium. Accordingly, they urged that level and levelized credit insurance premiums should be excluded from the prohibition on creditors financing credit insurance premiums so long as they are also paid in full on a monthly basis. Industry representatives have further stated that, even if the Bureau concludes that level or levelized credit insurance premiums are not ''calculated'' on a monthly basis within the meaning of the exclusion from the prohibition, they are not ''financed'' by a creditor and thus are not prohibited by the statutory provision.

3. Delay of § 1026.36(i) Effective Date

In light of these concerns, and the Bureau's belief that, if the effective date were not delayed, creditors could face uncertainty about whether and under what circumstances credit insurance premiums may be charged periodically in connection with covered consumer credit transactions secured by a dwelling, the Bureau issued the 2013 Effective Date Final Rule delaying the June 1, 2013 effective date of § 1026.36(i) to January 10, 2014.[48] In that final rule, the Bureau stated its belief that this uncertainty could result in a substantial compliance burden to industry. However, the Bureau also stated that it would revisit the effective date of the provision in this proposal.

B. Amendments to § 1026.36(i)

The Bureau proposed, as contemplated in the 2013 Effective Date Final Rule, amendments to § 1026.36(i) to clarify the scope of the prohibition on a creditor financing, directly or indirectly, any premiums for credit insurance in connection with a

[47] 78 FR at 11390.

[48] 78 FR 32547 (May 31, 2013).

consumer credit transaction secured by a dwelling. The Bureau proposed these amendments because it was persuaded, based on communications with consumer advocates, creditors, and trade associations, that its statement in the final rule in response to consumer group public comments may have been overbroad concerning when a creditor violates the prohibition on financing credit insurance premiums.

1. General Clarifications of Prohibition's Scope

The Proposal

The Bureau proposed two general clarifications to the scope of the prohibition. First, the Bureau proposed to clarify that, although the heading of the statutory prohibition emphasizes the prohibition on financing ''single-premium'' credit insurance, which historically has been accomplished by adding a lump-sum premium to the consumer's loan balance at consummation, the provision more broadly prohibits a creditor from ''financing'' credit insurance premiums ''directly or indirectly'' in connection with a covered consumer credit transaction secured by a dwelling. That is, it generally prohibits a creditor from financing credit insurance premiums at any time. Accordingly, the prohibited financing of credit insurance premiums is not limited to addition of a single, lump-sum premium to the loan amount by the creditor at consummation. The Bureau proposed to clarify the scope of the prohibition by striking the term ''single-premium'' from the § 1026.36(i) heading.

Second, the Bureau proposed to clarify the relationship between the exclusion for ''credit insurance for which premiums or fees are calculated and paid in full on a monthly basis'' and the general prohibition. The Bureau emphasized in the proposal that the mere fact that, under a particular premium calculation and payment arrangement, credit insurance premiums do not meet the conditions of the exclusion that they be ''calculated and paid in full on a monthly basis'' does not mean that a creditor is necessarily financing them in violation of the prohibition. For example, it is possible that credit insurance premiums could be calculated and paid in full by a consumer directly to a credit insurer on a quarterly basis with no indicia that the creditor is financing the premiums. (The Bureau's proposal to clarify the scope of the exclusion in situations in which the creditor is engaged in financing of credit insurance premiums is discussed below.)

Comments

Several commenters, including credit unions, credit insurance companies, and trade associations, expressed general appreciation and support for the Bureau's willingness to provide further clarifications regarding the prohibition. One credit insurance company asserted that the statutory provision is clear and requires no clarification. A number of credit insurance companies and trade associations supported the Bureau's foundational clarification that credit insurance premiums that do not meet the conditions of the exclusion that they be ''calculated and paid in full on a monthly basis'' do not necessarily indicate that a creditor is financing them in violation of the prohibition.

Several industry commenters, including credit unions and a credit union trade association, objected to the proposed removal of the term ''single-premium'' from the heading of § 1026.36(i), believing that the proposed change would expand the applicability of the prohibition to practices other than a creditor's addition of a single, lump-sum premium to the loan amount at consummation. The commenters stated that inclusion of the term ''single-premium'' in the heading of the statutory provision indicated that Congress intended the prohibition to apply only to that creditor practice.

Final Rule

The Bureau agrees that clarifications of the statutory and regulatory provisions are important to ensure that consumers and industry are able to determine which creditor practices regarding credit insurance are prohibited. The Bureau disagrees with the assertion that removal of the term ''single-premium'' from the heading of § 1026.36(i) affects the applicability of the regulatory provision or expands it beyond that of the statutory provision. The texts of both the statutory and regulatory provisions prohibit creditors from financing credit insurance premiums generally, not just those for single-premium credit insurance, in connection with certain dwelling-secured loans. Although the heading of the statutory provision emphasizes the applicability of the prohibition to financing of single-premium credit insurance, a basic rule of statutory interpretation is that the heading cannot narrow the plain meaning of the statutory text.[49]

[49] *Intel Corp.* v. *Advanced Micro Devices, Inc.,* 542 U.S. 241, 256 (2004).

2. Definition of ''Financing'' for Purposes of § 1026.36(i)

The Proposal

In the proposal, the Bureau explained its belief that practices that constitute ''financing'' of credit insurance premiums or fees by a creditor are generally equivalent to an extension of credit to a consumer with respect to payment of the credit insurance premiums or fees. While neither TILA nor the Dodd-Frank Act expressly defines the term ''financing,'' section 103(f) of TILA provides that the term ''credit'' means ''the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.'' [50] Based on this definition of ''credit,'' § 1026.4(a) of Regulation Z defines a ''finance charge'' to be a charge imposed by a creditor ''as an incident to or condition of an extension of credit.'' Thus, the Bureau believes the general understanding of the term ''financing'' under TILA and Regulation Z to be analogous to an extension of credit—*i.e.,* a creditor's granting of a right to incur a debt and defer its payment. The Bureau stated this belief in the proposal, noting that a creditor finances credit insurance premiums within the meaning of the prohibition when it provides a consumer the right to defer payment of premiums or fees, including when it adds a lump-sum premium to the loan balance at consummation, as well as when it adds a monthly credit insurance premium to the consumer's principal balance.

Accordingly, the Bureau proposed to add redesignated § 1026.36(i)(2)(ii), to clarify that a creditor finances credit insurance premiums or fees when it provides a consumer the right to defer payment of a credit insurance premium or fee owed by the consumer. However, the Bureau invited public comment on whether this clarification is appropriate. For example, the Bureau stated it did not believe that a brief delay in receipt of the consumer's premium or fee, such as might happen preceding a death or period of employment that the credit insurance is intended to cover, should cause immediate cancellation of the credit insurance. The Bureau also stated it did not believe that refraining from cancelling or causing cancellation of credit insurance in such circumstances means that a creditor has provided the consumer a right to defer payment of the premium or fee, but the Bureau invited public comment on consequences of defining the term ''finances'' as proposed. In addition, the Bureau noted that some creditors have suggested that

[50] 15 U.S.C. 1602(f). Accord 12 CFR 1026.2(a)(14).

they may, as a purely mechanical matter, add a monthly credit insurance premium to the principal balance shown on a monthly statement but then subtract the premium from the principal balance immediately or as soon as the premium or fee is paid. Accordingly, the Bureau solicited comment on whether a creditor should instead be considered to have financed credit insurance premiums or fees only if it charges a ''finance charge,'' as defined in § 1026.4(a) (which implements section 106 of TILA, 15 U.S.C. 1605), on or in connection with the credit insurance premium or fee. The Bureau also requested comment on other situations that may arise that could cause credit insurance premiums to be considered ''financed'' under the proposal and may warrant special treatment, such as deficiencies where credit insurance premiums are escrowed.

Comments on the Proposed Clarification

The Bureau received substantial comment from the credit insurance industry, trade associations, creditors, and consumer groups addressing the proposed definition of financing as well as the alternative. The Bureau received no comments identifying other situations such as escrowed premiums that could cause credit insurance premiums to be considered ''financed'' and may warrant special treatment. Most industry commenters, including credit insurance companies, credit unions, and their trade associations and attorneys, generally supported the proposed clarification that a creditor finances credit insurance premiums or fees when it provides a consumer the right to defer payment of a credit insurance premium or fee owed by the consumer. They urged the Bureau to clarify that the consumer does not ''owe'' the premium or fee until the consumer has incurred a ''debt'' for it, within the meaning of § 1026.2(a)(14). They stated that the consumer should not be considered to have incurred a debt for the credit insurance premium or fee until the monthly period in which the premium is due passes without the consumer having made the payment. Only then, these commenters stated, might creditors advance funds on the consumer's behalf and provide the consumer a right to defer its payment, such that financing might occur. Accordingly, many of these commenters urged the Bureau to clarify that a creditor finances a credit insurance premium only if it provides a consumer the right to defer payment of the premiums ''beyond the month in which they are due.'' These commenters addressed a specific illustration provided by consumer groups in connection with the 2013 Loan Originator Compensation Final Rule, which adopted the provisions this proposal would have amended. In that illustration, consumer groups described a creditor that appeared to be adding the premium to principal on a monthly basis and then providing the consumer the right to defer payment long beyond the month in which it was due, or even indefinitely. Commenters agreed that such a practice would be prohibited under the clarification they urged, though they stated, variously, that they had never heard of a creditor actually engaging in such a practice, or that such practices were very rare. They also stated that the clarification they urged would show why adding a lump-sum credit insurance premium to the loan balance at consummation was prohibited. They stated that in such circumstances, the premium is due at consummation, so there is no identifiable ''period'' in which the premium is due. One credit insurance company, as well as attorneys for creditors and credit insurance companies, stated that the credit insurance premium should be considered financed by the creditor only if the consumer does not pay the premium when it is due and the creditor incorporates it into the loan to create an additional obligation. The company and attorneys stated that a creditor should not be considered to have financed a past-due credit insurance premium if it does not add the premium to the loan amount, but instead it or the insurer provides a grace period, the insurer's obligation to perform under the credit insurance contract is suspended, or the contract is cancelled.

Some credit unions and credit insurance companies that urged the Bureau to adopt the clarification discussed above suggested that it was important, in part, to permit the continuation of some credit unions' practice of ''posting'' the premium to the consumer's account, meaning that it is added to principal before the credit insurance premium is due, so it is reflected on the next periodic statement. Under the practice, the creditor then credits the consumer's account (meaning it is subtracted from principal) after the creditor receives the consumer's payment. Comments suggested that, for at least some credit unions and other small creditors, it is necessary to post the charge prior to its due date so the consumer's next periodic statement reflects the monthly charge. Some of these commenters stated that additional interest accrues as a result of this addition until the consumer's subsequent payment of credit insurance premium is credited to the account. Other credit union commenters stated that when they add the premium to principal before it is due, no additional interest accrues as a result. One credit insurance company explained that this credit union practice was necessary because credit unions' accounting and data processing systems recognize only principal and interest categories. The company stated that, as a result, there is no other way for them to charge the premium without extensive and cost-prohibitive changes in these systems. The company also stated that, for any creditor making a closed-end, fixed-rate mortgage, the only way to charge the consumer a monthly credit insurance premium that declines as the mortgage balance declines and also to charge a total monthly payment (*i.e.,* a payment including premium, interest, and credit insurance premium) that remains constant from month to month, is to add the premium to principal. The same commenter stated that the act of adding the premium to principal before it is due should not be considered financing and that if the creditor adds the credit insurance premium to principal before the premium is due, the creditor should be considered to have financed the credit insurance premium only if the consumer subsequently fails to pay the credit insurance premium by the end of the month in which it is due. Another credit insurance company urged the Bureau to clarify that a creditor's addition of the credit insurance premium to the principal balance before it is due should not be considered financing of the credit insurance premium even if the consumer subsequently fails to make the payment when it is due, provided that the creditor added it to principal in the same monthly period in which the consumer was contractually obligated to pay the credit insurance premium.

Credit insurance companies, a credit insurance trade group, and several credit union commenters supported the proposed clarification of what constitutes financing but urged the Bureau to clarify that a creditor does not provide a consumer a right to defer payment of the credit insurance premium merely because the consumer fails to pay the premium when it is due, the creditor provides a forbearance, or the creditor and consumer enter into a post-consummation work-out agreement to defer or suspend mortgage payments. They stated that in such cases, the creditor may provide the consumer a

contractual right to defer payment of the credit insurance premium but typically does not ever add the deferred premium payment to the loan balance.

Consumer groups opposed the Bureau's proposed clarification that a creditor finances credit insurance premiums or fees when it provides a consumer the right to defer payment of a credit insurance premium or fee owed by the consumer. They reasoned that mere deferment of credit insurance premium payments is beneficial consumers, but, in their view, a creditor's act of charging consumers for the deferment is harmful to consumers. They expressed concern that the proposed clarification based on providing a consumer the right to defer payment of credit insurance premiums could cause creditors to stop deferring a consumer's obligation to pay credit insurance premiums without charge. They also stated that the proposed clarification could be confusing because the purpose of debt suspension contracts is to permit a consumer to skip a monthly mortgage payment. They disagreed with the comment of a credit insurance company that a creditor's addition of a credit insurance premium to principal in the same month that the consumer is contractually obligated to pay it should not be considered financing of the premium, even if doing so results in increased interest charge to the consumer and regardless of whether the consumer pays the credit insurance premium when it is due. The consumer groups countered that, if additional interest is charged as a result of the creditor's addition of the credit insurance premium to principal, then the creditor is clearly financing the credit insurance premium, regardless of when the consumer is obligated to make the credit insurance premium payment.

Comments on the Alternative Clarification

Several consumer groups, legal services organizations, and fair housing organizations supported the alternative provision that would have clarified what constitutes financing of credit insurance premiums or fees, on which the Bureau invited public comment. The alternative clarification would have provided that a creditor finances credit insurance premiums only if it charges a finance charge on or in connection with the credit insurance premium or fee. These commenters, however, urged the Bureau to broaden the alternative proposal further, to clarify that a creditor charges a finance charge in connection with the premium and thus finances credit insurance premiums or fees if it charges the consumer any dollar amount in a given month that exceeds a rate filed with and not disapproved by the State insurance regulator.

A number of credit unions also supported the alternative clarification. Generally, the credit unions that supported the alternative approach were the same credit unions that reported using the practice of adding credit insurance premiums to principal before they are due but stated that, under their own practices, no additional interest accrues as a result of the addition. These commenters stated that their practice should not be considered to be financing credit insurance premiums, but that a creditor that adds premiums to principal and allows additional interest to accrue until the consumer's subsequent payment is applied should be considered to be financing the credit insurance premiums.

Most other credit insurance and credit union commenters opposed the alternative proposal, for several reasons. Several credit insurance companies, creditor trade associations, and a credit union opposed the alternative proposal because the definition is vague. Specifically, they noted that the definition of ''finance charge'' in § 1026.2(a)(14) excludes credit insurance premiums and fees under certain conditions, and argued that a definition of financing credit insurance premiums and fees that depends on whether a finance charge is imposed ''on or in connection with'' credit insurance premiums or fees would create confusion and lead to unintended consequences. For example, they stated that a finance charge may arguably be paid ''in connection'' with a premium if additional interest accrues because payment of the premium—even in full on a monthly basis—may result in slower amortization of the loan than would occur if no premium were paid. However, such interest does not indicate the premium or fee is being advanced by the creditor to or on behalf of the consumer. They also stated that any additional interest that is accrued as a result of the creditor adding a monthly credit insurance premium to principal and the passage of time until the consumer's subsequent payment is applied should not be considered financing, because the addition to principal for accounting and monthly statement purposes does not indicate that the creditor is advancing any funds to or on behalf of the consumer. One such credit union also emphasized that the additional interest that accrues under its practices is very small, totaling on average 84 cents per year. It stated that the substantial cost of having to change accounting and data processing systems would be considerable, such that credit unions might simply choose not to offer credit insurance products to their customers.

In addition, these commenters stated that the alternative proposal appears inconsistent with the statutory exclusion for credit insurance premiums and fees that are calculated and ''paid in full on a monthly basis,'' which would allow a finance charge in connection with a premium to the extent monthly outstanding balance credit insurance (where the premium satisfies the criteria for ''calculated'' on a monthly basis) is paid in the same month the charge is posted.

Final Rule

Definition of financing. The Bureau is adopting in § 1026.36(i)(2)(ii) the proposed definition of ''financing'' as proposed, with one modification. Under final § 1026.36(i)(2)(ii), ''financing'' occurs when a creditor treats a credit insurance premium as an amount owed and provides a consumer the right to defer payment of that obligation. The Bureau believes this clarification best conforms the concept of ''financing'' in § 1026.36(i) with Regulation Z's concept of an extension of ''credit'' in § 1026.2(a)(14), which is defined as ''the right to defer payment of *debt* or to incur *debt* and defer its payment'' (emphasis added). The Bureau also is adopting an additional clarification that granting the consumer this right to defer payment only constitutes financing if it provides the consumer the right to defer payment of the premiums or fees ''beyond the period in which they are due.''

The Bureau believes this additional clarification is appropriate in light of public comments, and also is consistent with the exclusion for credit insurance premiums that are calculated and paid in full on a monthly basis. As some commenters suggested, if the total amount owed by the consumer has not increased by the amount of the premium upon the close of the monthly period (after accounting for principal payments), then the creditor has not advanced funds or treated the premium as an addition to the consumer's ''debt.'' Thus, consistent with Regulation Z's general concept of ''credit'' in § 1026.4(a)(14), the creditor is not treating the premium or fee as a debt obligation owed by the consumer and granting a right to defer payment of a debt, and is not ''financing'' the premium. This also is consistent with § 1026.36(i)(2)(iii), which provides that any premium ''calculated'' on a monthly basis would not be considered financed

if it were also paid in full on a monthly basis—*i.e.,* that the premium was not treated as a debt that the consumer was given a right to defer payment of beyond the month in which it was due. Accordingly, a creditor will not be considered to have financed a credit insurance premium if, upon the close of the month, the consumer has failed to make the premium or fee payment, but the creditor does not incorporate that amount into the amount owed by the consumer. However, if the creditor treats the premium as an addition to the consumer's debt, such as by communicating to the consumer that the consumer *must* pay it to satisfy the consumer's obligations under the loan or by charging interest on the premium, the creditor will be considered to have financed the premium in violation of the prohibition.

The Bureau recognizes that there are some specific situations where it may be beneficial to consumers if creditors allow some period of time after the end of the monthly period in which a premium was due to decide if they would like to continue the insurance coverage. The Bureau believes the important distinction regarding whether or not the premium is considered to be financed hinges on whether the creditor treats the premium as a debt obligation due and then defers a right pay. But, as some commenters noted, as an alternative to the creditor adding an unpaid premium to the loan balance to create additional debt, a grace period could be provided during which the insurance remains in force unless the consumer chooses not to pay the premium (in which case the insurance contract is cancelled), the insurer's obligation to perform under the credit insurance contract could be suspended in the event of non-payment, or the insurance contract could be cancelled automatically if the premium is not paid. In these cases, the creditor may allow the consumer additional time to pay the premium and keep the insurance in force, but does not advance the amount of money necessary to meet the monthly credit insurance payment on the consumer's behalf and then *require* that the consumer pay the creditor—*i.e.,* the creditor does not treat the premium as a debt and then provide the consumer a right to defer payment of the premium or fee. The Bureau believes these practices would, in most cases, not arise to the level of ''financing'' unless the creditor treats the premium as a debt and then allows deferral of payment beyond the month in which it was due.

The Bureau believes similar logic would apply with respect to other situations, such as consumers who are offered forbearance, modification agreements, or are otherwise delinquent on their monthly payments. In these cases, a creditor that effectively pays the monthly premium on the consumer's behalf and then treats that amount as a debt owed to the creditor beyond the month in which it is due would be financing the premium for purposes of § 1026.36(i). For example, assume that a consumer has credit insurance and typically pays $50.00 per month for that product. If the consumer is granted a six-month forbearance of monthly payments by the creditor (and the credit insurance itself is not used to cover monthly payments, but simply remains as a monthly charge), the creditor ''finances'' for purposes of § 1026.36(i) if the creditor charges the consumer $50.00 each month without collecting payment and ultimately adds $300.00 to the consumer's debt. Similarly, if the same consumer were six months delinquent on his or her loan (meaning no payments have been received), the creditor would not be permitted to pay the credit insurance premiums on behalf of the consumer and then treat $300.00 as an additional amount owed.

The Bureau appreciates the remaining concerns raised by consumer groups, but disagrees with some of their analyses. Consumer groups suggested providing that a creditor finances credit insurance premiums or fees any time the amount charged to the consumer exceeds the premium filed with and not disapproved by the State insurance regulator. It is the Bureau's understanding that under some State insurance regulation practices, not all types of credit insurance rates (such as those determined by an actuarial method) must be filed with the regulator. More importantly, even when applicable rates are filed with a State insurance regulator, the fact that a consumer is being charged more than the filed rate does not necessarily mean the creditor is *financing* the premium, even if the creditor receives commissions from the credit insurer. A difference between the filed rate and the amount charged to the consumer could be the result of actions by the credit insurer, rather than the creditor.

The Bureau also disagrees that significant confusion about debt suspension products will be caused by the clarification that a creditor finances premiums or fees for credit insurance if it provides a consumer the right to defer payment of a credit insurance premium or fee. Debt suspension contracts permit the consumer to defer payments of *principal and interest.* The clarification the Bureau is adopting addresses granting a consumer a right to defer payments of credit insurance *premiums and fees.*

Application of the provision to single-premium credit insurance. The Bureau is also adding comment 36(i)–1 to clarify how the prohibition applies to single-premium and monthly-pay products. It clarifies that in the case of single-premium credit insurance, a creditor violates § 1026.36(i) by adding the credit insurance premium or fee to the amount owed by the consumer at closing. The comment states further that, in the case of monthly-pay credit insurance, a creditor violates § 1026.36(i) if, upon the close of the monthly period in which the premium or fee is due, the creditor includes the premium or fee in the amount owed by the consumer—and thus treats it not as a monthly charge that could be cancelled prior to being due, but as a ''debt'' that is owed by the consumer to the creditor, which the consumer then would have a right to pay at some later date.

Interest charged when the borrower is not granted a right to defer payment. The Bureau invited public comment on whether credit insurance premiums should be considered financed by a creditor only if the creditor imposes a finance charge on or in connection with the premium or fee. In doing so, the Bureau assumed that in some cases creditors were granting a consumer the right to defer payment and imposing a finance charge for that right, but in other cases creditors were not charging consumers for providing that right. The Bureau did not anticipate that creditors were charging interest on the credit insurance premium or fee even though no funds were being advanced on the consumer's behalf at the time they began charging interest, under the practice described by some commenters. However, the Bureau notes that consumer groups and several industry commenters have stated that, at least in some cases, creditors appear to be adding credit insurance premiums to a consumer's principal balance before the premium is due from the consumer—even though no funds are advanced on behalf of the consumer at that time. Interest then accrues on the increased principal until the consumer's subsequent payment is credited to the account. Commenters have pointed out that this is typically a very small amount of interest; one industry commenter noted that, on average, the amount of interest accrued due to this practice is 87 cents per consumer.

In such cases, the Bureau believes that the accruing interest does not indicate that the creditor has financed the

premium precisely because, as several such creditors insist, they do not (and could not) advance any funds for the premium, and therefore could not add to the consumer's debt, until after the consumer's payment is actually due. Nevertheless (and even though the amount of interest charged may be very little), the Bureau believes that interest charged under such practices raises potential consumer protection concerns and may not be appropriate—although the reason it may be inappropriate is not because it indicates the creditor is financing the premium. Rather, the potential concerns arise if the creditor is charging the consumer additional interest on the premium *even though* the creditor is *not* financing the premium.

The Bureau notes that the scope of the § 1026.36(i) prohibition is limited to a creditor's practice of financing of premiums—which does not include treating the premium as an addition to the consumer's principal and charging interest on the addition before the premium is due.[51] Indeed, even under the proposed alternative definition of financing—which would have relied upon the creditor's imposing a ''finance charge'' in connection with the premium—this interest would not have fallen under the exclusion. The interest at issue would fail to meet the definition of a ''finance charge'' under § 1026.4, which is any charge imposed as an incident to or a condition of an extension of ''credit.'' As discussed above, § 1026.2(a)(14) defines ''credit'' as ''the right to defer payment of a debt or to incur debt and defer its payment''—and in the case of this particular practice there is neither a debt nor a right to defer payment prior to the point at which the charge is actually due. Thus, under either of the proposed definitions of financing, this practice would not have been subject to the prohibition.

However, the fact that imposing interest on a premium before it is due does not constitute ''financing'' the premium does not mean that such practices comply with other Federal or State requirements. The Bureau intends to monitor this practice in the future and may address this issue at another time, whether by rulemaking or other means. However, based on public comments received, the Bureau believes that credit unions and other small creditors should be able to mitigate any risk that may arise from this practice by not collecting the interest that accrues from the consumer. For example, some credit unions that face these accounting and data processing system limitations appear to add the premium to principal before the consumer's payment is due but do so without additional interest being charged to the consumer. The Bureau believes credit unions or other creditors facing such system limitations may be able to credit any accrued interest back to the consumer timely, thereby mitigating consumer protection concerns.

3. Calculated and Paid in Full on a Monthly Basis

The Proposal

The Bureau proposed to clarify in § 1026.36(i)(2)(iii) that credit insurance premiums or fees are calculated on a monthly basis if they are determined mathematically by multiplying a rate by the monthly outstanding balance (*e.g.,* the loan balance following the consumer's most recent monthly payment). As discussed above, § 1026.36(i) excludes from the prohibition on a creditor financing credit insurance premiums or fees any ''credit insurance for which premiums or fees are calculated and paid in full on a monthly basis.'' Although it had considered the concerns raised by industry following the issuance of the 2013 Loan Originator Compensation Final Rule, the Bureau stated that it continued to believe that the more straightforward interpretation of the statutory language regarding a premium or fee that is ''calculated . . . on a monthly basis'' is a premium or fee that declines as the consumer pays down the outstanding principal balance. Credit insurance with this feature is often referred to as a ''monthly outstanding balance,'' or M.O.B. credit insurance product. Level or levelized premiums or fees that are calculated by multiplying a rate by the initial loan amount or by a fixed monthly principal and interest payment are not calculated ''on a monthly basis'' in any meaningful way because the factors in the calculation do not change monthly (in contrast to the M.O.B. credit insurance product). Accordingly, under the proposed clarification, credit insurance could not have been categorically excluded from the scope of the prohibition on the ground that it is ''calculated and fully paid on a monthly basis'' if its premium or fee does not decline as the consumer pays down the outstanding principal balance. The Bureau noted that even if a particular premium calculation and payment arrangement provides for credit insurance premiums to be calculated on a monthly basis within the meaning of the proposed clarification, it must also provide for the premiums to be paid in full on a monthly basis (rather than added to principal, for example) to be categorically excluded from § 1026.36(i).

Comments

Most of the comments discussed above addressed the statutory exclusion as it relates to the definition of financing, but the Bureau also received some comments specifically addressing the exclusion. One credit insurance company, three state trade associations of credit unions, one national trade association of credit unions, and several consumer groups, legal services organizations, and fair housing organizations supported the Bureau's proposal clarifying what credit insurance premiums are calculated on a monthly basis. They agreed with the Bureau's statement that the most straightforward interpretation of a premium that is ''calculated . . . on a monthly basis'' is one that is determined mathematically by multiplying a rate by the monthly outstanding balance. Consumer groups urged the Bureau to clarify that the exclusion should apply only to a rate filed with and not disapproved by a State insurance regulator. A credit insurance company commenter urged the Bureau to clarify that the premium or fee is ''paid in full on a monthly basis'' if the consumer is contractually required to pay it in the same month in which the creditor ''posts'' it to the consumer's account, even if the consumer does not in fact pay a premium by the end of the monthly period.

Other credit insurance companies, a credit insurance trade association, several credit unions, and two state trade associations of credit unions stated that the Bureau's clarification was too narrow. They argued that any ''monthly pay'' credit insurance product should be excluded from the prohibition, regardless of whether the premium declines as the outstanding balance of the loan declines. They noted that model state legislation includes similar phrasing and has not been interpreted as being limited to products whose premiums decline as the loan balance declines. They stated that there was no indication that Congress intended a narrow meaning when it used similar language in the statutory prohibition.

Finally, one creditor trade association believed that the Bureau's proposal meant that levelized premiums

[51] The same concerns do not seem to arise if a creditor adds the premium to a line labeled ''principal'' on a monthly statement due to accounting and data system limitations but does not otherwise treat the premium as an addition to the consumer's debt and does not charge interest on the addition.

necessarily amount to prohibited creditor financing of credit insurance and it opposed the Bureau's proposal on that basis. An actuarial firm noted that level premiums are an important option in credit insurance products and urged the Bureau not to ban them.

Final Rule

The Bureau is adopting the provision as proposed. The Bureau does not believe that similarities between the statutory provision and language in model state legislation cited by some commenters means that Congress intended the phrase ''calculated . . . on a monthly basis'' to include a premium that stays constant every month, rather than the more straightforward meaning discussed above. The Bureau disagrees with the commenter that urged the Bureau to deem a premium to have been ''paid in full on a monthly basis'' by a consumer simply because it is contractually required to be paid monthly. Instead, if the creditor does not receive the consumer's payment, then the analysis under this final rule's clarification on what constitutes a creditor's financing of credit insurance premiums or fees, discussed above, applies. Finally, the Bureau again emphasizes that a credit insurance product with a level or levelized premium is not prohibited by this final rule. For any credit insurance product that does not meet the conditions of the exclusion, this final rule's clarification on what constitutes a creditor's financing of credit insurance premiums or fees applies.

4. Description of Creditors as at Times Acting as ''Passive Conduits'' for Credit Insurance Premiums and Fees

The Proposal

The Bureau noted in the proposal that credit insurance companies, in their communications with the Bureau subsequent to issuance of the 2013 Loan Originator Compensation Final Rule, described creditors as acting as ''passive conduits'' collecting and transmitting monthly premiums from the consumer to a credit insurer, rather than advancing funds to an insurer and collecting them subsequently from the consumer. Under such a scenario described by the credit insurance companies, the Bureau stated its belief that a creditor would not likely be providing a consumer the right to defer payment of a credit insurance premium or fee owed by the consumer within the meaning of the proposal, as discussed above. Similarly, the Bureau stated that, under the alternative interpretation that a creditor ''finances'' credit insurance only if it charges a ''finance charge'' on or in connection with the credit insurance premium or fee, as discussed above, a creditor that acts merely as a passive conduit for the payment of credit insurance premiums and fees to a credit insurer would not likely be charging such a finance charge. The Bureau stated that, on the other hand, a creditor that does not act merely as a passive conduit, but instead achieves a levelized premium by deferring payments, or portions of payments, due to a credit insurer for a monthly outstanding balance credit insurance product (or by imposing a finance charge incident to such deferment, under the alternative interpretation discussed above) would likely be considered to be financing the credit insurance premiums or fees.

The Bureau invited public comment on the extent to which creditors act other than as passive conduits in a manner that would constitute financing of credit insurance premiums or fees. Relatedly, the Bureau sought public comment on whether debt cancellation or suspension contracts, which may be provided by the creditor itself or its affiliate, and not a separate insurance company, may warrant different or specialized treatment under the provision because a creditor would not, by nature, act as a ''passive conduit'' to an insurance provider. The Bureau specifically invited public comment on what actions by a creditor should or should not be considered financing of debt cancellation or suspension contract fees, when the creditor is a party to the debt cancellation or suspension contract and payments for principal, interest, and the debt cancellation or suspension contract are retained by the creditor.

Comments

Several commenters objected to the Bureau's inclusion in preamble of the credit insurance industry's description of creditors as ''passive conduits'' that merely transmit consumers' credit insurance premiums on to credit insurance companies. Two credit insurance companies conceded that they had described creditors in this way but expressed concern that the Bureau's use of the term in the preamble might be misinterpreted. They stated that the description was intended to refer to one example of when a creditor was not financing credit insurance premiums, but that it might be interpreted to mean that when a creditor acts other than as a ''passive conduit'' for credit insurance premiums, it is necessarily financing them. Further, they stated that the Bureau's discussion in the preamble of an example of a creditor acting other than as a passive conduit (*i.e.,* when the creditor achieves a levelized premium by deferring payments, or portions of payments, due to a credit insurer) does not ever happen in practice. In addition, industry commenters stated that debt cancellation or suspension contracts should not be treated differently under the prohibition, but instead are charged and collected functionally in the same manner as traditional insurance products, except that they generally are not regulated by state insurance commissions or subject to rate-filing requirements.

Consumer groups asserted that creditors never act as passive conduits because creditors receive substantial commissions from credit insurance companies for the policies they sell and because the creditors are the primary beneficiaries of the credit insurance. Accordingly, they stated that, whenever a consumer is charged more in total premiums for a levelized credit insurance product than it would be charged for a monthly outstanding balance product with equivalent coverage, the creditor should be deemed to have financed the credit insurance premium, even if the insurer, rather than the creditor, accomplished the ''levelizing'' of the premium.

Final Rule

With respect to the Bureau's discussion of creditors as ''passive conduits'' of credit insurance premiums in the preamble of the proposed rule, the Bureau did not propose to promulgate, and is not promulgating in this final rule, a provision adopting that concept. Instead, as the Bureau explained in the proposal, the description was offered by credit insurance companies in their discussions with the Bureau, and the Bureau referred to it in the proposal as a means to elicit public comments and information on creditor practices that do not fit that description, especially with respect to debt cancellation and debt suspension products. The Bureau did not state a belief that creditors do act as passive conduits, or that any action that does not fit that description amounts to a violation of the provision. In addition, based on public comments it received, the Bureau does not believe it is necessary to adopt a provision that treats debt suspension or debt cancellation fees differently from credit insurance products.

VII. Section 1022(b)(2) of the Dodd-Frank Act

A. Overview

In developing the final rule, the Bureau has considered the potential benefits, costs, and impacts.[52] In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, the Securities and Exchange Commission, HUD, the Federal Housing Finance Agency, 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.[53] These amendments focus primarily on clarifying or revising (1) Provisions of Regulation X's related to information requests and error notices; (2) loss mitigation procedures under Regulation X's servicing provisions; (3) amounts counted as loan originator compensation to retailers of manufactured homes and their employees for purposes of applying points and fees thresholds under HOEPA and the qualified mortgage rules in Regulation Z; (4) determination of which creditors operate predominantly in ''rural'' or ''underserved'' areas for various purposes under the mortgage regulations; (5) application of the loan originator compensation rules to bank tellers and similar staff; and (6) the prohibition on creditor-financed credit insurance. The Bureau also is adjusting the effective dates for certain provisions adopted by the 2013 Loan Originator Compensation Final Rule and making technical and wording changes for clarification purposes to Regulations B, X, and Z.

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 as well as the information and analysis on which the January rules were based provide insight into the benefits, costs and impacts and where relevant, the analysis provides a qualitative discussion of the benefits, cost 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,[54] an important benefit of most of the provisions of this 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. Other benefits and costs are considered below.

As described above, the Bureau is amending the commentary to § 1024.35(c) and § 1024.36(b). As adopted by the 2013 Mortgage Servicing Rules, these provisions and accompanying commentary require a servicer that has established an exclusive address at which it will receive communications pursuant to § 1024.35 and § 1024.36 to disclose that address whenever it provides a borrower any contact information for assistance from the servicer. The Bureau is amending the commentary so that the exclusive address need be provided on the written notice that designates the specific address; the periodic statement or coupon book required pursuant to 12 CFR 1026.41; any Web site the servicer maintains in connection with the servicing of the loan; and any notice required pursuant to §§ 1024.39 or .41 that includes contact information for assistance.

These amendments reduce the costs to servicers of complying with § 1024.35(c) and § 1024.36(b) of the final rule by reducing the number of documents and other sources of information that must be modified to include the designated address. The Bureau believes that these amendments will cause at most a minimal reduction in the benefits to consumers. A borrower looking for the address to which to send a notice of error or a request for information would likely consult the servicer's Web site, the borrower's statement or coupon book, any loss mitigation documents, or perhaps the written notice designating the specific address. Further, servicers have an obligation, established by the January rule, to maintain policies and procedures reasonably designed to achieve the objective of informing borrowers of the procedures for submitting written notices of error and written information requests. Thus, a servicer should provide the proper address to a borrower who contacts the servicer for the address to which to send a notice of error or a request for information. In light of these two parallel requirements, the Bureau believes borrowers will still have ready access to the exclusive address and are not likely to send a notice of error or a request for information to an improper address. Alternatives that would require the designated address on even fewer documents or communications would further reduce the compliance costs to servicers but would increase the risk that borrowers who wish to send a notice of error or a request for information would consult a document that did not include the exclusive address and would misroute their notice or request accordingly.

The Bureau is amending § 1024.35(g)(1)(iii)(B) (untimely notices of error) and § 1024.36(f)(1)(v)(B) (untimely requests for information), which, as adopted in January, provided respectively that the notice or request is untimely if it is delivered to the servicer more than one year after a mortgage loan balance was paid in full. Under the amended provisions, the one-year period designated by these requirements will begin when a mortgage loan is discharged, such as through foreclosure or deed in lieu of foreclosure, even if the loan balance was not paid in full.

These amendments reduce costs to servicers by increasing the number of situations in which a notice or request is untimely and servicers are therefore not required to comply with certain requirements of § 1024.35 or § 1024.36. To the extent servicers no longer respond to notices or requests that are untimely because of these amendments, the lack of a response may impose some cost to consumers. The Bureau does not have data on the frequency with which borrowers with a mortgage that is terminated without being paid in full also assert an error or request information (within the scope of these requirements) more than one year after such termination, nor does the Bureau have information on the subsequent outcomes for such borrowers. However, the Bureau believes that one year after a mortgage loan is discharged generally provides sufficient time for borrowers to assert errors or request information. Consequently, an inability to obtain a response to such a notice or request during the longer period the rule prescribed before these amendments

[52] 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.

[53] 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 May 2013 Escrows Final Rule.

[54] 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.

would constitute at most a minimal impact on the benefits to consumers.

The Bureau is amending the commentary to § 1024.41(b)(2)(i) and adding new § 1024.41(c)(2)(iv) to address the situation in which a servicer determines that additional information from the borrower is needed to complete an evaluation of a loss mitigation application after the servicer has informed the borrower, via the notice pursuant to § 1026.41(b)(2)(i)(B), that the loss mitigation application is complete or the borrower provided the particular information identified as missing in an original notice. In summary, the servicer must request the additional information and provide a reasonable time for the borrower to respond. If the borrower provides the additional information, the 30-day evaluation period within which to evaluate the borrower for all loss mitigation options available to the borrower begins as of the date the borrower provides the remaining information. The borrower, on the other hand, receives the protections against foreclosure during the period provided to gather the supplemental information. If the borrower provides the additional information, the borrower will also receive the right to appeal and other rights as though the application were actually complete when either the borrower submitted the original loss mitigation application (if the notice informed the borrower that the application was complete) or the borrower provided the particular information identified in the original notice (if the notice informed the borrower that the application was incomplete). In situations in which a servicer determines that supplemental information from the borrower is needed after sending the § 1024.41(b)(2)(i)(B) notice, these dates will generally be earlier than the date on which the borrower provides the supplemental information to make the application complete. Accordingly, the amended final rule provides greater consumer protections than the original final rule or the proposal.

The costs to the servicer of these amendments are the costs of complying that are incremental to the baseline costs arising from the 2013 Mortgage Servicing Final Rules. The Bureau believes that in all cases these costs are small given other provisions of the 2013 Mortgage Servicing Final Rules. As discussed above, under that final rule, servicers are required to review a loss mitigation application to determine whether it is complete or incomplete, to have policies and procedures reasonably designed to achieve the objectives of identifying documents and information that a borrower is required to submit to complete an otherwise incomplete loss mitigation application, and to exercise reasonable diligence in obtaining documents and information necessary to complete an incomplete application. Thus, the 2013 Mortgage Servicing Final Rules already obligated the servicer to exercise reasonable diligence to bring to completion an application that was facially complete but in fact lacked information necessary for review. The servicer would therefore, even absent the new provisions, have the personnel and infrastructure needed to contact the borrower for additional information and evaluate the application since these are required to comply with the other obligations stated above. Thus, the Bureau does not believe that the costs of complying with the amendment are significant.

The benefits to consumers of these amendments are the benefits of servicers following the procedures adopted by this final rule that are incremental to the baseline benefits defined by the final servicing rule. The amendment requires servicers to promptly request any additional information or documents needed to complete a facially complete loss mitigation application, and also provides borrowers with a reasonable amount of time to provide any such documents or information. The amendment delays the 30-day period during which a servicer must evaluate a complete application until after the borrower has provided such documents or information. This additional time benefits consumers by encouraging thorough review of these applications. Further, the rule will make clear that a servicer has fulfilled its obligations if it follows the new procedure. This encourages servicers to acknowledge and rectify their errors and therefore increases the likelihood that servicers will make loss mitigation decisions on the basis of complete information.

As an alternative, if borrowers receive protections from the date on which the application is actually complete (instead of facially complete), it is more likely the date would be past the 120th day of delinquency or closer to the date of a foreclosure sale. Servicers might have slightly lower costs under this alternative, perhaps from a shorter period of providing continuity of contact and monitoring the property, but borrowers would receive fewer protections against foreclosure. Further, servicers that wanted to provide fewer protections could more easily manipulate the date on which an application is actually complete than the date on which it is facially complete given that facial completeness is determined by a mandated timeline and disclosure and by how quickly the consumer provides any missing information identified in the disclosure.

The Bureau is amending the § 1024.41(b)(2)(ii) time period disclosure requirement, which requires a servicer to provide a date by which a borrower should submit any missing documents and information necessary to make a loss mitigation application complete. As explained above, § 1024.41(b)(2)(ii) as originally adopted requires the servicer to notify the borrower that the borrower should submit such missing documents and information by the earliest of certain dates. This requirement would have applied even if the nearest date would leave the borrower with very little time to assemble the missing information. The amendment requires the servicer to provide a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete. Commentary provides additional guidance and advises a servicer to select the nearest of four key dates that is at least seven days in the future. This change presents some tradeoff in benefits and costs for consumers, but on balance the Bureau believes that it will be beneficial to consumers. Consumers who would have been provided impracticable dates for responding in the initial notice generally benefit from this amendment by being provided with useful information. In particular, the Bureau believes that some consumers who might have failed to complete the loss mitigation application altogether when faced with an impracticable date for submitting materials would be more likely to complete the application by a reasonable date as determined under the amended rule, and thus to secure consideration for foreclosure alternatives and some of the important procedural rights available to them under the loss mitigation regulations. Servicers will incur one-time costs for changes to software to check whether the nearest key date is closer than the rule permits and provide the later date in this case. Servicers may also incur costs associated with receiving additional complete loss mitigation applications.

The Bureau is adding a new provision in § 1024.41(b)(3) addressing how borrower protections are determined when no foreclosure sale is scheduled as of the date a complete loss mitigation application is received or when a foreclosure sale is rescheduled after receipt of a complete application. Under the final servicing rule, a servicer could,

arguably, initiate the foreclosure process on day 121 of delinquency, receive a complete loss mitigation application from a borrower, schedule a foreclosure sale within 90 days, and then provide fewer protections than those afforded to loss mitigation applications received at least 90 days before a scheduled foreclosure sale. The new provisions provide that if no foreclosure sale has been scheduled as of the date that a complete loss mitigation application is received, the application shall be treated as if it were received at least 90 days before a scheduled foreclosure sale. In addition, the new provisions make clear that whether certain foreclosure protections and other rights in the rule apply depends on the date for which a foreclosure sale was scheduled at the time of a borrower's complete application. If the scheduled date later changes, the foreclosure protections and other rights that arose at the time of the complete application do not change.

The Bureau recognizes that the new provisions may reduce some of the flexibility servicers had under the 2013 Mortgage Servicing Rule. This is a cost to servicers. Further, some servicers in possession of an incomplete loss mitigation application on day 121 of delinquency who would not have scheduled a foreclosure sale may now do so in order to avoid the risk of a longer time to foreclosure. As a result, certain borrowers may have less time to respond to a loss mitigation offer and no right to appeal a denial. On the other hand, borrowers with servicers that do not accelerate the scheduling of foreclosure sales have clearer rights and most likely more time to respond to a loss mitigation offer and a right to appeal a denial. The Bureau cannot quantify these different effects, but believes that they are most likely small given the wide range of other factors that determine the time to foreclosure.

The Bureau is modifying § 1024.41(c)(2) to allow servicers to offer certain short-term forbearances to borrowers, notwithstanding the prohibition on servicers offering a loss mitigation option to a borrower based on the review of an incomplete loss mitigation application. This provision imposes no costs on servicers because it does not impose any new obligations on servicers relative to the final rule. The provision benefits servicers by providing a relatively low-cost way for servicers to provide borrowers with a particular loss mitigation option. Similarly, the provision imposes no costs on borrowers since the borrower can reject forbearance based on review of an incomplete loss mitigation option, provide a complete loss mitigation application, and be reviewed for all loss mitigation options available to the borrower (and other protections) as under the final rule. The provision benefits borrowers by providing borrowers with a particular loss mitigation option on the basis of an incomplete application and therefore without exhausting the option to have the servicer review a complete loss mitigation application.

As discussed above, the Bureau is conscious of the fact that some servicers have significantly exacerbated borrowers' financial difficulties in the past by using short-term forbearance programs inappropriately instead of reviewing the borrowers for long-term options. Thus, in developing this provision, the Bureau has sought to ensure that borrowers would receive significant benefits from forbearance based on review of an incomplete loss mitigation option with minimal additional risk or loss of consumer protections. However, while a long forbearance period creates risks to consumers by generating a significant debt and increasing the chance the borrower might have been better off with an option that the servicer would have offered after evaluating a complete loss mitigation application, the comments received also emphasized heavily that very short forbearance periods do not provide much benefit to borrowers in situations in which forbearance is being used appropriately because they do not allow sufficient time for borrowers to remedy the short-term problems that created the need for forbearance and resume making payments on their loans. The Bureau does not have data with which to identify the average or maximum length of time of forbearance that would balance these factors. Further, the risks to consumers from not specifying a maximum length of time for forbearance are mitigated somewhat by the fact that a borrower who receives a forbearance agreement without having submitted a complete loss mitigation application can trigger a review for loss mitigation options by submitting a complete application more than 37 days before a scheduled foreclosure sale. Taking these factors into account, the Bureau believes that borrowers benefit more from the new forbearance provisions than they would from alternatives that imposed a maximum length of time on forbearance.

The Bureau is also clarifying the ''first notice or filing'' standard in § 1024.41(f). The 2013 Mortgage Servicing Final Rules prohibited servicers from making the ''first notice or filing'' under state law during the first 120 days of the borrower's delinquency, but interpreted ''first notice or filing'' broadly to include notices of default or other notices required by applicable law in order to pursue acceleration of a mortgage loan obligation or the sale of a property securing a mortgage loan obligation. The Bureau is modifying this interpretation and adopting a narrower construction that more closely tracks the Federal Housing Administration's ''first legal'' standard. The Bureau also is clarifying how the rule works across states with different foreclosure laws—such as in ''judicial'' states where foreclosure requires an action filed in court and in ''non-judicial'' states where foreclosure requires notice or publication of sale.

The Bureau believes these amendments will benefit servicers by clarifying the scope of actions prohibited during a borrower's first 120 days in accordance with a familiar standard. In addition, the amendments will not unduly delay foreclosures in states that provide statutory or other notice and cure processes in advance of a foreclosure action or sale by forcing servicers to wait 120 days to send such a notice. The Bureau believes these amendments will benefit borrowers because they will allow notices that do not initiate foreclosure, but instead are intended to provide borrowers with information about counseling and other loss mitigation resources as a means of avoiding foreclosure during the first 120 days of delinquency, when those notices are most likely to benefit borrowers. The Bureau recognizes the possibility that these amendments may, in certain States, allow foreclosure to be initiated more quickly than under the Final Rule, but the Bureau believes that the amendments are beneficial to borrowers overall.

In addition, the Bureau is modifying or clarifying other Regulation X loss mitigation provisions. The Bureau is amending § 1024.41(c)(1)(ii) to state explicitly that the notice required by § 1024.41(c)(1)(ii) must state the deadline for accepting or rejecting a servicer's offer of a loss mitigation option. The Bureau is amending § 1024.41(h)(4) to provide expressly that the notice informing a borrower of the determination of his or her appeal must also state the amount of time the borrower has to accept or reject an offer of a loss mitigation option after the notice is provided to the borrower. The Bureau is amending § 1024.41(f)(1), the prohibition on referral to foreclosure until after the 120th day of delinquency, by exempting a foreclosure based on a borrower's violation of a due-on-sale clause or in which the servicer is joining the foreclosure action of a subordinate

lienholder. Finally, the Bureau is clarifying the requirement in § 1024.41(d)(1) (re-codified as § 1024.41(d)) that a servicer must disclose the reasons for the denial of any trial or permanent loan modification option available to the borrower to make clear that this provision requires the servicer to disclose only determinations actually made by the servicer and does not require a servicer to continue evaluating additional factors after a decision has been established. The Bureau believes these modifications will only minimally increase costs to servicers and the clarifications will likely benefit both servicers and consumers, in part through reduced implementation costs.

Two of the sets of modifications to the Regulation Z provisions involve loan originator compensation. The Bureau is clarifying for retailers of manufactured homes and their employees what compensation can be attributed to a transaction at the time the interest rate is set and must be included in the points and fees thresholds for qualified mortgages and high-cost mortgages under HOEPA. As discussed above, the final rule will exclude from points and fees of loan originator compensation paid by a retailer of manufactured homes to its employees and will clarify that the sales price of a manufactured home does not include loan originator compensation that must be included in points and fees. Both of these changes will reduce the burden for creditors in manufactured home transactions by eliminating the need for them in certain circumstances to attempt to determine what, if any, retailer employee compensation and what, if any, part of the sales price will count as loan originator compensation that must be included in points and fees. This amendment is also likely to lower slightly the amount of money counted toward the points and fees thresholds on the covered loans. As a result, keeping all other provisions of a given loan fixed, this will result in a greater number of loans to be eligible to be qualified mortgages. 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. The lower amount of points and fees may also lead fewer loans to be above the points and fees triggers for high-cost mortgages under HOEPA: This should make these loans both more available and offered at a lower cost to consumers, though consumers will not have the added consumer protections that apply to high-cost mortgages. 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 and the 2013 HOEPA Final Rule.

The Bureau also is revising the commentary addressing when employees of a creditor or loan originator in certain administrative or clerical roles (*e.g.,* tellers or greeters) may become ''loan originators'' under the 2013 Loan Originator Compensation Rule, and therefore subject to that Rule's requirements applicable to loan originators, such as qualification requirements and restrictions on certain compensation practices. As noted above, classifying such individuals as loan originators would subject them to the requirements applicable to loan originators with, in the Bureau's view, little appreciable benefit for consumers. Removing them from this classification should lower compliance costs including those related to SAFE Act training, certification requirements, and compensation restrictions.

The final rule's provisions regarding credit insurance clarify what constitutes financing of such premiums by a creditor, and is therefore generally prohibited under the Dodd-Frank Act with regard to credit insurance on mortgage loans. The final rule will also clarify when credit insurance premiums are considered to be calculated and paid on a monthly basis for purposes of a statutory exclusion from the prohibition for certain credit insurance premium calculation and payment arrangements. As noted earlier, the Bureau believes that language in the preamble to the 2013 Loan Originator Compensation Final Rule led to some confusion among creditors and credit insurance providers regarding whether credit insurance products were prohibited under the rule based on how their premiums are calculated. The Bureau is now clarifying that the prohibition only extends to creditors financing credit insurance premiums, and providing additional guidance on what constitutes creditor financing and what is excluded from the prohibition. Specifically, the Bureau is finalizing a modified version of the clarification it proposed that provides increased clarity regarding the application of the rule to certain products—particularly to insurance with ''level'' or ''levelized'' premiums—and this should benefit both creditors and providers of credit insurance products. As discussed above, the modification will, among other things, permit creditors to continue providing credit insurance products, including those with ''level'' or ''levelized'' premiums, so long as the premium is not treated as an obligation owed by the consumer beyond the month in which it is due. The Bureau also solicited comment on an alternative clarification, and believes on the basis of comments that the alternative is less clear and no more protective of consumers than the provision the Bureau is finalizing.

The final rule will also make two adjustments to provisions that provide certain exceptions for creditors operating predominantly in ''rural'' or ''underserved'' areas during the next two years, while the Bureau reexamines the definitions of ''rural'' and ''underserved'' as it recently announced in the May 2013 ATR Final Rule. Specifically, the final rule will extend an exception to the general prohibition on balloon features for high-cost mortgages under the 2013 HOEPA Final Rule that is available to certain loans made by small creditors who operate predominantly in rural or underserved areas temporarily to all small creditors, regardless of their geographic operations. The final rule will also amend an exemption from the requirement to maintain escrows for higher-priced mortgage loans under the 2013 Escrow Final Rule that is available to small creditors that extended more than 50 percent of their total covered transactions secured by a first lien in ''rural'' or ''underserved'' counties during the preceding calendar year to allow small creditors to qualify for the exemption if they made more than 50 percent of their covered transactions in ''rural'' or ''underserved'' counties during any of the previous three calendar years.

As noted above, the Bureau believes expanding the balloon-payment exception for high-cost mortgages to allow certain small creditors operating in areas that do not qualify as ''rural'' or ''underserved'' to continue to originate certain high-cost mortgages with balloon payments during the next two years will benefit creditors who might be unable to convert to offering adjustable rate mortgages by the time the final rules take effect in January 2014. The final rule will also promote consistency between HOEPA requirements and the May 2013 ATR Final Rule, thereby facilitating compliance for creditors. The Bureau believes that the final rule will also benefit consumers by increasing access to credit relative to the

2013 HOEPA Final Rule. Although balloon loans can in some cases increase risks for consumers, the Bureau believes that those risks are appropriately mitigated in these circumstances because the balloon loans must meet the requirements for qualified mortgages in order to qualify for the exception. This includes certain restrictions on the amount of up-front points and fees and various loan features, as well as a requirement that the loans be held on portfolio by the small creditor. These requirements reduce the risk of potentially abusive lending practices and provide strong incentives for the creditor to underwrite the loan appropriately.

The amendment to the qualifications for the exemption from the escrow requirements should minimize the disruptions from any changes in the categorization of certain counties while the Bureau is reevaluating the underlying definitions. This in turn should lower compliance costs for certain creditors during the interim period. Consumers may benefit from greater access to credit and lower costs, but in return will not receive the benefits of an escrow account. A more detailed discussion of these effects is contained in the discussion of benefits, costs, and impacts in part VII of the 2013 Escrows Final Rule.

C. Impact on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026; the Impact of the Provisions on Consumers in Rural Areas; Impact on Access to Consumer Financial Products and Services

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. The exceptions are those provisions related to the definitions of ''rural'' and ''underserved'' which directly impact entities with under $2 billion in total assets. The final rule may have some differential impacts on consumers in rural areas. To the extent that manufactured housing loans, higher-priced mortgage loans, high-cost loans or balloon loans are more prevalent in these areas, the relevant provisions may have slightly greater impacts. As discussed above, costs for creditors in these areas should be reduced; consumers should benefit from increased access to credit and lower costs, though they will not have access to the heightened protections afforded by various provisions. Given the nature and limited scope of the changes in the final rule, the Bureau does not believe that the final rule will reduce consumers' access to consumer financial products and services.

VIII. 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.[55] These analyses must ''describe the impact of the proposed rule on small entities.'' [56] 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,[57] or if the agency considers a series of closely related rules as one rule for purposes of complying with the IRFA or FRFA requirements.[58] 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.[59]

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. As noted above, in January, 2013, the Bureau issued the 2013 ATR Final Rule, 2013 Escrows Final Rule, 2013 HOEPA Final Rule, 2013 Mortgage Servicing Final Rules, and the 2013 Loan Originator Compensation Final Rule. Since January 2013, the Bureau also has issued the May 2013 ATR Final Rule, May 2013 Escrows Final Rule, and the 2013 Effective Date Final Rule, along with Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z).[60] The Supplementary Information to each of these rules set forth the Bureau's analyses and determinations under the RFA with respect to those rules. 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 rule and to the extent any changes are substantive, these changes will not have a material impact on small entities. The provisions related to servicing do not apply to many small entities under the small servicer exemption (and to the extent that they do, small entities will benefit from the same increased flexibility under the proposed provisions as other servicers), while the provisions related to loan originator compensation and the ''rural'' and ''underserved'' definitions lower the regulatory burden and possible compliance costs for affected entities. Therefore, the undersigned certifies that the rule will not have a significant impact on a substantial number of small entities.

IX. Paperwork Reduction Act

This final rule amends 12 CFR Part 1002 (Regulation B) which implements the Equal Credit Opportunity Act, 12 CFR Part 1026 (Regulation Z), which implements the Truth in Lending Act (TILA), and 12 CFR Part 1024 (Regulation X), which implements the Real Estate Settlement Procedures Act (RESPA). Regulations B, Z and X currently contain collections of information approved by OMB. The Bureau's OMB control number for Regulation B is 3170–0013, for Regulation Z is 3170–0015 and for Regulation X is 3170–0016. However, the Bureau has determined that this proposed rule would 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 1002

Aged, Banks, Banking, Civil rights, Consumer protection, Credit, Credit unions, Discrimination, Fair lending, Marital status discrimination, National banks, National origin discrimination, Penalties, Race discrimination, Religious discrimination, Reporting and

[55] 5 U.S.C. 601 *et seq.*

[56] 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 not-for-profit 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).

[57] 5 U.S.C. 605(b).

[58] 5 U.S.C. 605(c).

[59] 5 U.S.C. 609.

[60] 78 FR 44686 (July 24, 2013).

recordkeeping requirements, Savings associations, Sex discrimination.

12 CFR Part 1024

Condominiums, Consumer protection, Housing, Mortgage servicing, Mortgages, Reporting and recordkeeping.

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 12 CFR parts 1002, 1024, and 1026 as set forth below:

PART 1002—EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

■ 1. The authority citation for part 1002 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1691b.

■ 2. Appendix A to part 1002 is amended by revising paragraph 2.d to read as follows:

Appendix A to Part 1002—Federal Agencies To Be Listed in Adverse Action Notices

* * * * *

2. * * *

d. *Federal Credit Unions:* National Credit Union Administration, Office of Consumer Protection, 1775 Duke Street, Alexandria, VA 22314.

* * * * *

■ 3. In Supplement I to Part 1002, under *Section 1002.14,* under *Paragraph 14(b)(3) Valuation,* as amended January 31, 2013, at 78 FR 7250, effective January 18, 2014, paragraphs 1.i and 3.v are revised and paragraph 3.vi is added to read as follows:

Supplement I to Part 1002—Official Interpretations

* * * * *

Section 1002.14—Rules on Providing Appraisals and Valuations

* * * * *

14(b)(3) Valuation.

1. * * *

i. A report prepared by an appraiser (whether or not licensed or certified) including the appraiser's estimate of the property's value or opinion of value.

* * * * *

3. * * *

v. Reports reflecting property inspections that do not provide an estimate of the value of the property and are not used to develop an estimate of the value of the property.

vi. Appraisal reviews that do not include the appraiser's estimate of the property's value or opinion of value.

* * * * *

PART 1024—REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)

■ 4. 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

■ 5. Section 1024.30, as added February 14, 2013, at 78 FR 10695 is amended by revising paragraph (a) to read as follows:

§ 1024.30 Scope.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, this subpart applies to any mortgage loan, as that term is defined in § 1024.31.

* * * * *

■ 6. Section 1024.35, as added February 14, 2013, at 78 FR 10695 is amended by revising paragraph (g)(1)(iii)(B) to read as follows:

§ 1024.35 Error resolution procedures.

* * * * *

(g) * * *

(1) * * *

(iii) * * *

(B) The mortgage loan is discharged.

* * * * *

■ 7. Section 1024.36, as added February 14, 2013, at 78 FR 10695, is amended by revising paragraph (f)(1)(v)(B) to read as follows:

§ 1024.36 Requests for information.

* * * * *

(f) * * *

(1) * * *

(v) * * *

(B) The mortgage loan is discharged.

* * * * *

■ 8. Section 1024.39, as added February 14, 2013, at 78 FR 10695, is amended by revising paragraphs (b)(1) and (3) to read as follows:

§ 1024.39 Early intervention requirements for certain borrowers.

* * * * *

(b) *Written notice.* (1) *Notice required.* Except as otherwise provided in this section, a servicer shall provide to a delinquent borrower a written notice with the information set forth in paragraph (b)(2) of this section not later than the 45th day of the borrower's delinquency. A servicer is not required to provide the written notice more than once during any 180-day period.

* * * * *

(3) *Model clauses.* Model clauses MS–4(A), MS–4(B), and MS–4(C), in appendix MS–4 to this part may be used to comply with the requirements of this paragraph (b).

* * * * *

■ 9. Section 1024.41, as added February 14, 2013, at 78 FR 10695, is amended by revising paragraph (b)(2)(ii), adding paragraph (b)(3), revising paragraphs (c)(1)(ii) and (c)(2)(i), adding paragraphs (c)(2)(iii) and (iv), and revising paragraphs (d), (f)(1), (h)(4), and (j) to read as follows:

§ 1024.41 Loss mitigation procedures.

* * * * *

(b) * * *

(2) * * *

(ii) *Time period disclosure.* The notice required pursuant to paragraph (b)(2)(i)(B) of this section must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete.

(3) *Determining Protections.* To the extent a determination of whether protections under this section apply to a borrower is made on the basis of the number of days between when a complete loss mitigation application is received and when a foreclosure sale occurs, such determination shall be made as of the date a complete loss mitigation application is received.

(c) * * *

(1) * * *

(ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage. The servicer shall include in this notice the amount of time the borrower has to accept or reject an offer of a loss mitigation program as provided for in paragraph (e) of this section, if applicable, and a notification, if applicable, that the borrower has the right to appeal the denial of any loan modification option as well as the amount of time the borrower has to file such an appeal and any requirements for making an appeal, as provided for in paragraph (h) of this section.

(2) * * *

(i) *In general.* Except as set forth in paragraphs (c)(2)(ii) and (iii) of this section, a servicer shall not evade the requirement to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in

connection with an incomplete loss mitigation application.

* * * * *

(iii) *Payment forbearance.* Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a short-term payment forbearance program to a borrower based upon an evaluation of an incomplete loss mitigation application. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program offered pursuant to this section.

(iv) *Facially complete application.* If a borrower submits all the missing documents and information as stated in the notice required pursuant to § 1026.41(b)(2)(i)(B), or no additional information is requested in such notice, the application shall be considered facially complete. If the servicer later discovers additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes of paragraphs (f)(2) and (g) of this section until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it was facially complete, for the purposes of paragraphs (d), (e), (f)(2), (g), and (h) of this section, and as of the date the application was actually complete for the purposes of paragraph (c). A servicer that complies with this paragraph will be deemed to have fulfilled its obligation to provide an accurate notice under paragraph (b)(2)(i)(B).

(d) *Denial of loan modification options.* If a borrower's complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower pursuant to paragraph (c) of this section, a servicer shall state in the notice sent to the borrower pursuant to paragraph (c)(1)(ii) of this section the specific reason or reasons for the servicer's determination for each such trial or permanent loan modification option and, if applicable, that the borrower was not evaluated on other criteria.

* * * * *

(f) * * *

(1) *Pre-foreclosure review period.* A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless:

(i) A borrower's mortgage loan obligation is more than 120 days delinquent;

(ii) The foreclosure is based on a borrower's violation of a due-on-sale clause; or

(iii) The servicer is joining the foreclosure action of a subordinate lienholder.

* * * * *

(h) * * *

(4) *Appeal determination.* Within 30 days of a borrower making an appeal, the servicer shall provide a notice to the borrower stating the servicer's determination of whether the servicer will offer the borrower a loss mitigation option based upon the appeal and, if applicable, how long the borrower has to accept or reject such an offer or a prior offer of a loss mitigation option. A servicer may require that a borrower accept or reject an offer of a loss mitigation option after an appeal no earlier than 14 days after the servicer provides the notice to a borrower. A servicer's determination under this paragraph is not subject to any further appeal.

* * * * *

(j) *Small servicer requirements.* A small servicer shall be subject to the prohibition on foreclosure referral in paragraph (f)(1) of this section. A small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process and shall not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option.

■ 10. Appendix MS–3 to Part 1024, as added February 14, 2013, at 78 FR 10695, is amended by revising the entry for MS–3(D) in the table of contents at the beginning of the appendix, and revising the heading of MS–3(D) to read as follows:

Appendix MS–3 to Part 1024

* * * * *

MS–3(D)—Model Form for Renewal or Replacement of Force-Placed Insurance Notice Containing Information Required by § 1024.37(e)(2)

* * * * *

■ 11. In Supplement I to Part 1024, as added February 14, 2013, at 78 FR 10695:

■ a. Under *Section 1024.17—Escrow Accounts,* the heading for 17(k)(5)(ii) is revised.

■ b. Under *Section 1024.33—Mortgage Servicing Transfers:*

■ i. Under *Paragraph 33(a) Servicing Disclosure Statement,* paragraph 1 is revised.

■ ii. Under *Paragraph 33(c)(1) Payments not considered late,* paragraph 2 is revised.

■ c. Under *Section 1024.35—Error Resolution Procedures, Paragraph 35(c),* paragraph 2 is revised.

■ d. Under *Section 1024.36—Request for Information, Paragraph 36(b),* paragraph 2 is revised.

■ e. Under *Section 1024.38—General Servicing Policies, Procedures and Requirements, Paragraph 38(b)(5),*paragraph 3 is added.

■ f. The heading for *Section 1024.41* is revised.

■ g. Under *Section 1024.41—Loss Mitigation Procedures:*

■ i. *Paragraphs 41(b)(2), 41(b)(3), 41(c)(2)(iii),* and *41(c)(2)(iv)* are added.

■ ii. The heading for *paragraphs 41(c) is* revised.

■ iii. Under newly designated 41(c), *paragraph (c)(2)(iii)* is added.

■ iv. The heading *Paragraph 41(d)(1)* is removed.

■ v. Under *paragraph 41(d),* paragraph 3 is redesignated as *Paragraph(c)(1),* paragraph 4, and paragraph 4 is redesignated as paragraph 3.

■ vii. Under paragraph 41(d), paragraph 4 is added.

■ viii. Under paragraph 41(f), new paragraph 1 is added.

The revisions and additions read as follows:

Supplement I to Part 1024—Official Bureau Interpretations

* * * * *

Subpart B—Mortgage Settlement and Escrow Accounts

* * * * *

Section 1024.17—Escrow Accounts

* * * * *

17(k)(5)(ii) Inability to disburse funds.

* * * * *

Subpart C—Mortgage Servicing

* * * * *

Section 1024.33—Mortgage Servicing Transfers

* * * * *

33(a) Servicing disclosure statement.

1. *Terminology.* Although the servicing disclosure statement must be clear and conspicuous pursuant to § 1024.32(a), § 1024.33(a) does not set forth any specific rules for the format of the statement, and the specific language of the servicing disclosure statement in appendix MS–1 is not required to be used. The model format may be supplemented with additional information that clarifies or enhances the model language.

* * * * *

33(c) Borrower payments during transfer of servicing.

33(c)(1) Payments not considered late.

1. * * *

2. *Compliance with § 1024.39.* A transferee servicer's compliance with § 1024.39 during the 60-day period beginning on the effective date of a servicing transfer does not constitute treating a payment as late for purposes of § 1024.33(c)(1).

Section 1024.35—Error Resolution Procedures

* * * * *

35(c) Contact information for borrowers to assert errors.

* * * * *

2. *Notice of an exclusive address.* A notice establishing an address that a borrower must use to assert an error may be included with a different disclosure, such as a notice of transfer. The notice is subject to the clear and conspicuous requirement in § 1024.32(a)(1). If a servicer establishes an address that a borrower must use to assert an error, a servicer must provide that address to the borrower in the following contexts:

i. The written notice designating the specific address, required pursuant to § 1024.35(c) and § 1024.36(b).

ii. Any periodic statement or coupon book required pursuant to 12 CFR 1026.41.

iii. Any Web site the servicer maintains in connection with the servicing of the loan.

iv. Any notice required pursuant to §§ 1024.39 or .41 that includes contact information for assistance.

* * * * *

Section 1024.36—Requests for Information

* * * * *

36(b) Contact information for borrowers to request information.

1. * * *

2. *Notice of an exclusive address.* A notice establishing an address that a borrower must use to request information may be included with a different disclosure, such as a notice of transfer. The notice is subject to the clear and conspicuous requirement in § 1024.32(a)(1). If a servicer establishes an address that a borrower must use to request information, a servicer must provide that address to the borrower in the following contexts:

i. The written notice designating the specific address, required pursuant to § 1024.35(c) and § 1024.36(b).

ii. Any periodic statement or coupon book required pursuant to 12 CFR 1026.41.

iii. Any Web site the servicer maintains in connection with the servicing of the loan.

iv. Any notice required pursuant to §§ 1024.39 or .41 that includes contact information for assistance.

* * * * *

Section 1024.38—General Servicing Policies, Procedures and Requirements

38(b) Objectives.

38(b)(5) Informing Borrowers of the Written Error Resolution and Information Request Procedures.

* * * * *

3. *Notices of error incorrectly sent to addresses associated with submission of loss mitigation applications or the continuity of contact.* A servicer's policies and procedures must be reasonably designed to ensure that if a borrower incorrectly submits an assertion of an error to any address given to the borrower in connection with submission of a loss mitigation application or the continuity of contact pursuant to § 1024.40, the servicer will inform the borrower of the procedures for submitting written notices of error set forth in § 1024.35, including the correct address. Alternatively, the servicer could redirect such notices to the correct address.

* * * * *

Section 1024.41—Loss Mitigation Procedures

41(b) Receipt of loss mitigation application.

41(b)(1) Complete loss mitigation application.

* * * * *

4. *Diligence requirements.* Although a servicer has flexibility to establish its own requirements regarding the documents and information necessary for a loss mitigation application, the servicer must act with reasonable diligence to collect information needed to complete the application. Further, a servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Reasonable diligence includes, without limitation, the following actions:

i. A servicer requires additional information from the applicant, such as an address or a telephone number to verify employment; the servicer contacts the applicant promptly to obtain such information after receiving a loss mitigation application;

ii. Servicing for a mortgage loan is transferred to a servicer and the borrower makes an incomplete loss mitigation application to the transferee servicer after the transfer; the transferee servicer reviews documents provided by the transferor servicer to determine if information required to make the loss mitigation application complete is contained within documents transferred by the transferor servicer to the servicer; and

iii. A servicer offers a borrower a payment forbearance program based on an incomplete loss mitigation application; the servicer notifies the borrower that he or she is being offered a payment forbearance program based on an evaluation of an incomplete application, and that the borrower has the option of completing the application to receive a full evaluation of all loss mitigation options available to the borrower. If a servicer provides such a notification, the borrower remains in compliance with the payment forbearance program, and the borrower does not request further assistance, the servicer could suspend reasonable diligence efforts until near the end of the payment forbearance program. Near the end of the program, and prior to the end of the forbearance period, it may be necessary for the servicer to contact the borrower to determine if the borrower wishes to complete the application and proceed with a full loss mitigation evaluation.

* * * * *

41(b)(2)Review of loss mitigation application submission.

41(b)(2)(i) Requirements.

Paragraph 41(b)(2)(i)(B).

1. *Later discovery of additional information required to evaluate application.* Even if a servicer has informed a borrower that an application is complete (or notified the borrower of specific information necessary to complete an incomplete application), if the servicer determines, in the course of evaluating the loss mitigation application submitted by the borrower, that additional information or a corrected version of a previously submitted document is required, the servicer must promptly request the additional information or corrected document from the borrower pursuant to the reasonable diligence obligation in § 1024.41(b)(1). See § 1024.41(c)(2)(iv) addressing facially complete applications.

41(b)(2)(ii) Time period disclosure.

1. *Reasonable date.* Section 1024.41(b)(2)(ii) requires that a notice informing a borrower that a loss mitigation application is incomplete must include a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete. In determining a reasonable date, a servicer should select the deadline that preserves the maximum borrower rights under § 1024.41 based on the milestones listed below, except when doing so would be impracticable to permit the borrower sufficient time to obtain and submit the type of documentation needed. Generally, it would be impracticable for a borrower to obtain and submit documents in less than seven days. In setting a date, the following milestones should be considered (if the date of a foreclosure sale is not known, a servicer may use a reasonable estimate of the date for which a foreclosure sale may be scheduled):

i. The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower;

ii. The date that is the 120th day of the borrower's delinquency;

iii. The date that is 90 days before a foreclosure sale;

iv. The date that is 38 days before a foreclosure sale.

41(b)(3) Determining Protections.

1. *Foreclosure sale not scheduled.* If no foreclosure sale has been scheduled as of the date that a complete loss mitigation application is received, the application is considered to have been received more than 90 days before any foreclosure sale.

2. *Foreclosure sale re-scheduled.* The protections under § 1024.41 that have been determined to apply to a borrower pursuant to § 1024.41(b)(3) remain in effect thereafter, even if a foreclosure sale is later scheduled or rescheduled.

41(c) Evaluation of loss mitigation applications.

* * * * *

41(c)(2) Incomplete loss mitigation application evaluation.

* * * * *

41(c)(2)(iii) Payment forbearance.

1. *Short-term payment forbearance program.* The exemption in § 1024.41(c)(2)(iii) applies to short-term payment forbearance programs. A payment forbearance program is a loss mitigation option for which a servicer allows a borrower to forgo making certain payments or portions of payments for a period of time. A short-term payment forbearance program allows the forbearance of payments due over periods of no more than six months. Such a program would be short-term regardless of the amount of time a servicer allows the borrower to make up the missing payments.

2. *Payment forbearance and incomplete applications.* Section 1024.41(c)(2)(iii) allows a servicer to offer a borrower a short-term payment forbearance program based on an evaluation of an incomplete loss mitigation application. Such an incomplete loss mitigation application is still subject to the other obligations in § 1024.41, including the obligation in § 1024.41(b)(2) to review the application to determine if it is complete, the obligation in § 1024.41(b)(1) to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application (see comment 41(b)(1)–4.iii), and the obligation to provide the borrower with the § 1024.41(b)(2)(i)(B) notice that the servicer acknowledges the receipt of the application and has determined the application is incomplete.

3. *Payment forbearance and complete applications.* Even if a servicer offers a borrower a payment forbearance program based on an evaluation of an incomplete loss mitigation application, the servicer must still comply with all the requirements in § 1024.41 if the borrower completes his or her loss mitigation application.

41(c)(2)(iv) Facially complete application.

1. *Reasonable opportunity.* Section 1024.41(c)(2)(iv) requires a servicer to treat a facially complete application as complete for the purposes of paragraphs (f)(2) and (g) until the borrower has been given a reasonable opportunity to complete the application. A reasonable opportunity requires the servicer to notify the borrower of what additional information or corrected documents are required, and to afford the borrower sufficient time to gather the information and documentation necessary to complete the application and submit it to the servicer. The amount of time that is sufficient for this purpose will depend on the facts and circumstances.

2. *Borrower fails to complete the application.* If the borrower fails to complete the application within the timeframe provided under § 1024.41(c)(2)(iv), the application shall be considered incomplete.

41(d) Denial of loan modification options.

* * * * *

4. *Reasons listed.* A servicer is required to disclose the actual reason or reasons for the denial. If a servicer's systems establish a hierarchy of eligibility criteria and reach the first criterion that causes a denial but do not evaluate the borrower based on additional criteria, a servicer complies with the rule by providing only the reason or reasons with respect to which the borrower was actually evaluated and rejected as well as notification that the borrower was not evaluated on other criteria. A servicer is not required to determine or disclose whether a borrower would have been denied on the basis of additional criteria if such criteria were not actually considered.

41(f) Prohibition on foreclosure referral.

1. *Prohibited activities.* Section 1024.41(f) prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process under certain circumstances. Whether a document is considered the first notice or filing is determined on the basis of foreclosure procedure under the applicable State law.

i. Where foreclosure procedure requires a court action or proceeding, a document is considered the first notice or filing if it is the earliest document required to be filed with a court or other judicial body to commence the action or proceeding (*e.g.,* a complaint, petition, order to docket, or notice of hearing).

ii. Where foreclosure procedure does not require an action or court proceeding, such as under a power of sale, a document is considered the first notice or filing if it is the earliest document required to be recorded or published to initiate the foreclosure process.

iii. Where foreclosure procedure does not require any court filing or proceeding, and also does not require any document to be recorded or published, a document is considered the first notice or filing if it is the earliest document that establishes, sets, or schedules a date for the foreclosure sale.

iv. A document provided to the borrower but not initially required to be filed, recorded, or published is not considered the first notice or filing on the sole basis that the document must later be included as an attachment accompanying another document that is required to be filed, recorded, or published to carry out a foreclosure.

* * * * *

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 12. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

* * * * *

Subpart C—Closed-End Credit

■ 13. Section 1026.23 is amended by revising paragraph (a)(3)(ii) to read as follows:

§ 1026.23 Right of rescission.

(a) * * *

(3) * * *

(ii) For purposes of this paragraph (a)(3), the term ''material disclosures'' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 1026.32(c) and (d) and 1026.43(g).

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 14. Section 1026.31, as amended January 31, 2013, at 78 FR 6856 is amended by revising paragraphs (g), (h)(1)(iii)(A), and (h)(2)(iii)(A) to read as follows:

§ 1026.31 General rules.

* * * * *

(g) Accuracy of annual percentage rate. For purposes of section 1026.32, the annual percentage rate shall be considered accurate, and may be used in determining whether a transaction is covered by section 1026.32, if it is accurate according to the requirements and within the tolerances under section 1026.22 for closed-end credit transactions or 1026.6(a) for open-end credit plans. The finance charge tolerances for rescission under section 1026.23(g) or (h) shall not apply for this purpose.

(h) * * *

(1) * * *

(iii) * * *

(A) Make the loan or credit plan satisfy the requirements of 15 U.S.C. 1631–1651; or

* * * * *

(2) * * *

(iii) * * *

(A) Make the loan or credit plan satisfy the requirements of 15 U.S.C. 1631–1651; or

* * * * *

■ 15. Section 1026.32 is amended by:

■ a. Revising paragraph (a)(2)(iii), as amended January 31, 2013, at 78 FR 6856;

■ b. Revising paragraph (b)(1)(ii), as amended June 12, 2013, at 78 FR 35430;

■ c. Revising paragraph (b)(1)(vi), as amended January 30, 2013, at 78 FR 6408;

■ d. Revising paragraph (b)(2)(ii), as amended June 12, 2013, at 78 FR 35430; and

■ e. Revising paragraphs (b)(2)(vi), (b)(6)(ii), and (d)(1)(ii)(C), as amended January 31, 2013, at 78 FR 6856.

The revisions read as follows:

§ 1026.32 Requirements for high-cost mortgages.

(a) * * *

(2) * * *

(iii) A transaction originated by a Housing Finance Agency, where the Housing Finance Agency is the creditor for the transaction; or

* * * * *

(b) * * *

(1) * * *

(ii) All compensation paid directly or indirectly by a consumer or creditor to a loan originator, as defined in § 1026.36(a)(1), that can be attributed to that transaction at the time the interest rate is set unless:

(A) That compensation is paid by a consumer to a mortgage broker, as defined in § 1026.36(a)(2), and already has been included in points and fees under paragraph (b)(1)(i) of this section;

(B) That compensation is paid by a mortgage broker, as defined in § 1026.36(a)(2), to a loan originator that is an employee of the mortgage broker;

(C) That compensation is paid by a creditor to a loan originator that is an employee of the creditor; or

(D) That compensation is paid by a retailer of manufactured homes to its employee.

* * * * *

(vi) The total prepayment penalty, as defined in paragraph (b)(6)(i) or (ii) of this section, as applicable, incurred by the consumer if the consumer refinances the existing mortgage loan, or terminates an existing open-end credit plan in connection with obtaining a new mortgage loan, with the current holder of the existing loan or plan, a servicer acting on behalf of the current holder, or an affiliate of either.

(2) * * *

(ii) All compensation paid directly or indirectly by a consumer or creditor to a loan originator, as defined in § 1026.36(a)(1), that can be attributed to that transaction at the time the interest rate is set unless:

(A) That compensation is paid by a consumer to a mortgage broker, as defined in § 1026.36(a)(2), and already has been included in points and fees under paragraph (b)(2)(i) of this section;

(B) That compensation is paid by a mortgage broker, as defined in § 1026.36(a)(2), to a loan originator that is an employee of the mortgage broker;

(C) That compensation is paid by a creditor to a loan originator that is an employee of the creditor; or

(D) That compensation is paid by a retailer of manufactured homes to its employee.

* * * * *

(vi) The total prepayment penalty, as defined in paragraph (b)(6)(i) or (ii) of this section, as applicable, incurred by the consumer if the consumer refinances an existing closed-end credit transaction with an open-end credit plan, or terminates an existing open-end credit plan in connection with obtaining a new open-end credit plan, with the current holder of the existing transaction or plan, a servicer acting on behalf of the current holder, or an affiliate of either;

* * * * *

(6) * * *

(ii) *Open-end credit.* For an open-end credit plan, *prepayment penalty* means a charge imposed by the creditor if the consumer terminates the open-end credit plan prior to the end of its term, other than a waived, bona fide third-party charge that the creditor imposes if the consumer terminates the open-end credit plan sooner than 36 months after account opening.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(C) A loan that meets the criteria set forth in §§ 1026.43(f)(1)(i) through (vi) and 1026.43(f)(2), or the conditions set forth in § 1026.43(e)(6).

* * * * *

■ 16. Section 1026.35 is amended by revising paragraphs (b)(2)(i)(D), (b)(2)(iii)(A), and (b)(2)(iii)(D)(*1*) to read as follows:

§ 1026.35 Requirements for higher-priced mortgage loans.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(D) A reverse mortgage transaction subject to § 1026.33.

* * * * *

(iii) * * *

(A) During any of the three preceding calendar years, the creditor extended more than 50 percent of its total covered transactions, as defined by § 1026.43(b)(1), secured by a first lien, on properties that are located in counties that are either ''rural'' or ''underserved,'' as set forth in paragraph (b)(2)(iv) of this section;

* * * * *

(D) * * *

(*1*) Escrow accounts established for first-lien higher-priced mortgage loans on or after April 1, 2010, and before January 1, 2014; or

* * * * *

■ 17. Section 1026.36, as amended February 15, 2013, at 78 FR 11280, is amended by revising paragraphs (a)(1)(i)(A) and (B), adding paragraphs (a)(6), and (b), and revising paragraphs (f)(3)(i) introductory text, (f)(3)(ii), (i), and (j)(2) to read as follows:

§ 1026.36 Prohibited acts or practices and certain requirements for credit secured by a dwelling.

(a) * * *

(1) * * *

(i) * * *

(A) A person who does not take a consumer credit application or offer or negotiate credit terms available from a creditor to that consumer selected based on the consumer's financial characteristics, but who performs purely administrative or clerical tasks on behalf of a person who does engage in such activities.

(B) An employee of a manufactured home retailer who does not take a consumer credit application, offer or negotiate credit terms, or advise a consumer on credit terms.

* * * * *

(6) *Credit terms.* For purposes of this section, the term ''credit terms'' includes rates, fees, and other costs. Credit terms are selected based on the consumer's financial characteristics when those terms are selected based on any factors that may influence a credit decision, such as debts, income, assets, or credit history.

* * * * *

(b) *Scope.* Paragraphs (c)(1) and (2) of this section apply to closed-end consumer credit transactions secured by a consumer's principal dwelling. Paragraph (c)(3) of this section applies to a consumer credit transaction secured by a dwelling. Paragraphs (d) through (i) of this section apply to closed-end consumer credit transactions secured by a dwelling. This section does not apply to a home equity line of credit subject to § 1026.40, except that paragraphs (h) and (i) of this section apply to such credit when secured by the consumer's principal dwelling and paragraph (c)(3) applies to such credit when secured by a dwelling. Paragraphs (d) through (i) of this section do not apply to a loan that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D).

* * * * *

(f) * * *

(3) * * *

(i) Obtain for any individual whom the loan originator organization hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 1, 2014, used to screen the individual) and for any individual regardless of when hired who, based on reliable information known to the loan originator organization, likely does not meet the standards under § 1026.36(f)(3)(ii), before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling:

* * * * *

(ii) Determine on the basis of the information obtained pursuant to paragraph (f)(3)(i) of this section and any other information reasonably available to the loan originator organization, for any individual whom the loan originator organization hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 1, 2014, used to screen the individual) and for any individual regardless of when hired who, based on reliable information known to the loan originator organization, likely does not meet the standards under this paragraph (f)(3)(ii), before the individual acts as a loan originator in a consumer credit transaction secured by a dwelling, that the individual loan originator:

* * * * *

(i) *Prohibition on financing credit insurance.* (1) A creditor may not finance, directly or indirectly, any premiums or fees for credit insurance in connection with a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling). This prohibition does not apply to credit insurance for which premiums or fees are calculated and paid in full on a monthly basis.

(2) For purposes of this paragraph (i):

(i) ''Credit insurance'':

(A) Means credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life, or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, but

(B) Excludes credit unemployment insurance for which the unemployment insurance premiums are reasonable, the creditor receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to a separate insurance contract and are not paid to an affiliate of the creditor;

(ii) A creditor finances premiums or fees for credit insurance if it provides a consumer the right to defer payment of a credit insurance premium or fee owed by the consumer beyond the monthly period in which the premium or fee is due; and

(iii) Credit insurance premiums or fees are calculated on a monthly basis if they are determined mathematically by multiplying a rate by the actual monthly outstanding balance.

(j) * * *

(2) For purposes of this paragraph (j), ''depository institution'' has the meaning in section 1503(3) of the SAFE Act, 12 U.S.C. 5102(3). For purposes of this paragraph (j), ''subsidiary'' has the meaning in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.

* * * * *

■ 18. Section 1026.43, as added January 30, 2013, at 78 FR 6408, is amended by revising paragraphs (a)(2) and (e)(4)(ii) introductory text and (e)(4)(ii)(C) to read as follows:

§ 1026.43 Minimum standards for transactions secured by a dwelling.

(a) * * *

(2) A mortgage transaction secured by a consumer's interest in a timeshare plan, as defined in 11 U.S.C. 101(53(D); or

* * * * *

(e) * * *

(4) * * *

(ii) *Eligible loans.* A qualified mortgage under this paragraph (e)(4) must be one of the following at consummation:

* * * * *

(C) A loan that is eligible to be guaranteed by the U.S. Department of Veterans Affairs;

* * * * *

■ 19. Appendix H to Part 1026, as amended February 14, 2013, at 78 FR 10901, is amended by revising the entry for H–30(C) in the table of contents at the beginning of the appendix, and revising the heading of H–30(C) to read as follows:

Appendix H to Part 1026—Closed-End Model Forms and Clauses

* * * * *

H–30(C) Sample Form of Periodic Statement for a Payment-Option Loan

* * * * *

■ 20. In Supplement I to Part 1026:

■ a. Under *Section 1026.25—Record Retention*

■ i. Under *Paragraph 25(c)(2) Records related to requirements for loan originator compensation,* as amended February 15, 2013, at 78 FR 11280, paragraph 1 is revised.

■ ii. Under *Paragraph 25(c)(3) Records related to minimum standards for transactions secured by a dwelling,* as added January 30, 2013, at 78 FR 6408, paragraph 1 is revised.

■ b. Under *Section 1026.32—Requirements for High-Cost Mortgages:*

■ i. Under *Paragraph 32(b)(1),* as amended January 30, 2013, at 78 FR 6408, paragraph 2 is added.

■ ii. Under *Paragraph 32(b)(1)(ii),* as amended June 12, 2013, at 78 FR 35430, paragraph 5 is added.

■ iii. *Paragraph 32(b)(2)* and paragraph 1 are added.

■ iv. Under *Paragraph 32(b)(2)(i),* as amended January 30, 2013, at 78 FR 6408, paragraph 1 is revised.

■ v. Under *Paragraph 32(b)(2)(i)(D),* as amended January 30, 2013, at 78 FR 6408, paragraph 1 is revised.

■ vi. Under *Paragraph 32(d)(8)(ii),* as amended January 30, 2013, at 78 FR 6408, paragraph 1 is revised.

■ c. Under *Section 1026.34—Prohibited Acts or Practices in Connection with High-Cost Mortgages,* under *Paragraph 34(a)(5)(v),* as amended January 30, 2013, at 78 FR 6408, paragraph 1 is revised.

■ d. Under *Section 1026.35—Requirements for Higher-Priced Mortgage Loans*

■ i. Under *Paragraph 35(b)(2)(iii),* paragraph 1 is revised.

■ ii. Under *Paragraph 35(b)(2)(iii)(D(1),* paragraph 1 is revised.

■ e. Under *Section 1026.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling*

■ i. Under *Paragraph 36(a),* as amended February 15, 2013, at 78 FR 11280, paragraphs 1, 4, and 5 are revised.

■ ii. Paragraph *36(a)(1)(i)(B)* and paragraph 1 are added.

■ iii. Under *Paragraph 36(b),* as amended February 15, 2013, at 78 FR 11280, paragraph 1 is revised.

■ iv. Under *Paragraph 36(d)(1),* as amended February 15, 2013, at 78 FR 11280, paragraphs 1, 3, and 6 are revised.

■ v. Under *Paragraph 36(f)(3)(i),* as amended February 15, 2013, at 78 FR 11280, paragraphs 1 and 2 are revised.

■ vi. Under *Paragraph 36(f)(3)(ii),* as amended February 15, 2013, at 78 FR 11280, paragraphs 1 and 2 are revised.

■ f. Under *Section 1026.41—Periodic Statements for Residential Mortgage Loans*

■ i. Under *Paragraph 41(b),* as amended February 14, 2013, at 78 FR 10901, paragraph 1 is revised.

■ ii. Under *Paragraph 41(d),* as amended February 14, 2013, at 78 FR 10901, paragraph 3 is revised.

■ iii. Under *Paragraph 41(d)(4),* as amended February 14, 2013, at 78 FR 10901, paragraph 1 is revised.

■ iv. Under *Paragraph 41(e)(3),* as amended February 14, 2013, at 78 FR 10901, paragraph 1 is revised.

■ v. Under *Paragraph 41(e)(4)(iii),* as amended February 14, 2013, at 78 FR 10901, paragraph 1 is revised.

■ g. Under *Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling:*

■ i. Under *Paragraph 43(b)(8),* as added January 30, 2013, at 78 FR 6408, paragraph 4 is revised.

■ ii. Under *Paragraph 43(c)(3),* as added January 30, 2013, at 78 FR 6408, paragraph 6 is revised.
■ iii. Under *Paragraph 43(e)(4),* as added January 30, 2013, at 78 FR 6408, paragraph 1 is revised.
■ iv. Under *Paragraph 43(e)(5),* as amended June 12, 2013, at 78 FR 35430, paragraph 8 is revised.
■ v. Under *Paragraph 43(f)(2)(iii),* as added January 30, 2013, at 78 FR 6408, paragraph 1 is revised.

The revisions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart D—Miscellaneous

Section 1026.25—Record Retention

* * * * *

25(c) Records related to certain requirements for mortgage loans.

25(c)(2) Records related to requirements for loan originator compensation.

1. * * *

i. *Records sufficient to evidence payment and receipt of compensation.* Records are sufficient to evidence payment and receipt of compensation if they demonstrate the following facts: The nature and amount of the compensation; that the compensation was paid, and by whom; that the compensation was received, and by whom; and when the payment and receipt of compensation occurred. The compensation agreements themselves are to be retained in all circumstances consistent with § 1026.25(c)(2)(i). The additional records that are sufficient necessarily will vary on a case-by-case basis depending on the facts and circumstances, particularly with regard to the nature of the compensation. For example, if the compensation is in the form of a salary, records to be retained might include copies of required filings under the Internal Revenue Code that demonstrate the amount of the salary. If the compensation is in the form of a contribution to or a benefit under a designated tax-advantaged plan, records to be maintained might include copies of required filings under the Internal Revenue Code or other applicable Federal law relating to the plan, copies of the plan and amendments thereto in which individual loan originators participate and the names of any loan originators covered by the plan, or determination letters from the Internal Revenue Service regarding the plan. If the compensation is in the nature of a commission or bonus, records to be retained might include a settlement agent ''flow of funds'' worksheet or other written record or a creditor closing instructions letter directing disbursement of fees at consummation. Where a loan originator is a mortgage broker, a disclosure of compensation or broker agreement required by applicable State law that recites the broker's total compensation for a transaction is a record of the amount actually paid to the loan originator in connection with the transaction, unless actual compensation deviates from the amount in the disclosure or agreement. Where compensation has been decreased to defray the cost, in whole or part, of an unforeseen increase in an actual settlement cost over an estimated settlement cost disclosed to the consumer pursuant to section 5(c) of RESPA (or omitted from that disclosure), records to be maintained are those documenting the decrease in compensation and reasons for it.

ii. *Compensation agreement.* For purposes of § 1026.25(c)(2), a compensation agreement includes any agreement, whether oral, written, or based on a course of conduct that establishes a compensation arrangement between the parties (*e.g.,* a brokerage agreement between a creditor and a mortgage broker or provisions of employment contracts between a creditor and an individual loan originator employee addressing payment of compensation). Where a compensation agreement is oral or based on a course of conduct and cannot itself be maintained, the records to be maintained are those, if any, evidencing the existence or terms of the oral or course of conduct compensation agreement. Creditors and loan originators are free to specify what transactions are governed by a particular compensation agreement as they see fit. For example, they may provide, by the terms of the agreement, that the agreement governs compensation payable on transactions consummated on or after some future effective date (in which case, a prior agreement governs transactions consummated in the meantime). For purposes of applying the record retention requirement to transaction-specific commissions, the relevant compensation agreement for a given transaction is the agreement pursuant to which compensation for that transaction is determined.

* * * * *

25(c)(3) Records related to minimum standards for transactions secured by a dwelling.

1. *Evidence of compliance with repayment ability provisions.* A creditor must retain evidence of compliance with § 1026.43 for three years after the date of consummation of a consumer credit transaction covered by that section. (See comment 25(c)(3)–2 for guidance on the retention of evidence of compliance with the requirement to offer a consumer a loan without a prepayment penalty under § 1026.43(g)(3).) If a creditor must verify and document information used in underwriting a transaction subject to § 1026.43, the creditor shall retain evidence sufficient to demonstrate compliance with the documentation requirements of the rule. Although a creditor need not retain actual paper copies of the documentation used in underwriting a transaction subject to § 1026.43, to comply with § 1026.25(c)(3), the creditor must be able to reproduce such records accurately. For example, if the creditor uses a consumer's Internal Revenue Service (IRS) Form W–2 to verify the consumer's income, the creditor must be able to reproduce the IRS Form W–2 itself, and not merely the income information that was contained in the form.

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

Section 1026.32—Requirements for High-Cost Mortgages

* * * * *

32(b) Definitions.

* * * * *

Paragraph 32(b)(1).

* * * * *

2. *Charges paid by parties other than the consumer.* Under § 1026.32(b)(1), points and fees may include charges paid by third parties in addition to charges paid by the consumer. Specifically, charges paid by third parties that fall within the definition of points and fees set forth in § 1026.32(b)(1)(i) through (vi) are included in points and fees. In calculating points and fees in connection with a transaction, creditors may rely on written statements from the consumer or third party paying for a charge, including the seller, to determine the source and purpose of any third-party payment for a charge.

i. *Examples—included in points and fees.* A creditor's origination charge paid by a consumer's employer on the consumer's behalf that is included in the finance charge as defined in § 1026.4(a) or (b), must be included in points and fees under § 1026.32(b)(1)(i), unless other exclusions under § 1026.4 or § 1026.32(b)(1)(i)(A) through (F) apply. In addition, consistent with comment 32(b)(1)(i)–1, a third-party payment of an item excluded from the finance charge under a provision of § 1026.4, while not included in the total points and fees under § 1026.32(b)(1)(i), may be included under § 1026.32(b)(1)(ii) through (vi). For example, a payment by a third party of a creditor-imposed fee for an appraisal performed by an employee of the creditor is included in points and fees under § 1026.32(b)(1)(iii). *See* comment 32(b)(1)(i)–1.

ii. *Examples—not included in points and fees.* A charge paid by a third party is not included in points and fees under § 1026.32(b)(1)(i) if the exclusions to points and fees in § 1026.32(b)(1)(i)(A) through (F) apply. For example, certain bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either are excluded from points and fees under § 1026.32(b)(1)(i)(D), regardless of whether those charges are paid by a third party or the consumer.

iii. *Seller's points.* Seller's points, as described in § 1026.4(c)(5) and commentary, are excluded from the finance charge and thus are not included in points and fees under § 1026.32(b)(1)(i). However, charges paid by the seller for items listed in § 1026.32(b)(1)(ii) through (vi) are included in points and fees.

iv. *Creditor-paid charges.* Charges that are paid by the creditor, other than loan originator compensation paid by the creditor that is required to be included in points and fees under § 1026.32(b)(1)(ii), are excluded from points and fees. *See*

§§ 1026.32(b)(1)(i)(A), 1026.4(a), and comment 4(a)–(2).

* * * * *

Paragraph 32(b)(1)(ii).

* * * * *

4. *Loan originator compensation—calculating loan originator compensation in connection with other charges or payments included in the finance charge or made to loan originators.*

* * * * *

iii. *Creditor's origination fees—loan originator not employed by creditor.* Compensation paid by a creditor to a loan originator who is not employed by the creditor is included in the calculation of points and fees under § 1026.32(b)(1)(ii). Such compensation is included in points and fees in addition to any origination fees or charges paid by the consumer to the creditor that are included in points and fees under § 1026.32(b)(1)(i). For example, assume that a consumer pays to the creditor a $3,000 origination fee and that the creditor pays a mortgage broker $1,500 in compensation attributed to the transaction. Assume further that the consumer pays no other charges to the creditor that are included in points and fees under § 1026.32(b)(1)(i) and that the mortgage broker receives no other compensation that is included in points and fees under § 1026.32(b)(1)(ii). For purposes of calculating points and fees, the $3,000 origination fee is included in points and fees under § 1026.32(b)(1)(i) and the $1,500 in loan originator compensation is included in points and fees under § 1026.32(b)(1)(ii), equaling $4,500 in total points and fees, provided that no other points and fees are paid or compensation received.

* * * * *

5. *Loan originator compensation—calculating loan originator compensation in manufactured home transactions.* i. If a manufactured home retailer qualifies as a loan originator under § 1026.36(a)(1), then compensation that is paid by a consumer or creditor to the retailer for loan origination activities and that can be attributed to the transaction at the time the interest rate is set must be included in points and fees. For example, assume a manufactured home retailer takes a residential mortgage loan application and is entitled to receive at consummation a $1,000 commission from the creditor for taking the mortgage loan application. The $1,000 commission is loan originator compensation that must be included in points and fees.

ii. If the creditor has knowledge that the sales price of a manufactured home includes loan originator compensation, then such compensation can be attributed to the transaction at the time the interest rate is set and therefore is included in points and fees under § 1026.32(b)(1)(ii). However, the creditor is not required to investigate the sales price of a manufactured home to determine if the sales price includes loan originator compensation.

iii. As provided in § 1026.32(b)(1)(ii)(D), compensation paid by a manufactured home retailer to its employees is not included in points and fees under § 1026.32(b)(1)(ii).

* * * * *

Paragraph 32(b)(2).

1. See comment 32(b)(1)–2 for guidance concerning the inclusion in points and fees of charges paid by parties other than the consumer.

* * * * *

Paragraph 32(b)(2)(i).

1. *Finance charge.* The points and fees calculation under § 1026.32(b)(2) generally does not include items that are included in the finance charge but that are not known until after account opening, such as minimum monthly finance charges or charges based on account activity or inactivity. Transaction fees also generally are not included in the points and fees calculation, except as provided in § 1026.32(b)(2)(vi). See comments 32(b)(1)–1 and 32(b)(1)(i)–1 for additional guidance concerning the calculation of points and fees.

* * * * *

Paragraph 32(b)(2)(i)(D).

1. For purposes of § 1026.32(b)(2)(i)(D), the term *loan originator* means a loan originator as that term is defined in § 1026.36(a)(1), without regard to § 1026.36(a)(2). See comments 32(b)(1)(i)(D)–1 through –4 for further guidance concerning the exclusion of bona fide third-party charges from points and fees.

* * * * *

Paragraph 32(d)(8)(ii).

1. *Failure to meet repayment terms.* A creditor may terminate a loan or open-end credit agreement and accelerate the balance when the consumer fails to meet the repayment terms resulting in a default in payment under the agreement; a creditor may do so, however, only if the consumer actually fails to make payments resulting in a default in the agreement. For example, a creditor may not terminate and accelerate if the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. If a consumer files for or is placed in bankruptcy, the creditor may terminate and accelerate under § 1026.32(d)(8)(ii) if the consumer fails to meet the repayment terms resulting in a default of the agreement. Section 1026.32(d)(8)(ii) does not override any State or other law that requires a creditor to notify a consumer of a right to cure, or otherwise places a duty on the creditor before it can terminate a loan or open-end credit agreement and accelerate the balance.

* * * * *

Section 1026.34—Prohibited Acts or Practices in Connection With High-Cost Mortgages

* * * * *

34(a)(5) Pre-loan counseling.

* * * * *

Paragraph 34(a)(5)(v) Counseling fees.

1. *Financing.* Section 1026.34(a)(5)(v) does not prohibit a creditor from financing the counseling fee as part of the transaction for a high-cost mortgage, if the fee is a bona fide third-party charge as provided by § 1026.32(b)(1)(i)(D) and (b)(2)(i)(D).

* * * * *

Section 1026.35—Requirements for Higher-Priced Mortgage Loans

* * * * *

35(b) Escrow accounts.

* * * * *

35(b)(2) Exemptions.

* * * * *

Paragraph 35(b)(2)(iii).

1. *Requirements for exemption.* Under § 1026.35(b)(2)(iii), except as provided in § 1026.35(b)(2)(v), a creditor need not establish an escrow account for taxes and insurance for a higher-priced mortgage loan, provided the following four conditions are satisfied when the higher-priced mortgage loan is consummated:

i. During any of the three preceding calendar years, more than 50 percent of the creditor's total first-lien covered transactions, as defined in § 1026.43(b)(1), are secured by properties located in counties that are either ''rural'' or ''underserved,'' as set forth in § 1026.35(b)(2)(iv). Pursuant to that section, a creditor may rely as a safe harbor on a list of counties published by the Bureau to determine whether counties in the United States are rural or underserved for a particular calendar year. Thus, for example, if a creditor originated 90 covered transactions, as defined by § 1026.43(b)(1), secured by a first lien, during 2011, 2012, or 2013, the creditor meets this condition for an exemption in 2014 if at least 46 of those transactions in one of those three calendar years are secured by first liens on properties that are located in such counties.

* * * * *

Paragraph 35(b)(2)(iii)(D)(1).

1. *Exception for certain accounts.* Escrow accounts established for first-lien higher-priced mortgage loans for which applications were received on or after April 1, 2010, and before January 1, 2014, are not counted for purposes of § 1026.35(b)(2)(iii)(D). For applications received on and after January 1, 2014, creditors, together with their affiliates, that establish new escrow accounts, other than those described in § 1026.35(b)(2)(iii)(D)(*2*), do not qualify for the exemption provided under § 1026.35(b)(2)(iii). Creditors, together with their affiliates, that continue to maintain escrow accounts established for first-lien higher-priced mortgage loans for which applications were received on or after April 1, 2010, and before January 1, 2014, still qualify for the exemption provided under § 1026.35(b)(2)(iii) so long as they do not establish new escrow accounts for transactions for which they received applications on or after January 1, 2014, other than those described in § 1026.35(b)(2)(iii)(D)(*2*), and they otherwise qualify under § 1026.35(b)(2)(iii).

* * * * *

Section 1026.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

36(a) Definitions.

1. *Meaning of loan originator.* i. *General.* A. Section 1026.36(a) defines the set of activities or services any one of which, if done for or in the expectation of compensation or gain, makes the person doing such activities or

performing such services a loan originator, unless otherwise excluded. The scope of activities covered by the term loan originator includes:

1. Referring a consumer to any person who participates in the origination process as a loan originator. Referring is an activity included under each of the activities of offering, arranging, or assisting a consumer in obtaining or applying to obtain an extension of credit. Referring includes any oral or written action directed to a consumer that can affirmatively influence the consumer to select a particular loan originator or creditor to obtain an extension of credit when the consumer will pay for such credit. See comment 36(a)–4 with respect to certain activities that do not constitute referring.

2. Arranging a credit transaction, including initially contacting and orienting the consumer to a particular loan originator's or creditor's origination process or particular credit terms that are or may be available to that consumer selected based on the consumer's financial characteristics, assisting the consumer to apply for credit, taking an application, offering particular credit terms to the consumer selected based on the consumer's financial characteristics, negotiating credit terms, or otherwise obtaining or making an extension of credit.

3. Assisting a consumer in obtaining or applying for consumer credit by advising on particular credit terms that are or may be available to that consumer based on the consumer's financial characteristics, filling out an application form, preparing application packages (such as a credit application or pre-approval application or supporting documentation), or collecting application and supporting information on behalf of the consumer to submit to a loan originator or creditor. A person who, acting on behalf of a loan originator or creditor, collects information or verifies information provided by the consumer, such as by asking the consumer for documentation to support the information the consumer provided or for the consumer's authorization to obtain supporting documents from third parties, is not collecting information on behalf of the consumer. See also comment 36(a)z4.i through iv with respect to application-related administrative and clerical tasks and comment 36(a)–1.v with respect to third-party advisors.

4. Presenting particular credit terms for the consumer's consideration that are selected based on the consumer's financial characteristics, or communicating with a consumer for the purpose of reaching a mutual understanding about prospective credit terms.

* * * * *

4. * * *

i. *Application-related administrative and clerical tasks.* The definition of loan originator does not include a loan originator's or creditor's employee who provides a credit application form from the entity for which the person works to the consumer for the consumer to complete or, without assisting the consumer in completing the credit application, processing or analyzing the information, or discussing particular credit terms that are or may be available from a creditor or loan originator to that consumer selected based on the consumer's financial characteristics, delivers the credit application from a consumer to a loan originator or creditor. A person does not assist the consumer in completing the application if the person explains to the consumer filling out the application the contents of the application or where particular consumer information is to be provided, or generally describes the credit application process to a consumer without discussing particular credit terms that are or may be available from a creditor or loan originator to that consumer selected based on the consumer's financial characteristics.

ii. *Responding to consumer inquiries and providing general information.* The definition of loan originator does not include persons who:

A. * * *

B. As employees of a creditor or loan originator, provide loan originator or creditor contact information of the loan originator or creditor entity for which he or she works, or of a person who works for that the same entity to a consumer, provided that the person does not discuss particular credit terms that are or may be available from a creditor or loan originator to that consumer selected based on the consumer's financial characteristics and does not direct the consumer, based on his or her assessment of the consumer's financial characteristics, to a particular loan originator or particular creditor seeking to originate credit transactions to consumers with those financial characteristics;

C. Describe other product-related services (for example, persons who describe optional monthly payment methods via telephone or via automatic account withdrawals, the availability and features of online account access, the availability of 24-hour customer support, or free mobile applications to access account information); or

D. * * *

iii. *Loan processing.* The definition of loan originator does not include persons who, acting on behalf of a loan originator or a creditor:

A. * * *

B. * * *

C. Coordinate consummation of the credit transaction or other aspects of the credit transaction process, including by communicating with a consumer about process deadlines and documents needed at consummation, provided that any communication that includes a discussion about credit terms available from a creditor to that consumer selected based on the consumer's financial characteristics only confirms credit terms already agreed to by the consumer;

* * * * *

iv. *Underwriting, credit approval, and credit pricing.* The definition of loan originator does not include persons who:

A. * * *

B. Approve particular credit terms or set particular credit terms available from a creditor to that consumer selected based on the consumer's financial characteristics in offer or counter-offer situations, provided that only a loan originator communicates to or with the consumer regarding these credit terms, an offer, or provides or engages in negotiation, a counter-offer, or approval conditions; or

* * * * *

5. *Compensation.*

* * * * *

iv. *Amounts for charges for services that are not loan origination activities.*

A. * * *

B. Compensation includes any salaries, commissions, and any financial or similar incentive to an individual loan originator, regardless of whether it is labeled as payment for services that are not loan origination activities.

* * * * *

36(a)(1)(i)(B) Employee of a retailer of manufactured homes.

1. The definition of loan originator does not include an employee of a manufactured home retailer that ''assists'' a consumer in obtaining or applying for consumer credit as defined in comment 36(a)–1.i.A.*3,* provided the employee does not advise the consumer on specific credit terms, or otherwise engage in loan originator activity as defined in § 1026.36(a)(1). The following examples describe activities that, in the absence of other activities, do not define a manufactured home retailer employee as a loan originator:

i. Generally describing the credit application process to a consumer without advising on credit terms available from a creditor.

ii. Preparing residential mortgage loan packages, which means compiling and processing loan application materials and supporting documentation, and providing general application instructions to consumers so consumers can complete an application, without interacting or communicating with the consumer regarding transaction terms, but not filling out a consumer's application, inputting the information into an online application or other automated system, or taking information from the consumer over the phone to complete the application.

iii. Collecting information on behalf of the consumer with regard to a residential mortgage loan. Collecting information ''on behalf of the consumer'' would include gathering information or supporting documentation from third parties on behalf of the consumer to provide to the consumer, for the consumer then to provide in the application or for the consumer to submit to the loan originator or creditor.

iv. Providing or making available general information about creditors or loan originators that may offer financing for manufactured homes in the consumer's general area, when doing so does not otherwise amount to ''referring'' as defined in comment 36(a)–1.i.A.*1.* This includes making available, in a neutral manner, general brochures or information about the different creditors or loan originators that may offer financing to a consumer, but does not include recommending a particular creditor or loan originator or otherwise influencing the consumer's decision.

* * * * *

36(b) Scope.

1. *Scope of coverage.* Section 1026.36(c)(1) and (c)(2) applies to closed-end consumer

credit transactions secured by a consumer's principal dwelling. Section 1026.36(c)(3) applies to a consumer credit transaction, including home equity lines of credit under § 1026.40, secured by a consumer's dwelling. Paragraphs (h) and (i) of § 1026.36 apply to home equity lines of credit under § 1026.40 secured by a consumer's principal dwelling. Paragraphs (d), (e), (f), (g), (h), and (i) of § 1026.36 apply to closed-end consumer credit transactions secured by a dwelling. Closed-end consumer credit transactions include transactions secured by first or subordinate liens, and reverse mortgages that are not home equity lines of credit under § 1026.40. See § 1026.36(b) for additional restrictions on the scope of § 1026.36, and §§ 1026.1(c) and 1026.3(a) and corresponding commentary for further discussion of extensions of credit subject to Regulation Z.

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36(d) Prohibited payments to loan originators.

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36(d)(1) Payments based on a term of a transaction.

1. * * *

ii. *Single or multiple transactions.* The prohibition on payment and receipt of compensation under § 1026.36(d)(1)(i) encompasses compensation that directly or indirectly is based on the terms of a single transaction of a single individual loan originator, the terms of multiple transactions by that single individual loan originator, or the terms of multiple transactions by multiple individual loan originators. Compensation to an individual loan originator that is based upon profits determined with reference to a mortgage-related business is considered compensation that is based on the terms of multiple transactions by multiple individual loan originators. For clarification about the exceptions permitting compensation based upon profits determined with reference to mortgage-related business pursuant to either a designated tax-advantaged plan or a non-deferred profits-based compensation plan, see comment 36(d)(1)–3. For clarification about ''mortgage-related business,'' see comments 36(d)(1)–3.v.B and –3.v.E.

A. Assume that a creditor pays a bonus to an individual loan originator out of a bonus pool established with reference to the creditor's profits and the profits are determined with reference to the creditor's revenue from origination of closed-end consumer credit transactions secured by a dwelling. In such instance, the bonus is considered compensation that is based on the terms of multiple transactions by multiple individual loan originators. Therefore, the bonus is prohibited under § 1026.36(d)(1)(i), unless it is otherwise permitted under § 1026.36(d)(1)(iv).

B. Assume that an individual loan originator's employment contract with a creditor guarantees a quarterly bonus in a specified amount conditioned upon the individual loan originator meeting certain performance benchmarks (*e.g.,* volume of originations monthly). A bonus paid following the satisfaction of those contractual conditions is not directly or indirectly based on the terms of a transaction by an individual loan originator, the terms of multiple transactions by that individual loan originator, or the terms of multiple transactions by multiple individual loan originators under § 1026.36(d)(1)(i) as clarified by this comment 36(d)(1)–1.ii, because the creditor is obligated to pay the bonus, in the specified amount, regardless of the terms of transactions of the individual loan originator or multiple individual loan originators and the effect of those terms of multiple transactions on the creditor's profits. Because this type of bonus is not directly or indirectly based on the terms of multiple transactions by multiple individual loan originators, as described in § 1026.36(d)(1)(i) (as clarified by this comment 36(d)(1)–1.ii), it is not subject to the 10-percent total compensation limit described in § 1026.36(d)(1)(iv)(B)(*1*).

iii. * * *

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D. The fees and charges described above in paragraphs B and C can only be a term of a transaction if the fees or charges are required to be disclosed in the Good Faith Estimate, the HUD–1, or the HUD–1A (and subsequently in any integrated disclosures promulgated by the Bureau under TILA section 105(b) (15 U.S.C. 1604(b)) and RESPA section 4 (12 U.S.C. 2603) as amended by sections 1098 and 1100A of the Dodd-Frank Act).

* * * * *

3. *Interpretation of § 1026.36(d)(1)(iii) and (iv).* Subject to certain restrictions, § 1026.36(d)(1)(iii) and § 1026.36(d)(1)(iv) permit contributions to or benefits under designated tax-advantaged plans and compensation under a non-deferred profits-based compensation plan even if the contributions, benefits, or compensation, respectively, are based on the terms of multiple transactions by multiple individual loan originators.

i. *Designated tax-advantaged plans.* Section 1026.36(d)(1)(iii) permits an individual loan originator to receive, and a person to pay, compensation in the form of contributions to a defined contribution plan or benefits under a defined benefit plan provided the plan is a designated tax-advantaged plan (as defined in § 1026.36(d)(1)(iii)), even if contributions to or benefits under such plans are directly or indirectly based on the terms of multiple transactions by multiple individual loan originators. In the case of a designated tax-advantaged plan that is a defined contribution plan, § 1026.36(d)(1)(iii) does not permit the contribution to be directly or indirectly based on the terms of that individual loan originator's transactions. A defined contribution plan has the meaning set forth in Internal Revenue Code section 414(i), 26 U.S.C. 414(i). A defined benefit plan has the meaning set forth in Internal Revenue Code section 414(j), 26 U.S.C. 414(j).

ii. *Non-deferred profits-based compensation plans.* As used in § 1026.36(d)(1)(iv), a ''non-deferred profits-based compensation plan'' is any compensation arrangement where an individual loan originator may be paid variable, additional compensation based in whole or in part on the mortgage-related business profits of the person paying the compensation, any affiliate, or a business unit within the organizational structure of the person or the affiliate, as applicable (*i.e.,* depending on the level within the person's or affiliate's organization at which the non-deferred profits-based compensation plan is established). A non-deferred profits-based compensation plan does not include a designated tax-advantaged plan or other forms of deferred compensation that are not designated tax-advantaged plans, such as those created pursuant to Internal Revenue Code section 409A, 26 U.S.C. 409A. Thus, if contributions to or benefits under a designated tax-advantaged plan or compensation under another form of deferred compensation plan are determined with reference to the mortgage-related business profits of the person making the contribution, then the contribution, benefits, or other compensation, as applicable, are not permitted by § 1026.36(d)(1)(iv) (although, in the case of contributions to or benefits under a designated tax-advantaged plan, the benefits or contributions may be permitted by § 1026.36(d)(1)(iii)). Under a non-deferred profits-based compensation plan, the individual loan originator may, for example, be paid directly in cash, stock, or other non-deferred compensation, and the compensation under the non-deferred profits-based compensation plan may be determined by a fixed formula or may be at the discretion of the person (*e.g.,* the person may elect not to pay compensation under a non-deferred profits-based compensation plan in a given year), provided the compensation is not directly or indirectly based on the terms of the individual loan originator's transactions. As used in § 1026.36(d)(1)(iv) and this commentary, non-deferred profits-based compensation plans include, without limitation, bonus pools, profits pools, bonus plans, and profit-sharing plans. Compensation under a non-deferred profits-based compensation plan could include, without limitation, annual or periodic bonuses, or awards of merchandise, services, trips, or similar prizes or incentives where the bonuses, contributions, or awards are determined with reference to the profits of the person, business unit, or affiliate, as applicable. As used in § 1026.36(d)(1)(iv) and this commentary, a business unit is a division, department, or segment within the overall organizational structure of the person or the person's affiliate that performs discrete business functions and that the person or the affiliate treats separately for accounting or other organizational purposes. For example, a creditor that pays its individual loan originators bonuses at the end of a calendar year based on the creditor's average net return on assets for the calendar year is operating a non-deferred profits-based compensation plan under § 1026.36(d)(1)(iv). A bonus that is paid to an individual loan originator from a source other than a non-deferred profits-based compensation plan (or a deferred compensation plan where the bonus is determined with reference to mortgage-related business profits), such as a retention bonus budgeted for in advance or a performance bonus paid out of a bonus pool set aside at the beginning of the

company's annual accounting period as part of the company's operating budget, does not violate the prohibition on payment of compensation based on the terms of multiple transactions by multiple individual loan originators under § 1026.36(d)(1)(i), as clarified by comment 36(d)(1)–1.ii; therefore, § 1026.36(d)(1)(iv) does not apply to such bonuses.

iii. *Compensation that is not directly or indirectly based on the terms of multiple transactions by multiple individual loan originators.* The compensation arrangements addressed in § 1026.36(d)(1)(iii) and (iv) are permitted even if they are directly or indirectly based on the terms of multiple transactions by multiple individual loan originators. See comment 36(d)(1)–1 for additional interpretation. If a loan originator organization's revenues are exclusively derived from transactions subject to § 1026.36(d) (whether paid by creditors, consumers, or both) and that loan originator organization pays its individual loan originators a bonus under a non-deferred profits-based compensation plan, the bonus is not directly or indirectly based on the terms of multiple transactions by multiple individual loan originators if § 1026.36(d)(1)(i) is otherwise complied with.

iv. *Compensation based on terms of an individual loan originator's transactions.* Under both § 1026.36(d)(1)(iii), with regard to contributions made to a defined contribution plan that is a designated tax-advantaged plan, and § 1026.36(d)(1)(iv)(A), with regard to compensation under a non-deferred profits-based compensation plan, the payment of compensation to an individual loan originator may not be directly or indirectly based on the terms of that individual loan originator's transaction or transactions. Consequently, for example, where an individual loan originator makes loans that vary in their interest rate spread, the compensation payment may not take into account the average interest rate spread on the individual loan originator's transactions during the relevant calendar year.

v. *Compensation under non-deferred profits-based compensation plans.* Assuming that the conditions in § 1026.36(d)(1)(iv)(A) are met, § 1026.36(d)(1)(iv)(B)(*1*) permits certain compensation to an individual loan originator under a non-deferred profits-based compensation plan. Specifically, if the compensation is determined with reference to the profits of the person from mortgage-related business, compensation under a non-deferred profits-based compensation plan is permitted provided the compensation does not, in the aggregate, exceed 10 percent of the individual loan originator's total compensation corresponding to the time period for which compensation under the non-deferred profits-based compensation plan is paid. The compensation restrictions under § 1026.36(d)(1)(iv)(B)(*1*) are sometimes referred to in this commentary as the ''10-percent total compensation limit'' or the ''10-percent limit.''

A. *Total compensation.* For purposes of § 1026.36(d)(1)(iv)(B)(*1*), the individual loan originator's total compensation consists of the sum total of: (1) All wages and tips reportable for Medicare tax purposes in box 5 on IRS form W–2 (or, if the individual loan originator is an independent contractor, reportable compensation on IRS form 1099–MISC) that are actually paid during the relevant time period (regardless of when the wages and tips are earned), except for any compensation under a non-deferred profits-based compensation plan that is earned during a different time period (see comment 36(d)(1)–3.v.C); (2) at the election of the person paying the compensation, all contributions that are actually made during the relevant time period by the creditor or loan originator organization to the individual loan originator's accounts in designated tax-advantaged plans that are defined contribution plans (regardless of when the contributions are earned); and (3) at the election of the person paying the compensation, all compensation under a non-deferred profits-based compensation plan that is earned during the relevant time period, regardless of whether the compensation is actually paid during that time period (see comment 36(d)(1)–3.v.C). If an individual loan originator has some compensation that is reportable on the W–2 and some that is reportable on the 1099–MISC, the total compensation is the sum total of what is reportable on each of the two forms.

B. *Profits of the Person.* Under § 1026.36(d)(1)(iv), a plan is a non-deferred profits-based compensation plan if compensation is paid, based in whole or in part, on the profits of the person paying the compensation. As used in § 1026.36(d)(1)(iv), ''profits of the person'' include, as applicable depending on where the non-deferred profits-based compensation plan is set, the profits of the person, the business unit to which the individual loan originators are assigned for accounting or other organizational purposes, or any affiliate of the person. Profits from mortgage-related business are profits determined with reference to revenue generated from transactions subject to § 1026.36(d). Pursuant to § 1026.36(b) and comment 36(b)–1, § 1026.36(d) applies to closed-end consumer credit transactions secured by dwellings. This revenue includes, without limitation, and as applicable based on the particular sources of revenue of the person, business unit, or affiliate, origination fees and interest associated with dwelling-secured transactions for which individual loan originators working for the person were loan originators, income from servicing of such transactions, and proceeds of secondary market sales of such transactions. If the amount of the individual loan originator's compensation under non-deferred profits-based compensation plans paid for a time period does not, in the aggregate, exceed 10 percent of the individual loan originator's total compensation corresponding to the same time period, compensation under non-deferred profits-based compensation plans may be paid under § 1026.36(d)(1)(iv)(B)(*1*) regardless of whether or not it was determined with reference to the profits of the person from mortgage-related business.

C. *Time period for which the compensation under the non-deferred profits-based compensation plan is paid and to which the total compensation corresponds.* Under § 1026.36(d)(1)(iv)(B)(*1*), determination of whether payment of compensation under a non-deferred profits-based compensation plan complies with the 10-percent limit requires a calculation of the ratio of the compensation under the non-deferred profits-based compensation plan (*i.e.,* the compensation subject to the 10-percent limit) and the total compensation corresponding to the relevant time period. For compensation subject to the 10-percent limit, the relevant time period is the time period for which a person makes reference to profits in determining the compensation (*i.e.,* when the compensation was earned). It does not matter whether the compensation is actually paid during that particular time period. For total compensation, the relevant time period is the same time period, but only certain types of compensation may be included in the total compensation amount for that time period (see comment 36(d)(1)–3.v.A). For example, assume that during calendar year 2014 a creditor pays an individual loan originator compensation in the following amounts: $80,000 in commissions based on the individual loan originator's performance and volume of loans generated during the calendar year; and $10,000 in an employer contribution to a designated tax-advantaged defined contribution plan on behalf of the individual loan originator. The creditor desires to pay the individual loan originator a year-end bonus of $10,000 under a non-deferred profits-based compensation plan. The commissions are paid and employer contributions to the designated tax-advantaged defined contribution plan are made during calendar year 2014, but the year-end bonus will be paid in January 2015. For purposes of the 10-percent limit, the year-end bonus is counted toward the 10-percent limit for calendar year 2014, even though it is not actually paid until 2015. Therefore, for calendar year 2014 the individual loan originator's compensation that is subject to the 10-percent limit would be $10,000 (*i.e.,* the year-end bonus) and the total compensation would be $100,000 (*i.e.,* the sum of the commissions, the designated tax-advantaged plan contribution (assuming the creditor elects to include it in total compensation for calendar year 2014), and the bonus (assuming the creditor elects to include it in total compensation for calendar year 2014)); the bonus would be permissible under § 1026.36(d)(1)(iv) because it does not exceed 10 percent of total compensation. The determination of total compensation corresponding to 2014 also would not take into account any compensation subject to the 10-percent limit that is actually paid in 2014 but is earned during a different calendar year (*e.g.,* an annual bonus determined with reference to mortgage-related business profits for calendar year 2013 that is paid in January 2014). If the employer contribution to the designated tax-advantaged plan is earned in 2014 but actually made in 2015, however, it may not be included in total compensation for 2014. A company, business unit, or affiliate, as applicable, may pay compensation subject to the 10-percent limit during different time periods falling within its annual accounting period for keeping records and reporting income and expenses,

which may be a calendar year or a fiscal year depending on the annual accounting period. In such instances, however, the 10-percent limit applies both as to each time period and cumulatively as to the annual accounting period. For example, assume that a creditor uses a calendar-year accounting period. If the creditor pays an individual loan originator a bonus at the end of each quarter under a non-deferred profits-based compensation plan, the payment of each quarterly bonus is subject to the 10-percent limit measured with respect to each quarter. The creditor can also pay an annual bonus under the non-deferred profits-based compensation plan that does not exceed the difference of 10 percent of the individual loan originator's total compensation corresponding to the calendar year and the aggregate amount of the quarterly bonuses.

D. *Awards of merchandise, services, trips, or similar prizes or incentives.* If any compensation paid to an individual loan originator under § 1026.36(d)(1)(iv) consists of an award of merchandise, services, trips, or similar prize or incentive, the cash value of the award is factored into the calculation of the 10-percent total compensation limit. For example, during a given calendar year, individual loan originator A and individual loan originator B are each employed by a creditor and paid $40,000 in salary, and $45,000 in commissions. The creditor also contributes $5,000 to a designated tax-advantaged defined contribution plan for each individual loan originator during that calendar year, which the creditor elects to include in the total compensation amount. Neither individual loan originator is paid any other form of compensation by the creditor. In December of the calendar year, the creditor rewards both individual loan originators for their performance during the calendar year out of a bonus pool established with reference to the profits of the mortgage origination business unit. Individual loan originator A is paid a $10,000 cash bonus, meaning that individual loan originator A's total compensation is $100,000 (assuming the creditor elects to include the bonus in the total compensation amount). Individual loan originator B is paid a $7,500 cash bonus and awarded a vacation package with a cash value of $3,000, meaning that individual loan originator B's total compensation is $100,500 (assuming the creditor elects to include the reward in the total compensation amount). Under § 1026.36(d)(1)(iv)(B)(*1*), individual loan originator A's $10,000 bonus is permissible because the bonus would not constitute more than 10 percent of individual loan originator A's total compensation for the calendar year. The creditor may not pay individual loan originator B the $7,500 bonus and award the vacation package, however, because the total value of the bonus and the vacation package would be $10,500, which is greater than 10 percent (10.45 percent) of individual loan originator B's total compensation for the calendar year. One way to comply with § 1026.36(d)(1)(iv)(B)(*1*) would be if the amount of the bonus were reduced to $7,000 or less or the vacation package were structured such that its cash value would be $2,500 or less.

E. *Compensation determined only with reference to non-mortgage-related business profits.* Compensation under a non-deferred profits-based compensation plan is not subject to the 10-percent total compensation limit under § 1026.36(d)(1)(iv)(B)(*1*) if the non-deferred profits-based compensation plan is determined with reference only to profits from business other than mortgage-related business, as determined in accordance with reasonable accounting principles. Reasonable accounting principles reflect an accurate allocation of revenues, expenses, profits, and losses among the person, any affiliate of the person, and any business units within the person or affiliates, and are consistent with the accounting principles applied by the person, the affiliate, or the business unit with respect to, as applicable, its internal budgeting and auditing functions and external reporting requirements. Examples of external reporting and filing requirements that may be applicable to creditors and loan originator organizations are Federal income tax filings, Federal securities law filings, or quarterly reporting of income, expenses, loan origination activity, and other information required by government-sponsored enterprises. As used in § 1026.36(d)(1)(iv)(B)(*1*), profits means positive profits or losses avoided or mitigated.

F. *Additional examples. 1.* Assume that, during a given calendar year, a loan originator organization pays an individual loan originator employee $40,000 in salary and $125,000 in commissions, and makes a contribution of $15,000 to the individual loan originator's 401(k) plan. At the end of the year, the loan originator organization wishes to pay the individual loan originator a bonus based on a formula involving a number of performance metrics, to be paid out of a profit pool established at the level of the company but that is determined in part with reference to the profits of the company's mortgage origination unit. Assume that the loan originator organization derives revenues from sources other than transactions covered by § 1026.36(d). In this example, the performance bonus would be directly or indirectly based on the terms of multiple individual loan originators' transactions as described in § 1026.36(d)(1)(i), because it is being determined with reference to profits from mortgage-related business. Assume, furthermore, that the loan originator organization elects to include the bonus in the total compensation amount for the calendar year. Thus, the bonus is permissible under § 1026.36(d)(1)(iv)(B)(*1*) if it does not exceed 10 percent of the loan originator's total compensation, which in this example consists of the individual loan originator's salary and commissions, the contribution to the 401(k) plan (if the loan originator organization elects to include the contribution in the total compensation amount), and the performance bonus. Therefore, if the loan originator organization elects to include the 401(k) contribution in total compensation for these purposes, the loan originator organization may pay the individual loan originator a performance bonus of up to $20,000 (*i.e.,* 10 percent of $200,000 in total compensation). If the loan originator organization does not include the 401(k) contribution in calculating total compensation, or the 401(k) contribution is actually made in January of the following calendar year (in which case it cannot be included in total compensation for the initial calendar year), the bonus may be up to $18,333.33. If the loan originator organization includes neither the 401(k) contribution nor the performance bonus in the total compensation amount, the bonus may not exceed $16,500.

2. Assume that the compensation during a given calendar year of an individual loan originator employed by a creditor consists of only salary and commissions, and the individual loan originator does not participate in a designated tax-advantaged defined contribution plan. Assume further that the creditor uses a calendar-year accounting period. At the end of the calendar year, the creditor pays the individual loan originator two bonuses: A ''performance'' bonus based on the individual loan originator's aggregate loan volume for a calendar year that is paid out of a bonus pool determined with reference to the profits of the mortgage origination business unit, and a year-end ''holiday'' bonus in the same amount to all company employees that is paid out of a company-wide bonus pool. Because the performance bonus is paid out of a bonus pool that is determined with reference to the profits of the mortgage origination business unit, it is compensation that is determined with reference to mortgage-related business profits, and the bonus is therefore subject to the 10-percent total compensation limit. If the company-wide bonus pool from which the ''holiday'' bonus is paid is derived in part from profits of the creditor's mortgage origination business unit, then the combination of the ''holiday'' bonus and the performance bonus is subject to the 10-percent total compensation limit. The ''holiday'' bonus is not subject to the 10-percent total compensation limit if the bonus pool is determined with reference only to the profits of business units other than the mortgage origination business unit, as determined in accordance with reasonable accounting principles. If the ''performance'' bonus and the ''holiday'' bonus in the aggregate do not exceed 10 percent of the individual loan originator's total compensation, the bonuses may be paid under § 1026.36(d)(1)(iv)(B)(*1*) without the necessity of determining from which bonus pool they were paid or whether they were determined with reference to the profits of the creditor's mortgage origination business unit.

G. *Reasonable reliance by individual loan originator on accounting or statement by person paying compensation.* An individual loan originator is deemed to comply with its obligations regarding receipt of compensation under § 1026.36(d)(1)(iv)(B)(*1*) if the individual loan originator relies in good faith on an accounting or a statement provided by the person who determined the individual loan originator's compensation under a non-deferred profits-based compensation plan pursuant to § 1026.36(d)(1)(iv)(B)(*1*) and where the statement or accounting is provided within a reasonable time period following the person's determination.

vi. *Individual loan originators who originate ten or fewer transactions.* Assuming that the conditions in § 1026.36(d)(1)(iv)(A) are met, § 1026.36(d)(1)(iv)(B)(*2*) permits compensation to an individual loan originator under a non-deferred profits-based compensation plan even if the payment or contribution is directly or indirectly based on the terms of multiple individual loan originators' transactions if the individual is a loan originator (as defined in § 1026.36(a)(1)(i)) for ten or fewer consummated transactions during the 12-month period preceding the compensation determination. For example, assume a loan originator organization employs two individual loan originators who originate transactions subject to § 1026.36 during a given calendar year. Both employees are individual loan originators as defined in § 1026.36(a)(1)(ii), but only one of them (individual loan originator B) acts as a loan originator in the normal course of business, while the other (individual loan originator A) is called upon to do so only occasionally and regularly performs other duties (such as serving as a manager). In January of the following calendar year, the loan originator organization formally determines the financial performance of its mortgage business for the prior calendar year. Based on that determination, the loan originator organization on February 1 decides to pay a bonus to the individual loan originators out of a company bonus pool. Assume that, between February 1 of the prior calendar year and January 31 of the current calendar year, individual loan originator A was the loan originator for eight consummated transactions, and individual loan originator B was the loan originator for 15 consummated transactions. The loan originator organization may award the bonus to individual loan originator A under § 1026.36(d)(1)(iv)(B)(*2*). The loan originator organization may not award the bonus to individual loan originator B relying on the exception under § 1026.36(d)(1)(iv)(B)(*2*) because it would not apply, although it could award a bonus pursuant to the 10-percent total compensation limit under § 1026.36(d)(1)(iv)(B)(*1*) if the requirements of that provision are complied with.

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6. *Periodic changes in loan originator compensation and terms of transactions.* Section 1026.36 does not limit a creditor or other person from periodically revising the compensation it agrees to pay a loan originator. However, the revised compensation arrangement must not result in payments to the loan originator that are based on the terms of a credit transaction. A creditor or other person might periodically review factors such as loan performance, transaction volume, as well as current market conditions for loan originator compensation, and prospectively revise the compensation it agrees to pay to a loan originator. For example, assume that during the first six months of the year, a creditor pays $3,000 to a particular loan originator for each loan delivered, regardless of the terms of the transaction. After considering the volume of business produced by that loan originator, the creditor could decide that as of July 1, it will pay $3,250 for each loan delivered by that particular loan originator, regardless of the terms of the transaction. No violation occurs even if the loans made by the creditor after July 1 generally carry a higher interest rate than loans made before that date, to reflect the higher compensation.

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36(f) Loan originator qualification requirements.

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Paragraph 36(f)(3).

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Paragraph 36(f)(3)(i).

1. *Criminal and credit histories.* Section 1026.36(f)(3)(i) requires the loan originator organization to obtain, for any of its individual loan originator employees who is not required to be licensed and is not licensed as a loan originator pursuant to the SAFE Act, a criminal background check, a credit report, and information related to any administrative, civil, or criminal determinations by any government jurisdiction. The requirement applies to individual loan originator employees who were hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 1, 2014, used to screen the individual). A credit report may be obtained directly from a consumer reporting agency or through a commercial service. A loan originator organization with access to the NMLSR can meet the requirement for the criminal background check by reviewing any criminal background check it receives upon compliance with the requirement in 12 CFR 1007.103(d)(1) and can meet the requirement to obtain information related to any administrative, civil, or criminal determinations by any government jurisdiction by obtaining the information through the NMLSR. Loan originator organizations that do not have access to these items through the NMLSR may obtain them by other means. For example, a criminal background check may be obtained from a law enforcement agency or commercial service. Information on any past administrative, civil, or criminal findings (such as from disciplinary or enforcement actions) may be obtained from the individual loan originator.

2. *Retroactive obtaining of information not required.* Section 1026.36(f)(3)(i) does not require the loan originator organization to obtain the covered information for an individual whom the loan originator organization hired as a loan originator before January 1, 2014, and screened under applicable statutory or regulatory background standards in effect at the time of hire. However, if the individual subsequently ceases to be employed as a loan originator by that loan originator organization, and later resumes employment as a loan originator by that loan originator organization (or any other loan originator organization), the loan originator organization is subject to the requirements of § 1026.36(f)(3)(i).

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Paragraph 36(f)(3)(ii).

1. *Scope of review.* Section 1026.36(f)(3)(ii) requires the loan originator organization to review the information that it obtains under § 1026.36(f)(3)(i) and other reasonably available information to determine whether the individual loan originator meets the standards in § 1026.36(f)(3)(ii). Other reasonably available information includes any information the loan originator organization has obtained or would obtain as part of a reasonably prudent hiring process, including information obtained from application forms, candidate interviews, other reliable information and evidence provided by a candidate, and reference checks. The requirement applies to individual loan originator employees who were hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 1, 2014, used to screen the individual).

2. *Retroactive determinations not required.* Section 1026.36(f)(3)(ii) does not require the loan originator organization to review the covered information and make the required determinations for an individual whom the loan originator organization hired as a loan originator on or before January 1, 2014 and screened under applicable statutory or regulatory background standards in effect at the time of hire. However, if the individual subsequently ceases to be employed as a loan originator by that loan originator organization, and later resumes employment as a loan originator by that loan originator organization (or any other loan originator organization), the loan originator organization employing the individual is subject to the requirements of § 1026.36(f)(3)(ii).

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36(i) Prohibition on financing credit insurance.

1. *Financing credit insurance premiums or fees.* In the case of single-premium credit insurance, a creditor violates § 1026.36(i) by adding the credit insurance premium or fee to the amount owed by the consumer at closing. In the case of monthly-pay credit insurance, a creditor violates § 1026.36(i) if, upon the close of the monthly period in which the premium or fee is due, the creditor includes the premium or fee in the amount owed by the consumer.

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Section 1026.41—Periodic Statements for Residential Mortgage Loans

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41(b) Timing of the periodic statement.

1. *Reasonably prompt time.* Section 1026.41(b) requires that the periodic statement be delivered or placed in the mail no later than a reasonably prompt time after the payment due date or the end of any courtesy period. Delivering, emailing or placing the periodic statement in the mail within four days of the close of the courtesy period of the previous billing cycle generally would be considered reasonably prompt.

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41(d) Content and layout of the periodic statement.

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3. *Terminology.* A servicer may use terminology other than that found on the sample periodic statements in appendix H–30, so long as the new terminology is commonly understood. For example, servicers may take into consideration regional differences in terminology and refer to the account for the collection of taxes and insurance, referred to in § 1026.41(d) as the ''escrow account,'' as an ''impound account.''

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41(d)(4) Transaction Activity.

1. *Meaning.* Transaction activity includes any transaction that credits or debits the amount currently due. This is the same amount that is required to be disclosed under § 1026.41(d)(1)(iii). Examples of such transactions include, without limitation:

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41(e)(3) Coupon book exemption.

1. *Fixed rate.* For guidance on the meaning of ''fixed rate'' for purposes of § 1026.41(e)(3), see § 1026.18(s)(7)(iii) and its commentary.

* * * * *

41(e)(4) Small servicers.

* * * * *

41(e)(4)(iii) Small servicer determination.

1. *Loans obtained by merger or acquisition.* Any mortgage loans obtained by a servicer or an affiliate as part of a merger or acquisition, or as part of the acquisition of all of the assets or liabilities of a branch office of a creditor, should be considered mortgage loans for which the servicer or an affiliate is the creditor to which the mortgage loan is initially payable. A branch office means either an office of a depository institution that is approved as a branch by a Federal or State supervisory agency or an office of a for-profit mortgage lending institution (other than a depository institution) that takes applications from the public for mortgage loans.

* * * * *

Corrections to FR Doc. 2013–16962

In FR Doc. 2013–16962 appearing on page 44685 in the **Federal Register** on Wednesday July 24, 2013, the following correction is made:

Supplement I to Part 1026 [Corrected]

1. On page 44725, in the second column, amendatory instruction 11.A.i.b is corrected to read ''Under *Paragraph 41(e)(4)(iii) Small servicer determination,* paragraph 2 is amended and paragraph 3 is added.''

Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling

* * * * *

43(b) Definitions.

* * * * *

43(b)(8) Mortgage-related obligations.

* * * * *

4. *Mortgage insurance, guarantee, or similar charges.* Section 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums or charges protecting the creditor against the consumer's default or other credit loss. This includes all premiums or similar charges, whether denominated as mortgage insurance, guarantee, or otherwise, as determined according to applicable State or Federal law. For example, monthly ''private mortgage insurance'' payments paid to a non-governmental entity, annual ''guarantee fee'' payments required by a Federal housing program, and a quarterly ''mortgage insurance'' payment paid to a State agency administering a housing program are all mortgage-related obligations for purposes of § 1026.43(b)(8). Section 1026.43(b)(8) includes these charges in the definition of mortgage-related obligations if the creditor requires the consumer to pay them, even if the consumer is not legally obligated to pay the charges under the terms of the insurance program. For example, if a mortgage insurance program obligates the creditor to make recurring mortgage insurance payments, and the creditor requires the consumer to reimburse the creditor for such recurring payments, the consumer's payments are mortgage-related obligations for purposes of § 1026.43(b)(8). However, if a mortgage insurance program obligates the creditor to make recurring mortgage insurance payments, and the creditor does not require the consumer to reimburse the creditor for the cost of the mortgage insurance payments, the recurring mortgage insurance payments are not mortgage-related obligations for purposes of § 1026.43(b)(8).

* * * * *

43(c) Repayment ability.

* * * * *

43(c)(3) Verification using third-party records.

* * * * *

6. *Verification of current debt obligations.* Section 1026.43(c)(3) does not require creditors to obtain additional records to verify the existence or amount of obligations shown on a consumer's credit report or listed on the consumer's application, absent circumstances described in comment 43(c)(3)–3. Under § 1026.43(c)(3)(iii), if a creditor relies on a consumer's credit report to verify a consumer's current debt obligations and the consumer's application lists a debt obligation not shown on the credit report, the creditor may consider the existence and amount of the obligation as it is stated on the consumer's application. The creditor is not required to further verify the existence or amount of the obligation, absent circumstances described in comment 43(c)(3)–3.

* * * * *

43(e) Qualified mortgages.

* * * * *

43(e)(4) Qualified mortgage defined—special rules.

1. *Alternative definition.* Subject to the sunset provided under § 1026.43(e)(4)(iii), § 1026.43(e)(4) provides an alternative definition of qualified mortgage to the definition provided in § 1026.43(e)(2). To be a qualified mortgage under § 1026.43(e)(4), the transaction must satisfy the requirements under § 1026.43(e)(2)(i) through (iii), in addition to being one of the types of loans specified in § 1026.43(e)(4)(ii)(A) through (E).

* * * * *

Paragraph 43(e)(5).

* * * * *

8. *Transfer to another qualifying creditor.* Under § 1026.43(e)(5)(ii)(B), a qualified mortgage under § 1026.43(e)(5) may be sold, assigned, or otherwise transferred at any time to another creditor that meets the requirements of § 1026.43(e)(5)(i)(D). That section requires that a creditor, during the preceding calendar year, together with all affiliates, originated 500 or fewer first-lien covered transactions and had total assets less than $2 billion (as adjusted for inflation) at the end of the preceding calendar year. A qualified mortgage under § 1026.43(e)(5) transferred to a creditor that meets these criteria would retain its qualified mortgage status even if it is transferred less than three years after consummation.

* * * * *

43(f) Balloon-Payment qualified mortgages made by certain creditors.

* * * * *

Paragraph 43(f)(2)(iii).

1. *Supervisory sales.* Section 1026.43(f)(2)(iii) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. A balloon-payment qualified mortgage under § 1026.43(f)(1) retains its qualified mortgage status if it is sold, assigned, or otherwise transferred to another person pursuant to: (1) A capital restoration plan or other action under 12 U.S.C. 1831o; (2) the actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee; (3) an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or (4) an agreement between the creditor and such an agency. A balloon-payment qualified mortgage under § 1026.43(f)(1) that is sold, assigned, or otherwise transferred under these circumstances retains its qualified mortgage status regardless of how long after consummation it is sold and regardless of the size or other characteristics of the transferee. Section 1026.43(f)(2)(iii) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in § 1026.43(f)(2)(iii) directing the sale of one or more qualified mortgages under § 1026.43(f)(1) held by the creditor or one of the other circumstances listed in § 1026.43(f)(2)(iii). For example, a balloon-payment qualified mortgage under § 1026.43(f)(1) that is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o would retain its status as a qualified mortgage following the sale. However, if the creditor simply chose to sell the same qualified mortgage as one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement the transaction would lose its status as a qualified mortgage following the

sale unless it qualifies under another definition of qualified mortgage.

* * * * *

Dated: September 12, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2013–22752 Filed 9–19–13; 4:15 pm]

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Part III

Department of Labor

Wage and Hour Division

29 CFR Part 552

Application of the Fair Labor Standards Act to Domestic Service; Final Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 552

RIN 1235–AA05

Application of the Fair Labor Standards Act to Domestic Service

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: In 1974, Congress extended the protections of the Fair Labor Standards Act (FLSA or the Act) to ''domestic service'' employees, but it exempted from the Act's minimum wage and overtime provisions domestic service employees who provide ''companionship services'' to elderly people or people with illnesses, injuries, or disabilities who require assistance in caring for themselves, and it exempted from the Act's overtime provision domestic service employees who reside in the household in which they provide services. This Final Rule revises the Department's 1975 regulations implementing these amendments to the Act to better reflect Congressional intent given the changes to the home care industry and workforce since that time. Most significantly, the Department is revising the definition of ''companionship services'' to clarify and narrow the duties that fall within the term; in addition third party employers, such as home care agencies, will not be able to claim either of the exemptions. The major effect of this Final Rule is that more domestic service workers will be protected by the FLSA's minimum wage, overtime, and recordkeeping provisions.

DATES: This regulation is effective January 1, 2015.

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, U.S. Department of Labor, Wage and Hour Division, 200 Constitution Avenue NW., Room S–3502, FP Building, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this Final Rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0675 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's current regulations may be directed to the nearest Wage and Hour Division (WHD) District Office. Please visit *http://www.dol.gov/whd* for more information and resources about the laws administered and enforced by WHD. Information and compliance assistance materials specific to this Final Rule can be found at: *www.dol.gov/whd/homecare.* You may also call the WHD's toll-free help line at (866) 4US–WAGE ((866)-487–9243) between 8:00 a.m. and 5:00 p.m. in your local time zone..

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I. Executive Summary

Purpose of the Regulatory Action

Prior to 1974, the FLSA's minimum wage and overtime compensation provisions did not protect domestic service workers unless those workers were employed by enterprises covered by the Act (generally those that had at least a certain annual dollar threshold in business, *see* 29 U.S.C. 203(s)). Congress amended the FLSA in 1974 to extend coverage to all domestic service workers, including those employed by private households or companies too small to be covered by the Act. See Fair Labor Standards Amendments of 1974, Public Law 93–259 § 7, 88 Stat. 55, 62 (1974). At the same time, Congress created an exemption from the minimum wage and overtime compensation requirements for domestic service workers who provide companionship services and an exemption from the Act's overtime compensation requirement for domestic service workers who reside in the households in which they provide services, i.e., live-in domestic service workers. *Id.;* 29 U.S.C. 13(a)(15), 13(b)(21).[1] The new statutory text explicitly granted the Department the authority to define the terms ''domestic service employment'' and ''companionship services.'' *See* 29 U.S.C. 213(a)(15).

The legislative history of the 1974 amendments explains that the changes were intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service, but to exempt from coverage casual babysitters and individuals who provided companionship services. The ''companionship services'' exemption was to apply to ''elder sitters'' whose primary responsibility was to watch over an elderly person or person with an illness, injury, or disability in the same manner that a babysitter watches over children. *See* 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973) (statement of Sen. Williams). The companionship services exemption was not intended to exclude ''trained personnel such as nurses, whether registered or practical,'' from the protections of the Act. *See* Senate Report No. 93–690, 93rd Cong., 2d Sess., p. 20 (1974); House Report No. 93–913, 93rd Cong., 2d Sess., p. 36 (1974).

In 1975, the Department promulgated regulations implementing the companionship services and live-in domestic service employee exemptions. *See* 40 FR 7404 (Feb. 20, 1975); 29 CFR part 552. These regulations defined companionship services as ''fellowship, care, and protection,'' which included ''household work . . . such as meal preparation, bed making, washing of clothes, and other similar services'' and could include general household work not exceeding ''20 percent of the total weekly hours worked.'' 29 CFR 552.6. Additionally, the 1975 regulations permitted third party employers, or employers of home care workers other than the individuals receiving care or their families or households, to claim both the companionship services and

[1] Congress simultaneously also created an exemption from the Act's minimum wage and overtime requirements for domestic service employees ''employed on a casual basis . . . to provide babysitting services.'' 29 U.S.C. 213(a)(15). This rulemaking does not make, nor did the proposal it follows suggest, changes to the Department's regulations regarding the babysitting exemption.

live-in domestic service employee exemptions. 29 CFR 552.109. These regulations have remained substantially unchanged since they were promulgated.

The home care industry, however, has undergone dramatic expansion and transformation in the past several decades. The Department uses the term home care industry to include providers of home care services, and the term ''home care services'' to describe services performed by workers in private homes and whose job titles include home health aide, personal care attendant, homemaker, companion, and others.

In the 1970s, many individuals with significant care needs were served in institutional settings rather than in their homes and their communities. Since that time, there has been a growing demand for long-term home care for persons of all ages, largely due to the rising cost of traditional institutional care and, in response to the disability civil rights movement, the availability of federal funding assistance for home care, reflecting the nation's commitment to accommodate the desire of individuals to remain in their homes and communities. As more individuals receive services at home rather than in nursing homes or other institutions, workers who provide home care services, referred to as ''direct care workers'' in this Final Rule but employed under titles including certified nursing assistants, home health aides, personal care aides, and caregivers, perform increasingly skilled duties. Today, direct care workers are for the most part not the elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974, but are instead professional caregivers.

Despite this professionalization of home care work, many direct care workers employed by individuals and third-parties have been excluded from the minimum wage and overtime protections of the FLSA under the companionship services exemption, which courts have read broadly to encompass essentially all workers providing services in the home to elderly people or people with illnesses, injuries, or disabilities regardless of the skill the duties performed require. The earnings of these workers remain among the lowest in the service industry, impeding efforts to improve both jobs and care. The Department believes that the lack of FLSA protections harms direct care workers, who depend on wages for their livelihood and that of their families, as well as the individuals receiving services and their families, who depend on a professional, trained workforce to provide high-quality services.

Because the 1975 regulations define companionship services and address third-party employment in a manner that, given the changes to the home care services industry, the home care services workforce, and the scope of home care services provided, no longer aligns with Congress's intent when it extended FLSA protections to domestic service employees, the Department is modifying the relevant regulatory provisions in 29 CFR part 552. These changes are intended to clarify and narrow the scope of duties that fall within the definition of companionship services in order to limit the application of the exemption. The Department intends for the exemption to apply to those direct care workers who are performing ''elder sitting'' rather than the professionalized workforce for whom home care is a vocation. In addition, by prohibiting employers of direct care workers other than the individual receiving services or his or her family or household from claiming the companionship services or live-in domestic service employment exemptions, the Department is giving effect to Congress's intent in 1974 to expand coverage to domestic service employees rather than to restrict coverage for a category of workers already covered.

Summary of the Major Provisions of the Final Rule

This Final Rule makes changes to several sections of 29 CFR part 552, the Department's regulations concerning domestic services employment.

The Department is slightly revising the definition of ''domestic service employment'' in § 552.3 to clarify the language and modernize the list of examples of professions that fall within this category.

This Final Rule also updates the definition of ''companionship services'' in § 552.6 in order to restrict the term to encompass only workers who are providing the sorts of limited, non-professional services Congress envisioned when creating the exemption. Specifically, paragraph (a), which uses more modern language than appears in the 1974 amendments or 1975 regulations, provides that ''companionship services'' means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. It also defines ''fellowship'' as engaging the person in social, physical, and mental activities and ''protection'' as being present with the person in his or her home, or to accompany the person when outside of the home, to monitor the person's safety and well-being. Paragraph (b) provides that the term ''companionship services'' also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. It defines ''care'' as assistance with activities of daily living and instrumental activities of daily living. Paragraph (c) provides that the term ''companionship services'' does not include general domestic services performed primarily for the benefit of other members of the household. Paragraph (d) provides that the term ''companionship services'' does not include the performance of medically related services, and it explains that the determination of whether the services performed are medically related is based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants, regardless of the actual training or occupational title of the individual providing the services.

In order to better ensure that live-in domestic service employees are compensated for all hours worked, the Department is also changing the language in §§ 552.102 and .110 to require the keeping of actual records of the hours worked by such employees.

The Department is revising § 552.109, the regulatory provision regarding domestic service employees employed by third-party employers, or employers other than the individual receiving services or his or her family or household. To better ensure that the domestic service employees to whom Congress intended to extend FLSA protections in fact enjoy those protections, the new regulatory text precludes third party employers (*e.g.,* home care agencies) from claiming the exemption for companionship services or live-in domestic service employees.

Effective Date

These changes will become effective on January 1, 2015. The Department believes that this extended effective date takes into account the complexity of the federal and state systems that are a significant source of funding for home care work and the needs of the diverse parties affected by this Final Rule (including consumers, their families, home care agencies, direct care workers, and local, state and federal Medicaid

programs) by providing such parties, programs and systems time to adjust.

Costs and Benefits

The Table below illustrates the potential scale of projected transfers, costs, and net benefits of the revisions to the FLSA regulations addressing domestic service employment. The primary effect shown in the Table is the transfer of income from home care agencies (and payers because a portion of costs will likely be passed through via price increases) to direct care workers, due to more workers being protected under the FLSA; the Department projects an average annualized transfer of $321.8 million in the medium-impact scenario (using a 7 percent real discount rate). These income transfers result from the narrowing of the companionship services exemption, specifically: payment for time spent by direct care workers traveling between individuals receiving services (consumers) for the same employer, and payment of an overtime premium when hours worked exceed 40 hours per week. Transfers resulting from the requirement to pay the minimum wage are expected to be zero because current wage data suggests that few affected workers, if any, are currently paid less than the federal minimum wage per hour.

The Department projects that the average annualized direct costs for regulatory familiarization, hiring new workers, and the deadweight loss due to the potential allocative inefficiency resulting from the rule will average $6.8 million per year over a 10-year period. In perspective, regulatory familiarization, hiring new workers, and the deadweight loss represents about 0.007 percent of industry revenue, while the disemployment impact of the rule affects about 0.06 percent of direct care workers. The relatively small deadweight loss occurs because both the demand for and supply of home care services appear to be inelastic in the largest component of this market, in which public payers reimburse for home care; thus, the equilibrium quantity of home care services is not very responsive to the changes in price.

The Department also expects the rule will reduce the high turnover rate among direct care workers, along with its associated employment costs to agencies, a key quantifiable benefit of the Final Rule. Because overtime compensation, hiring costs, and reduction in turnover depend on how employers choose to comply with the rule, the Department estimated a range of impacts based on three adjustment scenarios; the table below presents the intermediate scenario—''Overtime Scenario 2''—which is, along with a complete discussion of the data sources, methods, and results of this analysis, presented in Section VI, Executive Orders 12866 and 13563.

TABLE—SUMMARY OF IMPACT OF CHANGES TO FLSA COMPANIONSHIP SERVICES EXEMPTION

Impact	Year 1 ($ mil.)	Future years ($ mil.)	Average annualized value ($ mil.) [a]	
			3% Real rate	7% Real rate
Total Transfers				
Minimum wages [b] + Travel wages + Overtime Scenario 2	$210.2	$240.9 $468.3	$330.6	$321.8
(Lower bound—upper bound)	*($104–$281)*	*($119–$627)*	*($159–$442)*	
Total Cost of Regulations [e]				
Regulatory Familiarization + Hiring Costs [c] + Deadweight Loss	$20.7	$4.2 $5.1	$6.5	$6.8
(Lower bound—upper bound)	*($19–$21)*	*($4–$5)*	*($6–$7)*	
Disemployment (number of workers)	812	885 1,477	1,144 [d]	
Net Benefits				
Overtime Scenario 2 [c]	$9.4	$20.5 $15.5	$17.1	$17.1
(Lower bound—upper bound)	*($− 4–20)*	*($3–$31)*	*($4–$27)*	

[a] These costs represent a range over the nine year span. Costs are lowest in Year 2 and highest in Year 10 so these two values are reported.
[b] 2011 statistics on wages indicate that few affected workers, if any, are currently paid below the minimum wage (i.e. in no state is the 10th percentile wage below $7.25 per hour). See the Bureau of Labor Statistics Occupational Employment Statistics (OES), 2011 state estimates. Available at: *http://stats.bls.gov/oes/.*
[c] Based on overtime hours needed to be covered under Overtime Scenario 2.
[d] Simple average over 10 years.
[e] Excludes paperwork burden, estimated in Section V.

Not included in the table is the opportunity cost of managerial time spent adjusting worker schedules to reduce or avoid overtime hours and travel time. The Department expects these costs to be relatively small because employers, particularly home care agencies, already manage the schedules of nonexempt home care employees and therefore have systems in place to facilitate scheduling workers. Also unquantified is the potential impact on direct care workers resulting from employers making such schedule changes.

The costs, benefits and transfer effects of the Final Rule depend on the actions of employers, decision-makers within federal and state programs that provide funding for home care services, consumers, and workers. Depending upon whether employers choose to continue current work practices, rearrange worker schedules, or hire new workers, the costs, benefits and transfers will vary. The Department notes that the delayed effective date of this Final Rule creates a transition period during which all entities potentially impacted by this rule have the opportunity to review existing policies and practices and make necessary adjustments for compliance with this Final Rule. We believe this

transition period mitigates short-term impacts for the regulated community, relative to a regulatory alternative in which compliance is required immediately upon finalization. The Department will work closely with stakeholders and the Department of Health and Human Services to provide additional guidance and technical assistance during the period before the rule becomes effective, in order to ensure a transition that minimizes potential disruption in services and supports the progress that has allowed elderly people and persons with disabilities to remain in their homes and participate in their communities.

II. Background

A. What the FLSA Provides

The FLSA requires, among other things, that all covered employees receive minimum wage and overtime compensation, subject to various exemptions. The FLSA as originally enacted only covered domestic service workers if they worked for a covered enterprise, i.e., an agency or business subject to the FLSA or were an individual engaged in interstate commerce, an unlikely occurrence. Thus, prior to 1974, domestic service workers employed by covered businesses to provide cooking, cleaning, or caregiving tasks in private homes were entitled to the Act's minimum wage and overtime compensation provisions. In 1974, Congress extended FLSA coverage to ''domestic service'' employees employed in private households. *See* 29 U.S.C. 202(a), 206(f), 207(l). Domestic service workers include, for example, employees employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, and family chauffeurs. Senate Report No. 93–690, 93rd Cong., 2d Sess. p. 20 (1974). Thus, workers performing domestic tasks, such as cooking, cleaning, doing laundry, driving, and general housekeeping, and employed in private homes, either by households or by third party employers, are protected by the basic minimum wage and overtime protections of the FLSA.

Congressional committee reports state the reasons for extending the minimum wage and overtime protections to domestic service employees were ''so compelling and generally recognized as to make it hardly necessary to cite them.'' Senate Report No. 93–690, p. 18. The reports also state that private household work had been one of the least attractive fields of employment because wages were low, work hours were highly irregular, and non-wage benefits were few. *Id.* The U.S. House of Representatives Committee on Education and Labor stated its expectation ''that extending minimum wage and overtime protection to domestic service workers will not only raise the wages of these workers but will improve the sorry image of household employment . . . Including domestic workers under the protection of the Act should help to raise the status and dignity of this work.'' House Report No. 93–913, 93rd Cong., 2d Sess., pp. 33–34 (1974). During a debate on the amendments, one Senator referred to the importance of ''the dignity and respect that ought to come with honest work'' and the low wages that left many domestic service employees unable to rise out of poverty. *See* 119 Cong. Rec. S24773, S24799–80 (daily ed. July 19, 1973) (statement of Sen. Williams).

When Congress extended FLSA protections to domestic service employees, however, it created two exemptions within that category. First, it exempted from both the minimum wage and overtime compensation requirements of the Act casual babysitters and ''any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' 29 U.S.C. 213(a)(15). Second, it exempted from the overtime pay requirement ''any employee who is employed in domestic service in a household and who resides in such household.'' 29 U.S.C. 213(b)(21).

The legislative history explains:

> It is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service. However, the exemption reflects the intent of the committee to exclude from coverage . . . companions for individuals who are unable because of age and infirmity to care for themselves. But it is not intended that trained personnel such as nurses, whether registered or practical, shall be excluded. People who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support. The fact that persons performing . . . services as companions do some incidental household work does not keep them from being . . . companions for purposes of this exclusion.

Senate Report No. 93–690, p. 20; House Report No. 93–913, pp. 36. In addition, Senator Williams, Chairman of the Senate Subcommittee on Labor and the Senate floor manager of the 1974 amendments to the FLSA, described individuals who provided companionship services as ''elder sitters'' whose primary responsibility was ''to be there and to watch'' over an elderly person or person with an illness, injury, or disability in the same manner that a babysitter watches over children, ''not to do household work.'' 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973). He explained that the category of workers to which the term refers includes ''a neighbor'' who ''comes in and sits with'' ''an aged father, an aged mother, an infirm father, an infirm mother.'' *Id.* Senator Williams further noted that ''if the individual is [in the home] for the actual purpose of being . . . a companion,'' any work that is ''purely incidental'' would not mean the exemption did not apply. *Id.* Examples of such incidental work in the legislative history were ''making lunch'' or, in the babysitting context, ''throwing a diaper into the washing machine.'' *Id.*

B. Regulatory History

On February 20, 1975, the Department issued regulations at 29 CFR part 552 implementing the domestic service employment provisions. *See* 40 FR 7404. Subpart A of the rule defined and delimited the terms ''domestic service employment,'' ''employee employed on a casual basis in domestic service employment to provide babysitting services,'' and ''employment to provide companionship services to individuals who (because of age or infirmity) are unable to care for themselves.'' Subpart B of the rule set forth statements of general policy and interpretation concerning the application of the FLSA to domestic service employees including live-in domestic service employees. Section 552.6 defined companionship services as ''fellowship, care, and protection,'' which included ''household work . . . such as meal preparation, bed making, washing of clothes, and other similar services'' and could include general household work not exceeding ''20 percent of the total weekly hours worked.'' Section 552.109 provided that third party employers could claim the companionship services exemption or live-in domestic service employee exemption.

On December 30, 1993, the Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register**, inviting public comments on a proposal to revise 29 CFR 552.109 to clarify that, in order for the exemptions under § 13(a)(15) and § 13(b)(21) of the FLSA to apply, employees engaged in companionship services and live-in domestic service who are employed by a third party employer or agency must be ''jointly'' employed by the individual, family, or household using their services. Other

minor updating and technical corrections were included in the proposal. *See* 58 FR 69310. On September 8, 1995, the Department published a Final Rule revising the regulations to incorporate changes required by the recently enacted changes to Title II of the Social Security Act and making other updating and technical revisions. *See* 60 FR 46766. That same day, the Department published a proposed rule re-opening and extending the comment period on the proposed changes to § 552.109 concerning third party employment. *See* 60 FR 46797. The Department did not finalize this proposed change.

On January 19, 2001, the Department published an NPRM to amend the regulations to revise the definition of ''companionship services'' to more closely adhere to Congressional intent. The Department also sought to clarify the criteria used to determine whether employees qualify as trained personnel and to amend the regulations concerning third party employment. On April 23, 2001, the Department published a proposed rule re-opening and extending the comment period on the January 2001 proposed rule. *See* 66 FR 20411. This rulemaking was eventually withdrawn and terminated on April 8, 2002. *See* 67 FR 16668.

On December 27, 2011, the Department published an NPRM inviting public comments for a period of sixty (60) days on proposed changes to the exemptions for employees performing companionship services and live-in domestic service employees. *See* 76 FR 81190. The proposed changes were based on the Department's experience, including its previous rulemaking efforts, a thorough review of the legislative history, meetings with stakeholders, as well as additional research conducted concerning the changes in the demand for home care services, the home care industry, and the home care services workforce. On February 24, 2012, the Department extended the period for filing written comments. *See* 77 FR 11021. On March 13, 2012, the Department again extended the period for filing written comments with a final comment closing date of March 21, 2012. *See* 77 FR 14688. This Final Rule is the result of consideration of the comments received in response to the December 27, 2011 NPRM.

C. Need for Rulemaking

Since the Department published its regulations implementing the 1974 amendments to the FLSA, the home care industry has undergone dramatic transformation. In the 1970s, individuals who had significant care needs went into institutional settings. Over time, however, our nation has come to recognize the importance of providing services in private homes and other community-based settings and of supporting individuals in remaining in their homes and communities. This shift is in part a result of the rising cost of traditional institutional care, and has been made possible in significant part by the availability of government funding assistance for home care under Medicare and Medicaid.[2] The growing demand for long-term home care services is also due to the significant increase in the percentage of elderly people in the United States.[3] The Supreme Court's decision in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999), which held that it is a violation of the Americans with Disabilities Act for public entities to fail to provide services to persons with disabilities in the most integrated setting appropriate, further solidified our country's commitment to decreasing institutionalization and has also influenced this important trend.

This shift is reflected in the increasing number of agencies and workers engaged in home care. The number of Medicare-certified home care agencies increased from 2,242 in 1975 to 7,747 in 1999 and by the end of 2009, had grown to 10,581.[4] There has been a similar increase in the employment of home health aides and personal care aides in the private homes of individuals in need of assistance with basic daily living or health maintenance activities. The number of workers in these jobs tripled between 1988 and 2001; by 2001 there were 560,190 workers employed as home health aides and 408,360 workers employed as personal care aides.[5] Between 2001 and 2011, home health aide employment increased 65 percent to 924,650 and personal care aide employment doubled, increasing to 820,600.[6]

Furthermore, as services for elderly people and people with illnesses, injuries, or disabilities who require assistance in caring for themselves (referred to in this Final Rule as consumers) have increasingly been provided in individuals' homes rather than in nursing homes or other institutions, the duties performed in homes have changed as well. Most direct care workers are employed to do more than simply sit with and watch over the individuals for whom they work. They assist consumers with activities of daily living and instrumental activities of daily living, such as bathing, dressing, housework, or preparing meals. They often also provide medical care, such as managing the consumer's medications or performing tracheostomy care, that was previously almost exclusively provided in hospitals, nursing homes, or other institutional settings and by trained nurses. This work is far more skilled and professional than that of someone performing ''elder sitting.'' Although some direct care workers today still perform the services Congress contemplated, *i.e.,* sit with and watch over individuals in their homes, most do much more.

Yet the growth in demand for home care and the professionalization of the home care workforce have not resulted in growth in earnings for direct care workers. The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry. Studies have shown that the low income of direct care workers continues to impede efforts to improve both the circumstances of the workers and the quality of the services they provide.[7] Covering direct care workers under the Act is, thus, an important step in ensuring that the home care industry attracts and retains qualified workers that the sector will need in the future.

These low wages are at least in part the result of the application of the companionship services exemption to a wide range of direct care workers who then may not be paid minimum wage

[2] Public funds pay the overwhelming majority of the cost for providing home care services. Medicare payments represent over 40 percent of the industry's total revenues; other payment sources include Medicaid, insurance plans, and direct pay. The National Association for Home Care and Hospice (NAHC) reports, based on data from the Centers for Medicare and Medicaid Services (CMS), state that Medicare and Medicaid together paid roughly two-thirds of the funds paid to freestanding agencies (41 and 24 percent, respectively). Centers for Medicare and Medicaid Services (CMS), Office of the Actuary, National Health Care Expenditures Historical and Projections: 1965–2016. State and local governments account for 15 percent of revenues, while private health insurance accounts for eight percent. Out-of-pocket funds account for 10 percent of agency revenues. *http://www.bls.gov/oes/current/oes399021.htm.*

[3] *See* Shrestha, Laura, *The Changing Demographic Profile of the United States,* Congressional Research Service p. 13–14 (2006).

[4] *See* The National Association for Home Care & Hospice (NAHC), *Basic Statistics About Homecare: Updated 2010,* (2010). Available at: *http://web.archive.org/web/20120515112644/http://nahc.org/facts/10HC_Stats.pdf.*

[5] Bureau of Labor Statistics' (BLS), Occupational Employment Statistics (OES).

[6] *http://www.bls.gov/oes/current/oes399021.htm.*

[7] *See* Brannon, Diane, et al., ''Job Perceptions and Intent to Leave Among Direct Care Workers: Evidence From the Better Jobs Better Care Demonstrations'' *The Gerontologist,* 47, 6, p. 820–829 (2007).

for all hours worked and likely do not receive overtime wages for hours worked over forty in a workweek. In some instances, employers may be improperly claiming the exemption as to employees whose work falls outside the existing definition of companionship services in 29 CFR 552.6. In many others, however, employers are relying on the Department's 1975 regulation, which was written at a time when the scope of direct care work was much more limited and neither Congress nor the Department predicted the developments in home care services that were to come.

Courts have interpreted the current regulation broadly such that the companionship services exemption has expanded along with the home care industry and workforce; based on this expansive reading of the current regulation, essentially any services provided for an elderly person or person with an illness, injury, or disability in the person's private home constitute companionship services for which minimum wage and overtime need not be paid. *See, e.g., Sayler* v. *Ohio Bureau of Workers' Comp.,* 83 F.3d 784, 787 (6th Cir. 1996) (holding that a worker who ''helps [an adult with a serious back injury] dress, gives him his medication, helps him bathe, assists him in getting around their home, and cleans his bedclothes when he loses control of his bowels'' is providing companionship services under § 552.6); *McCune* v. *Or. Senior Servs. Div.,* 894 F.2d 1107, 1108–09 (9th Cir. 1990) (accepting that ''full-time, live-in attendants for elderly and infirm individuals unable to care for themselves'' who perform ''cleaning, cooking, and hygiene and medical care'' for those individuals were providing companionship services because under the current regulation, ''the recipients of these services [are] the determinative factor in applying the [companionship services] exception''); *Fowler* v. *Incor,* 279 F. App'x 590, 596 (10th Cir. 2008) (noting that ''[c]are related to the individual'' that falls within the current definition of companionship services ''has been expanded to include more frequent vacuuming and dusting for a client with allergies, mopping and sweeping for clients who crawl on the floor, and habilitation training, which often includes training the client to do housework, cooking, and attending to person hygiene''); *Cook* v. *Diana Hays and Options, Inc.,* 212 F. App'x 295, 296–97 (5th Cir. 2006) (holding that a direct care worker ''employed by . . . a non-profit corporation that provides home health care'' who ''provided simple physical therapy, prepared [consumers'] meals, assisted with [consumers'] eating, baths, bed-making, and teeth brushing, completed housework . . . and accompanied them on walks, to doctor visits, to Mass, and to the grocery store'' was exempt from the FLSA under the companionship services exemption as defined in current § 552.6). Furthermore, courts have narrowly construed the regulation's exclusion of ''trained personnel'' from companionship services such that direct care workers providing medical care, including certified nursing assistants and often home health aides, are not protected by the FLSA. *See, e.g., McCune,* 894 F.2d at 1110–11(holding that certified nursing assistants were not ''trained personnel'' excluded from the regulatory definition of companionship services because, unlike registered nurses and licensed practical nurses, certified nursing assistants in that case received only 60 hours of training); *Cox* v. *Acme Health Servs., Inc.,* 55 F.3d 1304, 1309–10 (7th Cir. 1995) (holding that a home health aide who had completed 75 hours of required training and ''performed patient care'' including ''administering complete bed baths, position and turning patients in bed, tube-feeding, the taking and recording of vital signs, bowel and bladder training, changing and cleaning patients' catheters, administering enemas, range-of-motion exercise training, speech training, and inserting non-medicated suppositories'' did not qualify as ''trained personnel'' and therefore provided ''companionship services'' as defined in the Department's regulations).

In this Final Rule, the Department is exercising its authority to amend the domestic service employment regulations to clarify and narrow the set of employees as to whom the companionship services and live-in domestic service employee exemptions may be claimed. *See Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 165 (2007) (discussing the gaps in the FLSA, including ''the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services''' that Congress ''entrusted the agency to work out'' (citing 29 U.S.C. 213(a)(15))). These limits are meant to ensure that these exemptions are applied only to the extent Congress intended in enacting the 1974 amendments.

Furthermore, because of the Department's revisions to these regulations, as home-based services continue to expand, employers will have clear guidance about the need to afford most direct care workers the protections of the FLSA, and the continued growth of home-based services will occur based on a realistic understanding of the professional nature of the home care workforce. Specifically, as explained in detail in this preamble, only direct care workers who primarily provide fellowship and protection are providing companionship services. Direct care workers who are employed by third party employers, such as private home care agencies, are the type of professional workers whose vocation merits minimum wage and overtime protections. Direct care workers who provide medically related services, such as certified nursing assistants, are doing work that calls for more skill and effort than that encompassed by the term ''companionship services.'' The Department believes that based on these principles, most direct care workers acting as home health aides, and many whose title is personal care assistant, will be entitled to minimum wage and overtime. These workers are due the respect and dignity that accompanies the protections of the FLSA.

The Department recognizes that this Final Rule will have an impact on individuals and families who rely on direct care workers for crucial assistance with day-to-day living and community participation. Throughout the rulemaking process, the Department has carefully considered the effects of the rule on consumers and has taken into account the perspective of elderly people and people with illnesses, injuries, and disabilities, as well as workers, employers, public agencies, and others. The Department has responded to comments from members of those groups and organizations representing them throughout this Final Rule. In particular, this preamble explains that the Department does not believe, as some commenters have suggested, that the rule will interfere with the growth of home- and community-based caregiving programs and thereby lead to increased institutionalization. Furthermore, the preamble explains that many states require the payment of minimum wage and often overtime to direct care workers, and the detrimental effects on the home care industry some commenters predict have not occurred in those states. To the contrary, the Department believes that ensuring minimum wage and overtime compensation will not only benefit direct care workers but also consumers because supporting and stabilizing the direct care workforce will result in better qualified employees, lower

turnover, and a higher quality of care. Furthermore, as described in detail throughout this preamble, the Department has modified the proposed regulations in response to comments to make the rule easier for the regulated community to understand and apply.

III. Summary of Comments on Changes to the FLSA Domestic Service Regulations

More than 26,000 individuals commented on the Department's Notice of Proposed Rulemaking. Comments were received from a broad array of constituencies, including direct care workers, consumers of home care services, small business owners and employers, worker advocacy groups and unions, employer and industry advocacy groups, law firms, Members of Congress, state government agencies, federal government agencies, professional associations, the disability community, and other interested members of the public. Several organizations attached the views of some of their individual members: National Partnership for Women and Families (8,733 individual comments), Progressive Jewish Alliance and Jewish Funds for Justice (687 individual comments), and Interfaith Worker Justice (500 individual comments), for example. Other organizations submitted a comment and attached membership signatures, such as the National Women's Law Center (Center) (3,392 signatures). Additional comments submitted after the comment period closed are not considered part of the official record and were not considered. All comments timely received may be viewed on the *www.regulations.gov* Web site, docket ID WHD–2011–0003.

Many comments received in response to the NPRM are: (1) Very general statements of support or opposition; (2) personal anecdotes that do not address a specific aspect of the proposed changes; (3) comments that are beyond the scope or authority of the proposed regulations; or (4) identical or nearly identical ''form letters'' sent in response to comment initiatives sponsored by various constituent groups. The remaining comments reflect a wide variety of views on the merits of particular sections of the proposed regulations. Many include substantive analyses and arguments in support of or in opposition to the proposed regulations. The substantive comments received on the proposed regulations are discussed below, together with the Department's response to those comments and a section-by-section discussion of the changes that have been made in the final regulatory text.

Terminology

Several commenters indicated that terms used by the Department in the NPRM were inconsistent with industry use and may be misinterpreted. Commenters themselves used a number of different terms in referring to the industry, the workers potentially impacted by the proposed rule, and the individuals receiving services from workers potentially impacted by the proposed rule. The Department has made an effort to modify its use of language where possible in the Final Rule except when quoting the statute, legislative history, case law, or when quoting a commenter. For example, the Department notes that the terms ''aged'' and ''infirmity'' appear in the current regulatory text due to the language Congress used in the statutory exemption. *See* 29 U.S.C. 213(a)(15). However, where possible throughout the preamble discussion, the Department instead uses the term ''consumers'' or ''elderly people or people with illnesses, injuries, or disabilities'' when discussing those who receive home care services, including companionship services. When discussing the workers who may be impacted by the Final Rule, the Department instead uses the term ''direct care worker'' to encompass the occupational categories of these domestic service workers and the terms used by commenters, such as home health aides, personal care aides, attendants, direct support professionals, and family caregivers. Finally, in this Final Rule, the Department uses the term ''home care'' to reflect the broader industry rather than home health care which specifically covers medical assistance performed by certified personnel.

Section-by-Section Analysis of Final Regulations

A. Section 552.3 (Domestic Service Employment)

Section 552.3, which defines domestic service employment, currently reads, ''[a]s used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.'' Section 552.3 also provides an illustrative list of various occupations which are considered ''domestic service employment.''

In the NPRM, the Department proposed to update and clarify the definition of domestic service employment in § 552.3. Specifically, the Department proposed to remove the qualifying introductory language ''as used in section 13(a)(15) of the Act'' because section 13(a)(15) refers to the Act's exemption for those employed to provide babysitting services on a casual basis and those performing companionship services. The definition of domestic service employment has a broader context than just the exemption found in 13(a)(15). The Department also proposed to remove the phrase ''of the person by whom he or she is employed'' from the definition because the Department believes this phrase may be confusing and misread as impermissibly narrowing coverage of domestic service employees under the Act. In addition, the Department proposed to delete the more outdated occupations listed in § 552.3, such as ''governesses,'' ''footmen,'' and ''grooms,'' and to include more modern occupations, such as ''nannies,'' ''home health aides,'' and ''personal care aides.'' The Department also proposed to include babysitters and companions on the list of domestic service workers. For the reasons stated below, this provision is adopted without change in the Final Rule. An additional conforming change has also been made to § 552.101(a).

Several organizations wrote to support the proposed changes, commenting that the proposed revised language would add clarity, thus reducing confusion among workers and employers. For example, the Equal Justice Center (EJC) lauded the Department's deletion of the introductory language referencing section 13(a)(15) of the Act, noting that ''the introductory language of section 552.3 . . . created a definitional inconsistency by exempting a group of workers Congress intended to include. The proposed deletion of this language effects clarity and serves as a recognition of the broad spectrum of occupations within the home Congress intended to protect.''

Other organizations supported the Department's proposal to remove the language specifying that domestic service work be performed in the home of the person by whom he or she is employed. The Center stated that the removal of the language ''will prevent confusion that could lead to narrower coverage of domestic service employees under the FLSA. This is particularly important given the high percentage of home care workers employed by third parties or agencies.'' Similarly, the American Federation of State, County and Municipal Employees (AFSCME) supported the Department's revised definition, stating, ''removal of the definitional interpretation potentially limiting such work to a private home of

the employer aptly adjusts the law to existing workplace realities.''

Commenters also voiced support for the Department's proposal to update the list of occupations that fall within the definition of domestic service employment. The EJC supported the Department's change to the list of illustrative occupations, explaining that, the revision ''limits litigation of coverage by guiding the Courts through modern and more accessible terminology that denotes the occupations that Congress intended to cover since 1974.'' This organization also commended the Department's addition of home health aides and personal care aides in the regulation, reflecting the prominence of the occupations in the burgeoning home care industry. *See also* American Civil Liberties Union (ACLU); PHI; and Susan Flanagan.

Few comments were received in opposition to the proposed definition. Those that opposed the proposed changes did so generally, such as the Texas Association for Home Care and Hospice, which commented that the definition should not be amended to include companions, home health aides, or personal care aides. Additionally, AARP, although generally supportive of the changes, recommended adding language to the regulation stating that a job title does not control legal status.

The Department has carefully considered all the comments regarding the proposed change to the definition of ''domestic service employment'' and has decided to adopt the regulation as proposed. The Department is making a conforming change to § 552.101(a) by deleting the phrase ''of the employer,'' so that the definition of ''domestic service employment'' is consistent with § 552.3. The Department believes that updating and clarifying this definition by deleting the limiting language ''as used in section 13(a)(15) of the Act'' reflects the legislative history, which is to extend FLSA coverage to all domestic employees whose ''vocation'' was domestic service. The Department also believes that deleting the phrase ''of the person by whom he or she is employed'' from the definition is more consistent with the legislative history. As discussed in the NPRM, this language has been part of the regulations since first implemented in 1975; however, the Department believes the definition may be confusing and may be misread as impermissibly narrowing coverage of domestic service employees under the FLSA. The Senate Committee responsible for the 1974 amendments looked at regulations issued under the Social Security Act for defining domestic service. The Department borrowed this language from the Social Security regulations without discussion or elaboration, and has consistently maintained that the phrase is an extraneous vestige. *See Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 169–70 (2007). This phrasing is not applicable to the realities of domestic service employment today, in which many employees are employed, either solely or jointly, by an entity other than the person in whose home the services are performed. Removal of this extraneous language more accurately reflects Congressional intent and clarifies coverage of these workers. 76 FR 81192.

Private Home

The Department also received a few comments concerning what constitutes a ''private home.'' The ACLU noted that a private home is distinguishable from a building that an employer rents out to strangers. One individual stated that the Department's definition of private home is too restrictive and does not extend to Independent Living or Assisted Living communities. This individual suggested that such residences should be considered the private home of the elderly individuals because they live there, the living arrangements are not temporary, and the individual's furniture, pictures, and personal files remain in the residence.

As explained above, in order to qualify as a domestic service employee, an employee's work must be performed in or about a ''private home.'' §§ 552.3, 552.101. The Department did not propose any changes to the definition of ''private home,'' and nothing in this Final Rule is altering the determination of whether work is being performed in or about a private home. Nonetheless, because this is a threshold question for determining whether an employer is entitled to claim the companionship services exemption, the Department is offering a summary of the definition of ''private home'' under existing law.

Under the Department's regulations, a private home may be a fixed place of abode or a temporary dwelling. § 552.101(a). ''A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.'' *Id.* However, ''[e]mployees employed in dwelling places which are primarily rooming or boarding houses are not considered domestic service employees. The places where they work are not private homes but commercial or business establishments.'' § 552.101(b).

The Senate Report also discusses the term ''private home,'' noting that ''the domestic service must be performed in a private home which is a fixed place of abode of an individual or family.'' S. Rep. No. 93–690, at 20 (1974). The Senate Report notes that ''[a] separate and distinct dwelling maintained by an individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.'' *Id.*

Several courts have addressed whether home care services were performed in a private home. In *Welding* v. *Bios Corp.,* 353 F.3d 1214 (10th Cir. 2004), the Tenth Circuit Court of Appeals analyzed whether a business providing services to individuals with developmental disabilities was entitled to rely on the companionship services exemption in paying its employees. The court explained that to claim the exemption, the business must establish that the services were provided in a private home. In assessing whether the residences at issue were private homes, the court described six factors (discussed below) to consider. *Id.* at 1219–20; *see Johnston* v. *Volunteers of Am., Inc.,* 213 F.3d 559, 562 (10th Cir. 2000) (explaining that the employer bears the burden of proving its employees fit within the companionship exemption). The court noted that the ''key inquiries are who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services.'' *Id.* at 1219.

The first factor calls for considering whether the client lived in the living unit before he or she received any services. If the person did not live in the home before becoming a client, and if the person would not live in the home if he or she were not receiving services, then the living unit would not be considered a private home. *Id.*

The second factor analyzes who owns the living unit; the court noted that ''[o]wnership is significant because it evidences control.'' 353 F.3d at 1219. If the living unit is owned by the client or the client's family, this is an indication that the services are performed in a private home. *Id.* However, if the living unit is owned by a service provider, this is an indication that the services are not performed in a private home. *Id.* If the client or the client's family leases the unit directly from the owner, the court concluded that this is some indication that it is a private home. *Id.; see Terwilliger* v. *Home of Hope, Inc.,* 21 F.

Supp. 2d 1294, 1299 (N.D. Okla. 1998) (holding that services were performed in a private home when the clients owned or leased the residences from a third party and the service provider had no legal interest in the residence). If the service provider leases the unit, the court concluded that this is some indication that it is not a private home. 353 F.3d at 1219; *Madison* v. *Res. for Human Dev., Inc.,* 233 F.3d 175, 179 (3d Cir. 2000) (holding that residences were not private homes when clients selected residences from provider-approved list and service provider leased the residences and subleased them to clients).

The third factor looks to who manages and maintains the residence, *i.e.,* who provides the essentials that the client needs to live there, such as paying the mortgage or rent, utilities, food, and house wares. The court explained that ''[i]f many of the essentials of daily living are provided for by the client or the client's family, that weighs strongly in favor of it being a private home. If they are provided for by the service provider, that weighs strongly in favor of it not being a private home.'' 353 F.3d at 1220.

The fourth factor is whether the client would be allowed to live in the unit if the client were not receiving services from the service provider. 353 F.3d at 1220. If the client would be allowed to live in the unit without contracting for services, then this factor would weigh in favor of it being a private home. *Id.; Madison,* 233 F.3d at 183 (concluding that it is not a private home if clients could not remain in the residence if they terminated their relationship with the service provider).

The fifth factor considers the relative difference in the cost/value of the services provided and the total cost of maintaining the living unit. 353 F.3d at 1220. ''If the cost/value of the services is incidental to the other living expenses, that weighs in favor it being a private home.'' *Id.*

The sixth factor addresses whether the service provider uses any part of the residence for the provider's own business purposes. 353 F.3d at 1220. The court concluded that if the service provider uses any part of the residence for its own business purpose, then this fact weighs in favor of it not being a private home. *Id.; see Johnston,* 213 F.3d at 565 (concluding that a residence is not a private home when the service provider had an office in the home for employees). If, however, the service provider does not use any part of the residence for its own business purpose, then this factor weighs in favor of it being a private home. 353 F.3d at 1220.

Other courts have looked at additional factors, emphasizing that all relevant factors must be considered. Those factors include: whether significant public funding is involved; who determines who lives together in the home; whether residents live together for treatment purposes as part of an overall care program; the number of residents; whether the clients can come and go freely; whether the employer or the client acquires the furniture; who has access to the home; and whether the provider is a for profit or not for profit entity. *See, e.g., Johnston,* 213 F.3d at 563–65; *Linn* v. *Developmental Services of Tulsa, Inc.,* 891 F. Supp. 574 (N.D. Okla. 1995); *Lott* v. *Rigby,* 746 F. Supp. 1084 (N.D. Ga. 1990).

Several courts have addressed the question of whether particular group residences of individuals in need of care are private homes. For example, the Tenth Circuit Court of Appeals held in *Johnston* v. *Volunteers of America, Inc.,* 213 F.3d 559 (10th Cir. 2000), that a business that provides care services to individuals with developmental disabilities in a supported living program did not meet its burden of proof to show that services were provided in a private home when the residents were placed outside the family home with strangers who also needed services and without the full-time, live-in care of a relative. *Id.* at 565. The court also relied on the facts that the clients' diets and daily activities were controlled by the business' employees and not a family member, and that the business could appropriate a room to use as an office. *Id.* Similarly, in *Madison* v. *Resources for Human Development, Inc.,* 233 F.3d 175 (3d Cir. 2000), the Third Circuit held that a non-profit corporation that provides supported living arrangements for adults with disabilities was not providing services in a private home. *Id.* at 184. In support of this holding, the court noted that the clients do not have a possessory interest in the homes; they sublease the property from the corporation, and they may only remain in the home to the extent they maintain a continued relationship with the corporation. *Id.* at 183. The court also relied on the fact that the clients do not have full control over who may access the home and that the clients did not have unfettered freedom in their day-to-day conduct. *Id.*

Following the analysis provided for in the case law, the Department has recognized that whether a living arrangement qualifies as a private home is a fact-specific inquiry. *See* Wage and Hour Opinion Letter, 2001 WL 15558952 (Feb. 9, 2001); Wage and Hour Opinion Letter, FLSA 2006–13NA (June 23, 2006). In evaluating whether a residence is a private home, the Department considers the six factors identified by the Tenth Circuit in *Welding* as well as the other factors identified in *Johnston, Linn* and *Lott. See* Wage and Hour Opinion Letter, FLSA 2006–13NA (June 23, 2006). The Department has made clear that the fact that the home is the sole residence of the individual is not enough to make it a private home under the FLSA. *See* Wage and Hour Opinion Letter, FLSA 2006–13NA (June 23, 2006), at 2; *see also Lott,* 746 F. Supp. at 1087 (concluding that the fact that the home was the client's sole residence was not enough to make it a private home). For example, in an opinion letter, the Department concluded that ''adult homes'' designed for individuals who are in need of assistance with certain day-to-day functions, such as meal preparation, housekeeping, and medications, were not private homes. *See* Wage and Hour Opinion Letter, FLSA 2001–14, 2001 WL 1869966, at 1 (May 14, 2001). The Department's conclusion was based on the fact that the clients are placed in a residence outside the family home and without the full-time live-in care of a relative. *Id.* at 2. The clients are housed in a residence with others who are also in need of long-term residential care. *Id.* Moreover, facility employees, and not a family member, control the client's diets and daily activities (to some degree). The Department also considered that the adult homes may select the clients who will share the same residence and can set up two residents per room, although the client has the right to request a private room for a higher fee. *Id.* Finally, despite the client's participation in the upkeep of the home, the service provider is ultimately responsible for the maintenance of the residence. *Id.*

However, in another case, the Department concluded that supported living services provided to consumers were performed in a private home. *See* Wage and Hour Opinion Letter, 1999 WL 1002387, at 2 (Apr. 8, 1999). In support of this conclusion, the Department noted that neither the public agency nor the private agency that provides the services determines where a client will live or with whom. *Id.* Rather, the client or the client's guardian makes these decisions and he or she is responsible for leasing the residence and paying the rent as well as for furnishing it to suit the individual's tastes and resources. *Id.* The Department also noted that the client typically lives alone or with only one roommate, and

that the private agency has no financial interest in the client's housing as it does not own or lease any of the housing.

As explained above, determining whether a particular living unit is a private home requires a fact-intensive analysis. Generally, such an inquiry exists along a continuum: on one end, a home owned and occupied for many years by an elderly individual would be a private home; on the other end of the continuum, a typical nursing home would not be considered a private home under the regulations. This Final Rule does not alter this inquiry in any way; rather, the analysis to determine whether an employee is working in a ''private home'' remains unchanged. Thus, employees who are working in a location that is not a private home were never properly classified as domestic service employees under the current regulations, and employers were not and are not entitled to claim the companionship services or live-in worker exemptions for such employees.

B. Section 552.6 (Companionship Services)

Current § 552.6 defines the term ''companionship services'' as ''those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.'' In the NPRM, the Department stated its intention to modernize and clarify what is encompassed within the definition of fellowship, care, and protection. Specifically, the Department proposed to divide § 552.6 into four paragraphs. Proposed paragraph (a) defined ''companionship services'' as ''the provision of fellowship and protection'' and described the duties and activities that fall within the meaning of those terms. Proposed paragraph (b) described the ''intimate personal care services'' that could be part of companionship services if provided ''incidental'' to fellowship and protection. Proposed paragraph (c) excluded from companionship services household work benefitting members of the household other than the consumer. Proposed paragraph (d) provided that companionship services do not include medical care of the type described.

The Final Rule maintains the general organizational structure of this section as proposed but modifies the proposed regulatory text as described below.

As an initial note, in this Final Rule, the Department has modified proposed § 552.6 by deleting the terms ''aged,'' ''advanced age,'' ''infirm,'' ''infirmity,'' and ''physical or mental infirmity'' in the title and regulatory text of this section. Where a descriptor is needed, the Department has substituted ''elderly person or person with an illness, injury, or disability.'' In addition, the Department has replaced in the regulatory text the phrase ''unable to care for themselves'' with ''requires assistance in caring for himself or herself.'' Although the language being replaced is derived from FLSA section 13(a)(15) and the existing regulations at § 552.6, the Department recognizes that such language is outdated and does not reflect contemporary views regarding the elderly and people with disabilities. The Department therefore has modified the text in the Final Rule and has made conforming changes to the title and text of § 552.106, which repeats the language from § 552.6. In addition, throughout this preamble, the Department has sought to use updated language, except when quoting from the statute, the legislative history, the current or proposed regulations, or comments submitted in response to the NPRM. By modernizing this language, the Department does not in any way intend to change the intent of Congress with respect to those who use companionship services.

Section 552.6(a) (Fellowship and Protection)

Proposed § 552.6(a) defined ''companionship services'' as ''the provision of fellowship and protection'' for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. The proposed language further defined the term ''fellowship'' to mean ''to engage the person in social, physical, and mental activities, including conversation, reading, games, crafts, walks, errands, appointments, and social events'' and the term ''protection'' to mean ''to be present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being.'' The Department adopts paragraph (a) essentially as proposed, with the slight modifications described below.

Comments from employees, employee advocacy groups and labor organizations generally supported the proposed revision of paragraph (a), agreeing with the Department that the definition more accurately reflected Congress's intent that the companionship exemption be akin to ''elder sitting.'' *See, e.g.,* Golden Gate University School of Law, Women's Employment Rights Clinic; Center on Wisconsin Strategy (COWS); National Employment Law Project (NELP); *see also* comments of several individual direct care workers stating that their work is not ''at all'' like elder sitting. Specifically, these individuals and organizations noted that Congress clearly wished to include under the protections of the Act employees for whom domestic work was a vocation, while allowing a narrow exemption for more casual arrangements. The Service Employees International Union (SEIU) explained that this distinction should turn on whether ''such tasks and duties are of a nature more typically performed by a worker engaged in his or her livelihood or rather, on a less formal basis, by a non-breadwinner.'' *See* SEIU; *see also* AFSCME, American Federation of Labor–Congress of International Organizations (AFL–CIO). In addition, Senator Harkin, joined by 18 other Senators, affirmed the Department's assessment of the legislative history, explaining that ''by the term 'companion' Congress meant someone who sits with an elderly or infirm person.''

Some non-profit advocacy organizations such as AARP, the National Council on Aging, and the National Consumers League (NCL) also supported the revised definition. These organizations noted that the revised definition would be helpful in clarifying what duties would be considered exempt ''companionship services'' and that the Department correctly identified ''fellowship'' and ''protection'' as the primary duties of an exempt companion. Similarly, the EJC stated that the definition would provide clarity, ''thereby assisting attorneys and courts to more readily find coverage by effectively categorizing an employee's work as either domestic or companionship services.''

Several employers, employer organizations and some associations opposed the proposed § 552.6(a), stating that its focus on fellowship and protection was inconsistent with legislative intent. Some of these commenters stated that the scope of the proposed definition is too restrictive, and ''goes too far conceptually in relating companionship to baby or elder 'sitting'.'' *See* National Association of State Directors of Developmental Disabilities Services (NASDDDS). In addition, although the American Network of Community Options and Resources (ANCOR), among others, concurred that the focus of companionship services should be fellowship and protection, it also requested that ''most assistance with dressing, grooming, meal preparation, feeding, and driving'' be included as part of fellowship and protection.

Commenters also sought further guidance from the Department concerning the scope of the companionship services definition. For example, the National Resource Center for Participant-Directed Services (NRCPDS) requested clarification regarding the use of the ''and'' in the phrase ''fellowship and protection'' because it suggests that it may be insufficient to provide either fellowship or protection alone, in the absence of the other. Additionally, many industry commenters were concerned that the Department's proposal excised the term ''care'' from the definitions of companionship services. These comments are discussed in greater detail below, in the subsection addressing § 552.6(b).

After carefully considering the comments concerning its proposed definition of ''companionship services,'' the Department has decided to adopt proposed § 552.6(a) with modifications. For the reasons described above, the Final Rule deletes the words ''for a person, who, because of advanced age or physical or mental infirmity, is unable to care for themselves'' found in the first sentence of proposed § 552.6(a) and uses instead ''for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself.'' In addition, the adopted regulatory text defining fellowship and protection has been slightly edited for clarity; these minor adjustments to wording and punctuation do not change the meaning of the regulation as proposed. The second and third sentences of § 552.6(a) read: ''The provision of *fellowship* means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events. The provision of *protection* means to be present with the person in his or her home, or to accompany the person when outside of the home, to monitor the person's safety and well-being.''

The Department believes this definition of companionship services is appropriate based on the legislative history of the 1974 FLSA amendments and dictionary definitions of relevant terms. The legislative history indicates that Congress intended to remove from the FLSA's minimum wage and overtime compensation protections only those domestic service workers for whom domestic service was not their vocation and whose actual purpose was to provide casual babysitting or companionship services. The legislative history describes a companion as someone who ''sits with [an elderly person],'' provides ''constant attendance,'' and renders services similar to a babysitter, *i.e.,* ''someone to be there and watch an older person,'' or an ''elder sitter.'' *See* 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973).

Dictionary definitions are also instructive in understanding the scope of an exempt companion's duties. The dictionary defines companionship as the ''relationship of companions; fellowship,'' and the term ''companion'' is defined as a ''person who associates with or accompanies another or others; associate; comrade.'' *See* Webster's New World Dictionary, p. 288 (2d College Ed. 1972). It further defines ''fellowship'' as including ''a mutual sharing, as of experience, activity, interest, etc.'' *Id.* at 514. These definitions demonstrate that a companion is someone in the home primarily to watch over and care for the elderly person or person with an illness, injury, or disability.

For these reasons, the Department believes it is appropriate for ''companionship services'' to be primarily focused on the provision of fellowship and protection, and that this focus is consistent with the general principle that coverage under the FLSA is broadly construed so as to give effect to its remedial purposes, and exemptions are narrowly interpreted and limited in application to those who clearly are within the terms and spirit of the exemption. *See, e.g., A.H. Phillips, Inc.* v. *Walling,* 324 U.S. 490, 493 (1945). Examples of activities that fall within fellowship and protection may include: watching television together; visiting with friends and neighbors; taking walks; playing cards, or engaging in hobbies. For the reasons explained below, the Department's definition of ''companionship services'' also allows for certain ''care'' activities, as defined in § 552.6(b), to be performed attendant to and in conjunction with fellowship and protection, as long as those activities comprise no more than 20 percent of the direct care worker's time working for a particular person in a particular workweek.

In response to commenters who requested clarification as to the Department's use of the phrase ''fellowship and protection,'' it is the Department's intent that the great majority of duties performed by a direct care worker whose duties meet the definition of companionship services will encompass both fellowship and protection, and that a caregiver would be hired to perform both duties. However, a direct care worker may, at times, perform certain tasks that require either fellowship or protection, such as sitting with a consumer while the individual naps (in which case, only protection would be provided) and still meet the definition of performing companionship services. The Department notes that this type of activity would not prevent application of the exemption, because the worker would be available to provide fellowship services when the consumer awakens.

Section 552.6(b) (Care)

Proposed § 552.6(b) provided that ''[t]he term 'companionship services' may include intimate personal care services that are incidental to the provision of fellowship and protection for the aged or infirm person.'' The proposed regulatory text further provided that these intimate personal care services ''must be performed attendant to and in conjunction with fellowship and protection of the individual'' and ''must not exceed 20 percent of the total hours worked in the workweek'' in order to fall within the definition of companionship services. Proposed § 552.6(b) next provided an illustrative, detailed list of intimate personal care services: (1) Dressing, (2) grooming, (3) toileting, (4) driving, (5) feeding, (6) laundry, and (7) bathing. Each listed intimate personal care service was preceded by the term ''occasional'' in the proposal. The Department explained in the preamble to the proposed rule that it was allowing for some work incidental to the fellowship and protection that primarily constitutes companionship services because the legislative history indicated that Congress contemplated that a direct care worker providing companionship services might perform tasks such as ''making lunch for the infirm person'' and ''some incidental household work.'' *See* 119 Cong. Rec. at S24801; *see also* 76 FR 81193.

After a careful review of the comments, and for the reasons explained in greater detail below, the Department has retained the fundamental purpose of proposed paragraph (b)—to define certain services that, if provided to a limited extent and incidentally to the fellowship and protection that are the core duties of an exempt companion, do not defeat the exemption—but has modified the proposed regulatory text in order to make the additional services an exempt companion may perform easier for the regulated community to understand. Section 552.6(b) now reads: ''The term *companionship services* also includes the provision of care if the care is provided attendant to and in conjunction with the provision of

fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The provision of *care* means to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).''

Care

Several commenters expressed concern that the proposed definition of companionship services did not sufficiently emphasize the provision of ''care.'' For example, BrightStar Healthcare of Baltimore City/County (''BrightStar'') and the Texas Association for Home Care and Hospice, among others, noted that the plain language of the statutory exemption used the term ''care,'' and that the legislative history also indicated a desire by Congress to have ''care'' encompassed in the definition. BrightStar asserted that ''it is clear from the legislative history that 'care' for those who are 'unable to care for themselves' is an integral part of what was contemplated in creating the companionship exemption.'' Congressman Lee Terry agreed that the Department's proposed definition ''is altering the focus of the exemption in a way that Congress neither intended nor envisioned.''

The Department does not disagree with commenters who wrote that ''care'' should be explicitly included in the regulatory definition of companionship services. Indeed, the proposal did not remove ''care'' from the regulatory definition of companionship services; rather, although proposed paragraph (a) did not use the word care, the Department sought in paragraph (b) to define and delimit the type of care that falls within the exemption. In the Final Rule, § 552.6(b) uses the term ''care'' rather than ''intimate personal care services'' to make more explicit that care remains part of companionship services.

Activities of Daily Living and Instrumental Activities of Daily Living

The Department received thousands of comments concerning the proposed list of intimate personal care services. These comments demonstrated problems raised by the proposed list, and the Department has modified this Final Rule accordingly. Specifically, upon consideration of these comments, the Final Rule describes the provision of care as assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs), with examples of each type of task, rather than using the term ''intimate personal care services'' and providing a detailed list of activities that fall into that category.

Many commenters supported the proposed list of intimate personal care services. For example, AFSCME and AARP agreed that the definition of companionship services should be narrowed and that only true ''fellowship and protection'' services, accompanied by personal care or household services that are incidental to those companionship services, should be exempt from the FLSA. Care Group, Inc., a provider of in-home medical services registered in the State of California, and NELP, among others, supported the Department's proposal but urged the Department to make the list of incidental services exclusive rather than illustrative.

In contrast, employers and other groups, such as the Texas Association for Home Care and Hospice and Americans for Limited Government (ALG), generally expressed the view that personal care should not be limited to ''incidental'' activities because the exemption explicitly states that consumers receiving services are ''unable to care for themselves''; these commenters suggested that whatever ''care'' the consumer needs should be included as part of unrestricted companionship services. *See also* The Virginia Association for Home Care and Hospice. The Visiting Nurse Associations of America (VNAA) expressed the view that the federal government should defer to existing state and local regulations concerning permissible duties. Similarly, California Association for Health Services at Home (CAHSAH) pointed to state guidance that makes clear that a companion must be allowed to perform all duties a client needs to remain independent.

Commenters also addressed the specific care tasks that the Department had included in the proposed list individually. In response to the Department's proposal to allow assistance with toileting as an incidental personal care service, the National Council on Aging, NELP, and Workforce Solutions expressed concern about potential injury to workers associated with this task. These commenters recommended the Department not include assistance with services such as toileting and activities that require positioning and mobility transfer assistance. *See also* The Workplace Project. The Legal Aid Society encouraged the Department to consider that tasks such as toileting, assistance with mobility, transfers, positioning, use of toileting equipment and changing diapers for persons with dementia are not casual activities but require training to be performed in a manner that is safe for the worker and the consumer. They suggested that if such activities constitute part of the regular work performed, the worker should not be exempt. Direct Care Alliance (DCA) stated that the permissible exempt duties should not include those that require physical strength or specialized training. Women's Employment Rights Clinic suggested that allowing an exempt companion to assist with toileting should only be permitted when exigent circumstances arise. They indicated that this activity requires training or experience that a companion, as intended by Congress, would not have.

Several commenters offered their views on the task of driving the consumer to appointments, errands, and social events as an incidental personal care service. ANCOR stated that driving to social events should not be included among the ''personal care services'' in the 20 percent limitation, indicating that ''many people with disabilities enjoy drives and times away from home and we do not believe this should be limited.'' The Texas Association for Home Care and Hospice and PHI both expressed the view that this section should include not only driving but also ''accompanying'' the consumer. They noted that other modes of transportation may be utilized by the consumer. Women's Employment Rights Clinic agreed with the Department's proposal to include occasionally driving a consumer to appointments, errands, and social events as part of incidental personal care services defined in § 552.6(b).

A number of comments were received on the proposed provision concerning meal preparation. The Connecticut Association for Home Care and Hospice expressed concern about the requirement that the client must consume the food in the direct care worker's presence in order to maintain the exemption. It pointed out that the proposal failed to take into account the possibility that the consumer may not eat all of the food prepared and would create an untenable situation whereby the consumer is forced to eat on an imposed schedule rather than as his or her appetite dictates. Others, like ALG, asserted that the proposal would force a direct care worker to dispose of leftover

food rather than to store it to be eaten later. Some commenters, including Women's Employment Rights Clinic, specifically supported the Department's qualification that any food prepared must be eaten in the presence of the direct care worker in order for the meal preparation to be part of companionship services. They indicated that this would ensure that preparing meals for and feeding the consumer remained attendant to and in conjunction with providing fellowship and protection.

Several commenters objected to including laundry in the list of personal care services. For example, Caring Across Generations and DAMAYAN Migrant Workers Association (DAMAYAN) both indicated that ''laundry is neither absolutely necessary for an elderly or infirm person during the companion worker's shift nor does it arise out of exigent circumstances that justify including 'occasional bathing' in proposed § 552.6(b)(7). Laundry services fall under the type of household services performed by housekeepers or laundresses and thus should be excluded.'' Others, such as the Latino Union of Chicago, similarly commented that ''an individual or family hiring a companion worker could just as easily hire a housekeeper or laundress to regularly launder clothes.''

With respect to bathing, some commenters supported the proposal's limitation on bathing duties to ''exigent circumstances.'' For example, Women's Employment Rights Clinic indicated that they thought the limitation to exigent circumstances was appropriate as this duty is one which requires the lifting, touching, and moving of a frail individual, and this normally requires increased training and experience.

The Department continues to believe Congress intended fellowship and protection to be the primary focus of an employee exempt under the companionship services exemption but that flexibility to provide some tasks incidental to fellowship and protection is appropriate. In light of the comments received concerning the proposed list of intimate personal care services, however, the Department has not adopted the regulatory text as proposed. Instead, section 552.6(b) now states, in relevant part: ''The provision of *care* means to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).''

As reflected in the comments, the Department now believes that the proposed list of intimate personal care services raised more questions than it answered. *See, e.g.,* ALG (stating that the list of proposed intimate personal care services created ''practical problems,'' such as prohibiting an exempt companion from operating a vacuum cleaner). The Department also agrees with commenters that the list was too specific and not flexible enough in its approach. The Department is persuaded by the view expressed by commenters such as the State of Washington's Department of Social and Health Services, that the ''use of 'intimate personal care services' should be updated to reflect current service categories: activities of daily living and instrumental activities of daily living'' and thus has modified the Final Rule to reflect this change. Therefore, in lieu of describing the permissible care services an exempt companion may perform as ''intimate personal care services,'' the Department instead has adopted the commonly used industry terms ''activities of daily living'' (ADLs) and ''instrumental activities of daily living'' (IADLs) to describe which services are allowed as part of ''care'' under the exemption. *See* 76 FR 81212. The Department has also replaced the detailed list of activities that appeared in proposed paragraph (b) with simple, illustrative lists of services that are commonly viewed as activities of daily living and instrumental activities of daily living. The Department intends that any additional tasks not explicitly named in the regulatory text but that fit easily within the spirit of the enumerated duties also qualify as ADLs or IADLs.

The Department believes that by replacing the proposed detailed list of intimate personal care services with the more commonly used industry phrases ''activities of daily living'' and ''instrumental activities of daily living,'' transition to the new regulation will be simplified. The State of Tennessee and the National Association of Medicaid Directors (NAMD) indicated that home health aides and personal care attendants are focused primarily on providing hands-on care and assistance with ADLs that enable that consumer to continue living safely in the community. The Virginia Association for Home Care and Hospice expressed the view that individuals need assistance with their ADLs and IADLs to live independently, and that these activities should be part of the incidental duties. Additionally, hundreds of comments received from workers referenced these terms as a sort of shorthand for describing the work commonly performed by direct care workers. Furthermore, Medicaid and Medicare programs also use these terms to describe direct care work. As noted by commenters such as NELP and PHI, Medicaid instructs that assistance with ADLs and IADLs ''is the core focus of home care services provided under Medicaid.'' Accordingly, the Department believes the regulated community is already familiar with these concepts and they will be easy for consumers, workers, and employers alike to understand.

The Department also believes that by broadening the base of services that a direct care worker may perform and still qualify for the companionship services exemption, consumers will have more of the immediate needs met that support them in living independently in their communities. Among the comments was a letter writing campaign by several hundred workers that requested that companionship services only include fellowship and protection, ''thereby excluding workers who assist clients with activities of daily living or instrumental activities of daily living.'' The Department is persuaded, however, by other comments that emphasized the critical importance of including an allowance for ADLs and IADLs in order for certain consumers to continue to live independently. *See, e.g.,* Scott Ehrsam, owner of a home care business; DCA.

The Department notes that the intimate personal care services proposed in the NPRM are encompassed within the categories of ''activities of daily living'' and ''instrumental activities of daily living'' adopted in the Final Rule. The Department emphasizes, however, the provision of such services only falls within the definition of companionship services if it is performed attendant to and in conjunction with the fellowship and protection provided to the consumer and if it does not exceed 20 percent of the total work hours of the direct care worker for any particular consumer in any particular workweek, as discussed in greater detail below.

This Final Rule provides flexibility within the bounds of Congressional intent. The FLSA grants the Secretary of Labor broad authority to define and delimit the scope of the exemption for companionship services. *See* 29 U.S.C. 213(a)(15). The Department believes its definition of the types of services that may be performed within the meaning of ''provision of care'' in the Final Rule is reasonable and consistent with Congressional intent that all other work

performed by an exempt companion must be incidental to the companion's primary purpose ''to watch over an elderly or infirm person in the same manner that a babysitter watches over children.'' 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973).

Twenty Percent Limitation

The Department also received a significant number of comments addressing the 20 percent limitation on the provision of care. Some commenters believed the cap was too high. *See, e.g.,* Women's Employment Rights Clinic; EJC. The EJC emphasized that 20 percent is a significant portion of the workweek and a lower percentage would better effectuate the goal of ensuring that the care tasks are truly incidental. Other commenters, however, thought the cap was too low. *See, e.g.,* The Westchester Consulting Group. Senior Helpers, among others, expressed doubt that the listed tasks could be accomplished in 20 percent of the direct care worker's workweek and expressed concern that seniors would be hurried through eating meals or forced to cancel appointments due to the amount of time allotted. Commenters including NCL and Workforce Solutions were concerned that the 20 percent cap would be difficult to administer. A few commenters expressed concern over the cost of monitoring the 20 percent limitation. The State of Oregon indicated that the 20 percent limitation should be eliminated, suggesting that the limitation should not be based upon tasks performed but rather should be based upon for whom the service is performed. CAHSAH asserted that the duties that fall under the 20 percent cap should be unrelated to the care of the client.

Some commenters suggested alternative methods for calculating hours worked performing incidental care duties. The National Council on Aging, Workforce Solutions, NELP, and others supported elimination of the 20 percent cap and replacing it with a two-step assessment. They suggested requiring an initial assessment to determine whether the worker had been hired primarily to perform the duties of fellowship and protection and whether the worker was in fact performing those duties. If the worker was not primarily performing those duties, the subsequent listings of permissible exempt activities would not be considered. If the worker were found to be hired primarily to provide fellowship and protection, then a second step review of the listed services would be conducted to confirm that the services were performed occasionally and incidental to the provision of fellowship and protection, and not as a regular part of the duties performed.

Organizations like DAMAYAN, The Workplace Project, and Houston Interfaith Worker Justice also proposed eliminating the 20 percent limitation and replacing it with a different test comprised of two steps: (1) If a direct care worker visits a client greater than three times per week and (2) performs any of the listed incidental tasks for any amount of time in greater than 50 percent of the visits, then the direct care worker would not fall within the companionship services exemption.

Finally, NCL and PHI suggested that the Department modify the cap on incidental activities across a workweek to one that prohibits a worker from spending more than 20 percent of work time performing care tasks per individual client per workweek.

The Department has carefully considered the variety of suggestions offered by commenters with respect to this issue, and it adopts the 20 percent limitation on care services essentially as proposed, although it has modified the text to explicitly state that the provision of care is limited to no more than 20 percent of the hours worked per workweek per consumer. The Department's view is that failing to provide such a limitation would ignore Congressional intent that making meals and doing laundry would be incidental to the exempt companion's primary purpose of watching over the consumer. *See* 119 Cong. Rec. S24773, S24801 (daily ed. July 19, 1973). Indeed, during a Senate floor exchange, Senators Williams and Burdick indicated that ''one may even require throwing some diapers in the automatic washing machine for the baby. This would be incidental to the main purpose of employment.'' *See* 119 Cong. Rec. at S24801. However, the Department also recognizes that a limited allowance for selected tasks, performed attendant to and in conjunction with fellowship and protection, is necessary as a matter of practicality. The Department believes that this 20 percent threshold, which is based on the proportion of total hours worked per workweek, will provide consumers and direct care workers with a needed flexibility in their day-to-day activities. As described below, in adopting the 20 percent figure, the Department is utilizing a long-established threshold that has been used in a variety of regulations, including current § 552.6. Employers are, thus, familiar with this type of time limitation, mitigating concerns that the 20 percent threshold would be difficult and costly to administer. In addition, the Department views section 552.6(b) of the Final Rule as a compromise designed to expand the base of allowable care while accommodating the concerns expressed about workplace safety for both the direct care worker and the consumer, as such a limitation restricts the amount of time spent engaged in these activities.

As the Department indicated in the preamble to the proposed regulation, the home care industry has undergone a dramatic transformation since the Department published the implementing regulations in 1975. In the 1970s, many individuals with significant care needs were served in institutional settings rather than in their homes and their communities, Since that time, there has been a growing demand for long-term home care for persons of all ages, largely due to the rising cost of institutional care, the impact of the disability civil rights movement, and the availability of funding assistance for home care under Medicaid, reflecting our nation's commitment to accommodate the desire of individuals to remain in their homes and communities. As the demand for long-term home care has grown, so has the complexity of duties performed in the home by the direct care worker. It is the Department's view that the focus of the companionship services exemption should remain on fellowship, protection, and care as defined in paragraph (b). Based on the wide scope of comments received detailing the extent of the services provided by direct care workers, the Department is aware that there is a significant continuum with respect to the services consumers require. The Department is not stating that all workers providing ''care,'' as defined in paragraph (b), will be able to accomplish the required care in 20 percent of their workweek. Rather, the Department is concluding that, if the care that is being provided attendant to and in conjunction with the provision of fellowship and protection requires more time than 20 percent of the workweek, then the worker is being called upon to provide services that are outside of the scope of the companionship services exemption. In such cases, minimum wage and overtime pay protections attach.

The Department believes that a 20 percent limitation for providing this care, coupled with a primary focus on the provision of fellowship and protection, is appropriate for a worker who is not entitled to the minimum wage and overtime compensation protections. The Department notes that a 20 percent limitation has been

implemented in this regulation for 38 years (concerning the provision of general household work), as well as in other regulations in this chapter such as § 552.5, Casual Basis (work that is incidental does not exceed 20 percent of hours worked in babysitting assignment); § 552.104(c), Babysitting services performed on a casual basis (babysitter who devotes more than 20 percent of time to household work is not exempt), as well as in other chapters addressing employee work hours in other enforcement contexts (e.g., §§ 786.100, 786.150, 786.200 (nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek)). *See also* §§ 553.212, 783.37, 784.116, 788.17, and 793.21.

As previously noted, a suggested two-step test was offered by some as a substitute for the 20 percent limitation on intimate personal care services. The suggested test was comprised of examining those direct care workers who visit a client more than three times a week, and if so, making a determination whether the direct care worker has performed any of the incidental personal care services for any amount of time in greater than 50 percent of the visits. In such cases, the organizations suggested that the direct care worker should not fall within the companionship services exemption. The Department declines to adopt the recommended test. The Department believes that this option would have a negative effect on continuity of care, an issue many commenters raised as a significant concern. *See, e.g.,* National Association of Area Agencies on Aging, New York State Association of Health Care Providers, Avalon Home Care, the National Association of States United for Aging and Disabilities (NASUAD); *see also* Testimony of Marie Woodard before the U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Workforce Protection (March 20, 2012). This two-step proposal would create an incentive to ensure that a particular direct care worker only visits a consumer no more than three times per week. As the National Association of Area Agencies on Aging points out in its comment, ''providing fundamental labor protections of minimum wage and overtime will help reduce turnover, improve continuity of care and help lower costs.'' The Department agrees with commenters who indicated that providing fundamental labor protections such as minimum wage and overtime compensation will improve continuity of care and wants to avoid offsetting those improvements to continuity of care by implementing a test that would create an incentive to use a direct care worker no more than three times per workweek.

Finally, the Department has incorporated the suggestion of NCL and PHI by modifying the Final Rule text to explicitly state that the 20 percent limitation applies to the tasks a worker performs per individual consumer. Further, as proposed, the 20 percent limitation also applies to total hours worked per workweek. The inclusion of the 20 percent limitation on a per consumer basis is intended to assist consumers and direct care workers in determining whether the worker meets the companionship services exemption in any given workweek. Many direct care workers provide services to more than one consumer in a workweek, and the proposed text did not account for the reality that a consumer would not typically know what percentage of time the direct care worker spent performing assistance with ADLs and IADLs for any other consumer. For example, if a direct care worker is employed for five mornings a week for consumer A and employed for four afternoons a week for consumer B, consumer B would have no way of knowing how much of the total workweek had been spent providing care to consumer A. The Department has therefore revised the text to specify that the 20 percent limitation applies to the work performed each workweek for a single consumer. Therefore, in determining whether to claim the companionship services exemption, a consumer need only consider the amount of care he or she has received during the workweek, not any services the direct care worker has provided to other consumers. The Department notes that this question only arises as to individuals, families, and households who employ direct care workers, because, as explained in the section of this preamble regarding third party employment, under the Final Rule, a third party employer of a direct care worker is not permitted to claim the companionship services exemption regardless of the duties performed.

Section 552.6(c) (Domestic Services Primarily for Other Members of the Household)

Current § 552.6 permits the companionship services exemption to apply to a worker who spends up to 20 percent of his or her time performing general household work which is unrelated to the care of the person receiving services. In the NPRM, the Department proposed to revise the current regulation by adding paragraph (c), which stated that ''work benefitting other members of the household, such as general housekeeping, making meals for other members of the household or laundering clothes worn or linens used by other members of the household'' would not fall within the definition of incidental intimate personal care duties that may constitute part of companionship services. Proposed paragraph (c) also provided that ''household services performed by, or ordinarily performed by, employees such as cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use, are not 'companionship services' unless they are performed only incidental to the provision of fellowship and protection as described in paragraph (b) of this section.'' For the reasons explained below, in the Final Rule, the Department adopts a significantly simplified version of the proposed text.

The Department received few comments on the issue of household work. Women's Employment Rights Clinic expressed support for the ''Department's effort to draw a clear line between the duties of a companion and the duties of domestic service workers such as maids, cooks and laundresses,'' writing ''that general household services such as window washing, vacuuming and dusting, should not fall under the duties of a companion.'' Advocacy organizations, such as ALG and NRCPDS, expressed concern that a direct care worker's performance of household work for the consumer would not be included within the 20 percent allowance for intimate personal care services listed in paragraph (b) of this section if the work includes a prohibited task, such as vacuuming. *See also* Lynn Berberich, Joni Fritz, and Georgetown University Law Center students. AARP agreed with the Department that ''providing general household services such as cooking a meal or doing laundry for the whole family, which significantly benefit all household members, should not be exempt.'' However, AARP requested that the Department provide examples as to what household work is considered incidental and therefore part of companionship services. AARP asked, ''[i]f some tuna salad is left over after the individual receiving companionship services has eaten lunch, and another member of the household eats this left over tuna salad,

would this be considered general household work, thereby denying the companionship exemption for the week?''

After carefully considering the comments, the Department has decided to revise proposed paragraph (c) to avoid ambiguity and eliminate redundancy in light of the revisions to paragraph (b). Specifically, § 552.6(c) of the Final Rule provides, in its entirety: ''The term *companionship services* does not include domestic services performed primarily for the benefit of other members of the household.'' This text much more simply and clearly conveys the Department's meaning, which is that companionship services are services provided specifically for the individual who requires assistance in caring for himself or herself rather than for other members of that individual's household. This limit to the definition of companionship services is consistent with Congress's central purpose in 1974 of extending FLSA coverage to domestic service workers such as maids, cooks, and housekeepers and excluding from that coverage only direct care workers who provide primarily fellowship and protection.

The Department intends to exclude from companionship services any general domestic services unrelated to care of the consumer as defined in paragraph (b) of this section. The determination of whether a particular task constitutes the provision of care or is instead a service performed primarily for the benefit of others in the household is based on a common sense assessment of the facts at issue. For example, in response to the question posed by AARP, if a person other than the consumer eats the leftover tuna salad, but the direct care worker prepared the meal for the consumer as opposed to for other members of the household, the meal preparation would constitute the provision of care that, if done attendant to and in conjunction with fellowship and protection and if within the 20 percent limitation on care, is part of companionship services. An exempt companion may also vacuum up food that the consumer drops, or wash a soiled blouse for the consumer; such activities are part of the care discussed in paragraph (b). Additionally, light housework, such as dusting a bedroom the consumer shares with another, that only tangentially benefits others living in the household may constitute care if performed attendant to and in conjunction with the provision of fellowship and protection of the consumer and within the 20 percent limitation. However, washing only the laundry of other members of the household or cooking meals for an entire family is excluded from companionship services under the Final Rule. To provide an additional example: if a direct care worker performs fellowship and protection for the consumer Monday through Thursday, but spends Friday exclusively performing light housework for the household as a whole, then the exemption is lost for the workweek, because the direct care worker cannot perform general household services for the entire household and still maintain the companionship services exemption during that workweek.

Section 552.6(d) (Medically Related Services)

The legislative history of the 1974 amendments makes clear that Congress did not intend the companionship services exemption to apply to domestic service employees who perform medical services, and the Department believed in 1975, as it does today, that the provision of medical care constitutes work that is not companionship services. Accordingly, under current § 552.6, companionship services do not include services provided for an elderly person or person with an illness, injury, or disability that ''require and are performed by trained personnel, such as a registered or practical nurse.'' In the NPRM, the Department proposed to revise § 552.6(d) to describe the medical care that is typically provided by trained personnel by offering examples of particular medical services rather than by naming occupations. Based on consideration of the comments received and for purposes of simplicity and clarity, the Department has decided not to adopt the text as proposed, but has instead adopted text closer to that which appears in current § 552.6. For the reasons explained below, § 552.6(d) now excludes from companionship services ''medically related services,'' defined as services that ''typically require and are performed by trained personnel such as registered nurses, licensed practical nurses, or certified nursing assistants.'' This section further provides that the determination of whether services are medically related ''is not based on the actual training or occupational title of the individual providing the services,'' so in many cases, direct care workers outside these named categories, particularly home health aides, will be excluded from the companionship services exemption under paragraph (d).

Proposed § 552.6(d) provided that ''[t]he term 'companionship services' does not include medical care (that is typically provided by personnel with specialized training) for the person, including, but not limited to, catheter and ostomy care, wound care, injections, blood and blood pressure testing, turning and repositioning, determining the need for medication, tube feeding, and physical therapy.'' It further provided that ''reminding the aged or infirm person of a medical appointment or a predetermined medicinal schedule'' was part of intimate personal care services as that phrase was defined in proposed § 552.6(b). The NPRM's preamble discussion of § 552.6(d) set forth the Department's rationale for its proposed change to the regulatory text. 76 FR 81195. The Department explained that in addition to care provided by registered nurses and licensed practical nurses, the types of tasks performed by certified nursing assistants and sometimes personal care aides or home health aides were the sort of medically related services typically provided by personnel with specialized training. *Id.* The preamble listed examples of such services, including medication management, the taking of vital signs (pulse, respiration, blood sugar screening, and temperature), and assistance with physical therapy. *Id.* In addition to providing this explanation of its position, the Department sought comment on whether the proposal appropriately reflected the medical care tasks performed by home health aides and personal care aides that require training as well as whether the regulation should include additional examples of minor health-related actions that could be part of companionship services, such as helping an elderly person take over-the-counter medication. *Id.*

Comments from labor organizations, non-profit and civil rights organizations, and worker advocacy groups generally supported the proposal to exclude from the definition of companionship services medical care that requires specialized training. *See, e.g.,* AARP, AFSCME, the Center, ACLU, Jobs with Justice, SEIU. Even the many employers and employer representatives who were critical of proposed § 552.6(d) recognized that medical care is beyond the scope of the companionship services exemption. *See, e.g.,* Husch Blackwell (agreeing with the Department that direct care workers who change feeding tubes, perform injections, or provide ostomy care do not qualify for the companionship services exemption but asserting that because current § 552.6 already excludes nurses from the exemption, there was no need to revise the regulation), BrightStar franchisees

(same), Senior Helpers (stating that home health aides who perform ''medical tasks like checking vital signs, changing bandages, giving injections or providing feeding tube or ostomy care'' are not providing companionship services but asserting that the Department should withdraw the NPRM).

Some commenters made suggestions regarding specific occupations. One individual commenter suggested that the Department ''expand the meaning of trained personnel to include Certified Nursing Assistants and other health care providers who have State certification.'' PHI and the AFL–CIO urged the Department to state that personal care aides and home health aides are not companions. PHI reasoned that personal care aides and home health aides are trained personnel rather than exempt companions because they provide medically related and personal care tasks that require specialized training, noting that home health aides are required, if paid with federal funds, to receive at least 75 hours of initial training, including at least 16 hours of supervised practical training, and 12 hours per year of continuing training. NAMD, on the other hand, wrote that unlicensed direct care workers such as home health aides and personal care aides should not be treated in the same manner as registered or licensed practical nurses.

The Department also received comments regarding specific medical services. Some commenters wrote that particular tasks should fall outside the definition of companionship services. For example, AFSCME believed that ''treating bed sores and monitoring physical manifestations of health conditions like diabetes or seizure disorders'' are ''medical or quasi-medical services'' that should be excluded from the definition of companionship services. Women's Employment Rights Clinic urged the Department to add toileting and bathing to the medically related tasks named in § 552.6(d).

Other commenters wrote that certain tasks should fall within the definition of companionship services. For example, BrightStar franchisees wrote that because ''specialized medical training is not necessary to take an individual's temperature with a regular home thermometer, or to provide them with hand lotion for 'routine skin care,' or to go on walks or do exercises together as recommended by a physical therapist,'' those tasks should not be excluded from companionship services. *See also* ANCOR (suggesting that these tasks be considered part of intimate personal care activities in proposed § 552.6(b)). NASDDDS wrote that tasks including wound care, injections, blood pressure testing, and turning and repositioning are routinely performed by family members and friends and thus are not necessarily associated with the type of professional caregiving that should be covered by the FLSA. The Oregon Department of Human Services, without providing specifics, recommended that the types of personal and medical services that a direct care worker may perform while still qualifying for the companionship services exemption be expanded.

The Department also received comments regarding the tasks it had identified as intimate personal care services rather than medically related services. For example, ANCOR and Pennsylvania Advocacy and Resources for Autism and Intellectual Disabilities stated that reminding the consumer of medical appointments or a predetermined medicinal schedule should be part of fellowship and protection in proposed § 552.6(a) because these duties are not ''intimate personal care services'' described in proposed § 552.6(b). AFSCME suggested that the Final Rule distinguish ''between infrequent reminders provided by a person engaged in fellowship or protection and those duties of a more medical nature required to serve the infirm and provided by vocational home care workers.'' AARP and Connecticut Association for Home Care & Hospice, among others, stated that applying a bandage to a minor wound and assisting with taking over-the-counter medication should be part of companionship services.

Finally, NRCPDS requested clarification regarding whether an agency administering a consumer-directed program may require a companion to undergo first aid or cardiopulmonary resuscitation (CPR) training without jeopardizing the applicability of the exemption, urging the Department to explain that training requirements that are limited and generally non-medical in nature should not disqualify a worker from the companionship services exemption.

The Department continues to believe it is crucial to exclude from companionship services the provision of services that are medical in nature because the individuals who perform those services are doing work that is far beyond the scope of ''elder sitting.'' In light of the comments received, however, the Department has not adopted the regulatory text as proposed. Instead, § 552.6(d) now states: ''The term 'companionship services' does not include the performance of medically related services provided for the person. The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants; the determination is not based on the actual training or occupational title of the individual performing the services.'' The Final Rule thus makes two substantive changes to the current rule's treatment of trained personnel, which excludes from companionship services those ''services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.'' 29 CFR 552.6. First, the Final Rule adds certified nursing assistants as an example of ''trained personnel'' who perform medically related services. Second, the Final Rule clarifies that whether the individual who performs medical tasks received training is irrelevant to the determination of whether the tasks are medically related.[8]

The Department is revising § 552.6(d) differently than proposed in the NPRM because it believes an explanation of what constitutes medically related services is simpler and easier for the regulated community to understand when framed by occupation than when described with a list of tasks. The comments received in response to the proposal highlight that direct care workers perform numerous tasks that that fall on both sides of the line between medical care and other services that fall within the meaning of ''care'' as described in § 552.6(b). The diversity of opinions commenters expressed regarding which tasks should be part of companionship services and which

[8] The Final Rule also makes two non-substantive changes to the current rule. First, it refers to ''licensed practical nurses'' instead of ''practical nurse[s].'' (The term ''registered nurses'' is identical to that used in the current rule.) This modification is meant only to update the regulation to use the more commonly used title for the occupation. Second, unlike the current and proposed rules, the Final Rule does not include a sentence stating that medical care performed in or about a private home, though not companionship services, is nevertheless within the category of domestic service employment. *See* 29 CFR 552.6; 76 FR 81244. Such work plainly falls within the definition of domestic services employment set out in § 552.3, and nurses, home health aides, and personal care aides are included in that provision's list of employees whose work may constitute domestic service employment. The Department has therefore determined that a sentence reiterating the point was redundant and thus unnecessary. This deviation from the current rule and proposed regulatory text is not meant to indicate that the Department believes the statements were incorrect or that the Department has changed its position on this point.

should not fall within the definition of that term revealed that an illustrative list of medically related services would not provide clarity to the regulated community. And as any list of such services would necessarily be illustrative; it would be nearly impossible, as well as beyond the scope of the Department's expertise, to name or describe all medically related services.

The Department believes that the alternative approach of defining medically related services outside the definition of companionship services as those that should be and typically are performed by workers who have completed specialized training offers better guidance to the regulated community. Naming a small number of occupations to illustrate the general sets of duties in question is simpler and more concise than referring to various particular medical tasks. Furthermore, the regulation that has been in place since 1974 used this approach, so the regulated community is already familiar with it. The more significant deviation from the existing text contained in the proposed rule was not necessary to achieve the Department's goal of ensuring that all direct care workers who perform medically related services that constitute work other than companionship services are provided the protections of the FLSA.

The decision to add certified nursing assistants (CNAs) to the list of examples of ''trained personnel'' is based on the legislative history of section 13(a)(15) of the Act as well as the training and work of CNAs. The House and Senate Reports addressing the 1974 amendments state that ''it is not intended that trained personnel such as nurses, whether registered or practical, shall be excluded'' from the protections of the FLSA under the companionship services exemption. House Report No. 93–913, p. 36; Senate Report No. 93–690, p. 20. The Department's current regulations are modeled on this language and reflect that without doubt, registered nurses and licensed practical nurses working in private homes do not provide companionship services. But Congress did not mean this list to be exclusive; the Reports say that trained personnel ''such as'' nurses are not exempt from the FLSA. *Id.* It is plain from these words and the surrounding language in the House and Senate Reports that ''trained personnel'' are a category of those ''employees whose vocation is domestic service'' and thus are not exempt from the FLSA's protections. *Id.* Therefore, the Department's expressly delegated authority to define companionship services includes the ability to exclude from the term's meaning medically related occupations or other medically related work beyond, to a reasonable extent, those named in the Reports.

Based on the training and duties of CNAs, the Department believes CNAs are properly considered outside the scope of the companionship services exemption. In 1987, Congress established federal requirements for certification of nursing assistants,[9] and many states have requirements that exceed these federal minimums.[10] Specifically, by federal law, CNAs (referred to in federal regulations as ''nurse aide[s]'') must receive at least 75 hours of training, including a minimum of 16 hours of clinical training, 42 CFR 483.152(a), and as of 2009, thirty states mandated between 80 to 180 hours of training.[11] The training curriculum for CNAs must include, among other things, ''basic nursing skills'' (*e.g.,* taking and recording vital signs), ''personal care skills'' (*e.g.,* skin care, transfers, positioning, and turning), and ''basic restorative skills'' (*e.g.,* maintenance of range of motion, care and use of prosthetic and orthotic devices). 42 CFR 483.152(b). In addition, all CNAs must pass a competency examination that includes a written or oral examination and skills demonstration. 42 CFR 483.154. Each state must maintain a registry of CNAs that contains the names of the individuals who have fulfilled these requirements. 42 CFR 483.156. The standardization of the CNA training curriculum, the competency exam requirement, and the existence of state registries tracking and confirming certification are all evidence of the professionalization of this category of workers. It is the Department's view that CNAs are the sort of ''trained personnel'' who provide direct care services as a vocation and thus are entitled to the protections of the FLSA.[12]

Furthermore, CNAs perform many tasks that are indisputably medical services, which constitute the sort of professional, skilled duties that are outside the scope of companionship services. Although the particular duties of CNAs vary by state, CNAs' core duties include administering medications or treatments, applying clean dressings, observing patients to detect symptoms that may require medical attention, and recording vital signs,[13] and typical additional duties include administering medications or treatments such as catheterizations, enemas, suppositories, and massages as directed by a physician or a registered nurse; turning and repositioning bedridden patients; and helping patients who are paralyzed or have restricted mobility perform exercises.[14] Additionally, CNAs often use equipment such as blood pressure units, medical thermometers, stethoscopes, bladder ultrasounds, glucose monitors, and urinary catheterization kits. It is the Department's view that these tasks constitute the sort of work that falls appropriately within FLSA protection.

Many of the duties of today's CNAs are similar to, or even more technical than, tasks LPNs performed in the 1970s, when Congress created the companionship services exemption with the explicit notion that LPNs were outside its scope. At that time, LPNs took and recorded temperature and blood pressure, changed dressings, administered prescribed medications, and helped with bathing or other personal hygiene; in private homes, they often assisted with meal preparation and facilitated comfort in addition to providing nursing care.[15] In contrast to today's CNAs, in the 1970s, ''nursing aides'' did not receive pre-employment training and did not provide services that required the technical training nurses received.[16] This shift in the field of nursing provides additional support for the Department's conclusion that

[9] Nursing Home Reform Act, Subtitle C of Title IV of the Omnibus Budget Reconciliation Act of 1987, Public Law 11–203, § 4201–4214. *http://assets.aarp.org/rgcenter/il/2006_08_cna.pdf.*

[10] *http://phinational.org/sites/phinational.org/files/clearinghouse/state-nurse-aide-training-requirements-2009.pdf.*

[11] *Id.*

[12] This change to the regulation makes obsolete but does not conflict with a court opinion holding that CNAs were not categorically excluded from the companionship services exemption under the current regulation. Specifically, in *McCune* v. *Oregon Senior Services Division,* 894 F.2d 1107 (9th Cir. 1990), the Ninth Circuit held—based on its reading of the current regulation— that CNAs were not the type of ''trained personnel'' who provide services that are not companionship services because the training for CNAs was not comparable to that required for RNs or LPNs. *Id.* at 1110–11. The Final Rule now makes clear, for the reasons explained, that the amount and type of training CNAs must receive is sufficiently significant to merit treatment as providing medically related, rather than companionship, services.

[13] O'NET, SOC 31–1014.00 (2012), *http://www.onetonline.org/link/summary/31-1014.00.*

[14] *See, e.g., http://www.maine.gov/boardofnursing/OLD%20WEBSITE/CNA%20BAsic%20Curriculum%2010-2008.pdf; https://www.flrules.org/gateway/ruleno.asp?id=64B9-15.002; http://www.in.gov/isdh/files/rescare.pdf; http://www.dphhs.mt.gov/cna/SkillsChecklist.pdf; http://www.utahcna.com/forms/UTcandidatehandbook.pdf; http://www.oregon.gov/OSBN/pdfs/publications/cnabooklet.pdf.*

[15] U.S. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 1974–75 Edition (1974).

[16] *Id.*

Congress's original intent in creating the companionship services exemption is best fulfilled by adding CNAs to the illustrative list of trained personnel.

The Department does not accept the suggestion of some commenters that it add home health aides (HHAs) and personal care aides (PCAs) to its illustrative list of trained personnel. The work of practitioners of those occupations does not necessarily include medically related services. Although Federal regulations require that HHAs complete a minimum of 75 hours of training and must pass a competency evaluation, these requirements are distinguishable from those for CNAs: the topics the training must address are more limited than those CNAs must study, the evaluation requirements are less stringent than for CNAs, and states need not maintain registries of HHAs. *Compare* 42 CFR 484.36(a), (b) *with* 42 CFR 483.152(a), (b); 42 CFR 483.156. PCAs are not subject to any federal standards for training and certification, nor are there state registries of PCAs. In addition, one of the core duties of an HHA is to ''entertain, converse with, or read aloud to patients to keep them mentally healthy and alert,'' [17] and one of the core duties of a personal care aide is to provide companionship.[18] Other duties of HHAs and PCAs often include grooming, dressing, and meal preparation. Therefore, HHAs and PCAs typically do not have the medical training CNAs receive, those titles are not associated with an official licensing system that allows their clear identification as trained personnel, and any particular HHA or PCA may perform only fellowship and protection and assistance with ADLs and IADLs. If in the future the same sort of professionalization that has occurred in the nursing assistance field extends to HHAs or PCAs such that either or both of those occupations require the training and perform the duties of CNAs today, or if some future category of worker arises that performs such skilled duties, however, it is the Department's intent that such fields could properly be considered ''trained personnel.''

The Department wishes to note two important caveats regarding its decision not to include HHAs or PCAs in its list of trained personnel. First, the list of occupations in the regulatory text is not exclusive. If a state or employer refers to a direct care worker by a title other than RN, LPN, or CNA, but his or her training requirements and services performed are roughly equivalent to or exceed those of any of these occupations, that worker does not qualify for the companionship services exemption. For example, according to PHI, twelve states require HHAs to be trained and credentialed as CNAs. Where a worker is a CNA and provides medically related services, regardless of any other job title he or she may hold, he or she is excluded from the companionship services exemption. *See* 29 CFR 541.2; FOH 22a04; Wage and Hour Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer, and Outside Sales Employees Under the Fair Labor Standards Act (all explaining that job titles do not determine exempt status under the FLSA). Second, as explained below, any HHA or PCA who performs medically related services does not qualify for the companionship services exemption. Based on the Department's understanding of the typical duties of these workers, the Department believes that many HHAs will for this reason not be subject to the exemption and therefore will be entitled to the protections of the FLSA. Of course, in addition, any HHA or PCA who is engaged in the provision of care during more than 20 percent of his or her hours worked for a particular consumer in a given workweek also does not qualify for the companionship services exemption. Furthermore, as explained in the section of this Final Rule regarding § 552.109, any third party that employs an HHA or PCA who works in a private home will not be permitted to claim the companionship services exemption. Given these limitations on the companionship services exemption, and the services HHAs and PCAs often provide, it is likely that almost all HHAs and many PCAs will not be exempt under the Act. Because almost all of these workers are providing home care as a vocation, the Department believes this is the appropriate result under the statute.

The second difference between the current and newly adopted regulatory text—that medically related services are those that typically require training, not only those performed by a person who actually has the training—is primarily based on the FLSA's fundamental premise that the tasks performed rather than the job title or credentials of the person performing them determines coverage under the Act. As explained elsewhere in this Final Rule, in enacting the 1974 amendments, Congress intended to exclude from FLSA coverage the work of individuals whose services did not constitute a vocation; it did not exclude domestic service employees who happened not to have training. The Department believes that any direct care worker who performs medical tasks that nurses or nursing assistants are trained to perform is the sort of employee whose work should be compensated pursuant to the requirements of the FLSA.[19]

Medically related services are not within the scope of companionship services whether the person performing them is registered, licensed, or certified to do so or not. Procedures performed may be invasive, sterile, or otherwise require the exercise of medical judgment; examples include but are not limited to catheter care, turning and repositioning, ostomy care, tube feeding, treating bruising or bedsores, and physical therapy. Regardless of actual training, these tasks require skill and effort far beyond what is called for by the provision of fellowship and protection, such as activities like reading, walks, and playing cards. They are also outside the category of assistance with instrumental activities of daily living (IADLs), which may fall under the provision of care described in § 522.6(b). The text of § 552.6(b) notes that IADLs include assisting a consumer with the physical taking of medications or arranging a consumer's medical appointments; minor health-related tasks such as helping a consumer put in eye drops, applying a band-aid to a minor cut, or calling a doctor's office to schedule an appointment are distinguishable from the medically related services RNs, LPNs, and CNAs are trained to and do perform. Furthermore, focusing on the tasks assigned to, rather than the actual training or occupational title of, the direct care worker avoids disincentivizing employers from hiring workers who are not adequately prepared for the duties they are assigned in order to avoid minimum wage and overtime requirements. This outcome, which becomes increasingly significant as services shift from institutions to

[17] O'NET, SOC 31–1011.00, *http://www.onetonline.org/link/details/31-1011.00.*

[18] O'NET, SOC 39–9021.00, *http://www.onetonline.org/link/details/39-9021.00.*

[19] The Department notes that the Final Rule's instruction not to look to the actual training of the person providing services calls for a shift in the way courts approach challenges to the assertion of the companionship services exemption. Courts have read the Department's current regulation to mean that direct care workers without the extensive training RNs and LPNs receive are not excluded from the exemption regardless of the services they provide. *See, e.g., Cox* v. *Acme Health Servs.,* 55 F.3d 1304, 1310 (7th Cir. 1995); *McCune* v. *Or. Senior Servs. Div.,* 894 F.2d 1107, 1110–11 (9th Cir. 1990). The Final Rule, which for the reasons explained reflects a reasonable reading of the statutory provision the Department has express authority to interpret, calls instead for a focus on the tasks performed.

homes, is not beneficial to workers or to consumers.

Finally, the Department notes that the purpose of § 552.6(d) is to exclude from the companionship services exemption those direct care workers who perform medically related tasks on more than isolated, emergency occasions. A direct care worker who provides companionship services but reacts to an unanticipated, urgent situation by, for example, performing cardiopulmonary resuscitation (CPR), performing the Heimlich maneuver, or using an epinephrine auto-injector is not excluded from the exemption. Furthermore, in response to NRCPDS's question regarding first aid or CPR training, the Department notes that such training is not equivalent to that which an RN, LPN, or CNA receives, and therefore a worker who has been taught these skills would not automatically be excluded from the companionship services exemption.

C. Section 552.102 (Live-in Domestic Service Employees) and Section 552.110 (Recordkeeping Requirements)

Live-in Domestic Service Employees

Section 13(b)(21) of the FLSA exempts from the overtime provision ''any employee who is employed in domestic service in a household and who resides in such household.'' 29 U.S.C. 213(b)(21). The Department's current regulation at § 552.102(a) provides that domestic service employees who reside in the household where they are employed are not entitled to overtime compensation. Section 552.102(a) also provides that domestic service workers who reside in the household of their employer are entitled to at least the minimum wage for all hours worked (unless they meet the companionship services exemption). Domestic service employees who reside in the household where they are employed are referred to as ''live-in domestic service employees.''

Under § 552.102(a), the Department allows the employer and live-in domestic service employee to enter into a voluntary agreement that excludes from hours worked the amount of the employee's sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits.[20] In order for periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. § 552.102(a). Section 552.102(a) makes clear that if the sleep time, meal time, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.

The Department allows for such an agreement because it recognizes that live-in employees are typically not working all of the time that they are on the premises and that, ordinarily, the employees may engage in normal private pursuits, such as sleeping, eating, and other periods of time when they are completely relieved from duty. *See also* § 785.23. However, current § 552.102(a) makes clear that live-in domestic service employees must be paid for all hours worked even when an agreement excludes certain hours. As an example, assume an employer and live-in domestic service employee enter into a voluntary agreement that excludes from hours worked the time between 11:00 p.m. and 7:00 a.m. for the purposes of sleeping. If the employee is required to perform any work during those hours, for example, the employee is required to assist the individual with going to the bathroom, or is required to periodically turn or reposition the individual, the employer is then required to pay the employee for the time spent performing work activities despite an agreement that typically designates those hours as non-working time. The proposed rule did nothing to change this obligation.

In the NPRM, the Department proposed changes to the recordkeeping requirement for live-in domestic service employees. Under proposed § 552.102(b), the Department would no longer allow the employer of a live-in domestic employee to use the agreement as the basis to establish the actual hours of work in lieu of maintaining an actual record of such hours. Proposed § 552.102(b) would require the parties to enter into a new agreement whenever there is a significant deviation from the existing agreement. Additionally, in the proposed changes to § 552.110(b), the Department would no longer permit an employer to maintain a copy of the agreement as a substitution for recording actual hours worked by the live-in domestic service employee. Instead, the Department would require the employer to maintain a copy of the agreement as well as records showing the exact number of hours worked by the live-in domestic service employees and pay employees for all hours actually worked. As more fully explained in the Recordkeeping Requirement section below, the Department is adopting the proposed recordkeeping requirements with minor modifications, as discussed in the preamble to §§ 552.102, 552.110.

Live-in Situations

The Department received several comments requesting clarification on the definition of a live-in domestic service employee. For example, Women's Employment Rights Clinic stated that it is critical that the regulations include a definition of a live-in domestic service employee because live-in domestic service workers remain exempt from overtime, and that the Department should provide clarification of the definition of a ''live-in'' so households and workers clearly understand when overtime must be paid. Women's Employment Rights Clinic suggested that the Department adopt the following definition: ''A live-in employee is one who (1) resides on the employer's premises on a permanent basis or for extended periods of time and (2) for whom the employer makes adequate lodging available seven days per week.'' Women's Employment Rights Clinic stated that this definition will help draw a needed distinction between workers on several consecutive 24-hour shifts and live-in employees, as well as a distinction between short-term assignments and assignments for extended periods of time that might appropriately be deemed live-in situations. The Legal Aid Society of NY also requested that the Department clarify the definition of live-in domestic service employee and make clear that the definition does not include a worker who spends only one night per week at a residence or must pay any part of the rent or mortgage or other expenses for upkeep of another residence.

In addition, the Department received comments questioning the continued use and viability of the overtime exemption for live-in domestic service employees. Students from the Georgetown University Law Center stated that the Department should eliminate the live-in domestic service employee exemption, suggesting that it is directly contrary to the Department's stated goals in the NPRM. The students urged the Department to provide overtime protections to live-in employees. On the other hand, one individual who hires direct care workers to provide services for his father requested that the Department not eliminate the live-in domestic service employee exemption.

Because the live-in domestic service employee exemption is statutorily created, the Department cannot eliminate the exemption as suggested by Georgetown Law students. Only Congress could eliminate the overtime

[20] This requirement is nearly identical to the requirement found in § 785.23.

exemption for such workers. Moreover, the Department did not propose any changes to the definition of live-in domestic service employee or otherwise discuss the requirements for meeting the live-in domestic service exemption in the NPRM. It is the Department's intention to continue to apply its existing definition of live-in domestic service employees. Under the Department's existing regulations and interpretations, an employee will be considered to be a live-in domestic service employee under § 552.102 if the employee: (1) Meets the definition of domestic service employment under § 552.3 and provides services in a ''private home'' pursuant to § 552.101; and (2) resides on his or her employer's premises on a ''permanent basis'' or for ''extended periods of time.'' *See also* § 785.23; FOH § 31b20.

Employees who work and sleep on the employer's premises seven days per week and therefore have no home of their own other than the one provided by the employer under the employment agreement are considered to ''permanently reside'' on the employer's premises. *See* Wage and Hour Opinion Letter FLSA–2004–7 (July 27, 2004). Further, in accordance with the Department's existing policy, employees who work and sleep on the employer's premises for five days a week (120 hours or more) are considered to reside on the employer's premises for ''extended periods of time.'' *See* FOH § 31b20. If less than 120 hours per week is spent working and sleeping on the employer's premises, five consecutive days or nights would also qualify as residing on the premises for extended periods of time. *Id.* For example, employees who reside on the employer's premises five consecutive days from 9:00 a.m. Monday until 5:00 p.m. Friday (sleeping four straight nights on the premises) would be considered to reside on the employer's premises for an extended period of time. Similarly, employees who reside on an employer's premises five consecutive nights from 9:00 p.m. Monday until 9:00 a.m. Saturday would also be considered to reside on their employer's premises for an extended period of time. *Id.*

Employees who work only temporarily, for example, for only a short period of time such as two weeks, for the given household are not considered live-in domestic service workers, because residing on the premises of such household implies more than temporary activity. In addition, employees who work 24-hour shifts but are not residing on the employer's premises ''permanently'' or for ''extended periods of time'' as defined above are not considered live-in domestic service workers and, thus, the employers are not entitled to the overtime exemption. The Department received many comments from employers and advocacy groups that serve persons with disabilities that appeared to confuse the issue of ''live-in'' care with 24-hour care. *See, e.g.,* Bureau of TennCare, NASDDDS, Cena Hampden, Scott Witt, and Gary Webb. For example, one individual suggested that her mother received ''live-in'' care when the employee worked only a 16-hour shift. The Department received several comments noting that the home care industry's use of the term ''live-in'' is different than the Department's use. Specifically, John Gilliland Law Firm stated that ''the term 'live-in' is used differently within the home care industry than how it is used by the Wage and Hour Division.'' The law firm noted that the home care industry uses the term ''live-in'' to refer to 24-hour assignments, often several consecutive assignments, where the client's location is not the employee's residence, and the Wage and Hour Division refers to ''live-in'' employees as those residing on the client's premises. Similarly, Women's Employment Rights Clinic noted that, based on their experience representing home care workers, employees who work several consecutive 24-hour shifts are often confused with live-in employees.

The fact that an individual may need 24-hour care does not make every employee who provides services to that individual a live-in domestic service employee. Rather, only those employees who are providing domestic services in a private home and are residing on the employer's premises ''permanently'' or for ''extended periods of time'' are considered live-in domestic service employees exempt from the overtime requirements of the FLSA. Employees who work 24-hour shifts but are not live-in domestic service employees must be paid at least minimum wage and overtime for all hours worked unless they are otherwise exempt under the companionship services exemption. (*See* Hours Worked section for a discussion of when sleep time is not hours worked.)

The Department received a few comments that argued that allowing employers to maintain an agreement under § 552.102(a) conflicts with the simultaneous requirement that an employer must maintain precise records of hours worked under proposed § 552.102(b). For example, The Workplace Project stated that allowing an agreement of hours worked will create confusion and will undermine the requirement that employers track actual hours worked. As a result, The Workplace Project recommended that the Department eliminate § 552.102(a) that allows employers of live-in domestic service workers to enter into an agreement. On the other hand, one individual requested that the Department continue to allow employers and employees to use agreements for live-in domestic service employees. California Foundation for Independent Living Centers (CFILC) also suggested that the Department should allow employers and employees to ''enter into mutually agreeable and non-coercive employment agreements to work compensated hours at a set hourly wage or monthly salary without triggering overtime compensation.'' CFILC stated that the agreements could guarantee the live-in domestic service employee breaks, meal periods, and 8 hours of uninterrupted sleep, and the agreements could be renegotiated to account for any changes that might arise.

The Department disagrees with the comments that suggested that continuing to allow employers and live-in domestic service employees to enter into mutually agreeable agreements is inconsistent with the recordkeeping requirements for live-in domestic service employees. The Department's regulation allows the employer and live-in employee to enter into a voluntary agreement that excludes from hours worked the amount of the employee's sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. *See* §§ 552.102(a), 785.23. The Department's regulation also allows employers and live-in employees to enter into such voluntary agreements (*see, infra,* Hours Worked section) because the Department recognizes that live-in employees are not necessarily working all the time that they are on the employer's premises. When an employee resides on the employer's premises it is in the employee's and the employer's interest to reach an agreement on the employee's work schedule so each may understand when the employee is expected to be working and when the employee is not expected to be working and is completely relieved from duty. The Department will accept any reasonable agreement of the parties, taking into consideration all of the pertinent facts. Despite allowing for voluntary agreements, however, the Department has always required that employers pay live-in domestic service

employees at least the minimum wage for all hours worked and that when sleep time, bona fide meal periods, and bona fide off-duty time are interrupted then employees must be compensated for such time regardless of whether an agreement typically designates those hours as non-working time. Under the new recordkeeping requirements for live-in domestic service employees (more fully addressed below), the Department simply requires the employer to maintain a copy of the agreement as well as records showing the exact number of hours worked by live-in domestic service employees and pay live-in domestic service employees for all hours actually worked. The requirement to record hours actually worked is no different than that required for other employers under the FLSA.

The Department also received comments reflecting the belief that the proposed rule required live-in employees to be paid for all 24 hours, or comments that were otherwise confused about the pay requirements for live-in and 24-hour shift workers. For example, a Senior Helper franchise owner believed that the Department's proposed rule required that domestic service employees scheduled for 24-hour shifts or deemed live-ins must be paid for the entire 24-hour period even when the employee is not working. The owner suggested that such an outcome would be unfair and that the rule should be redrafted and modeled after New Jersey law, which, based upon his description, requires that live-in employees be compensated for at least eight hours each day when the hours worked are irregular and intermittent. Another employer also believed that the Department's proposed rule required that agencies pay live-in employees for all 24 hours that they are on the clients' premises even if the employees receive six to eight hours of uninterrupted sleep. This employer suggested that this would double the cost to the clients. Several employers suggested that employees who live in or work 24-hour shifts should not be paid overtime because they are not working all the time. In addition, a few employers suggested that live-in or sleep-over employees should not be paid based on an hourly rate; rather, the employer should be allowed to pay the employee based on a flat overnight rate.

The Department's existing regulations regarding when employees must be compensated for sleep time, meal periods, or off-duty time are discussed in the Hours Worked section of this Final Rule. The definition of hours worked and the basis for taking any deductions outlined in that section apply to live-in domestic service employees and must be followed. Generally, where an employee resides on the employer's premises permanently or for extended periods of time, all of the time spent on the premises is not necessarily working time. The Department recognizes that such an employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from work duties. For a live-in domestic service employee, such as a live-in roommate, the employer and employee may voluntarily agree to exclude sleep time of not more than eight hours if (1) adequate sleeping facilities are furnished by the employer, and (2) the employee's time spent sleeping is uninterrupted. § 785.22–.23. In addition, meal periods may be excluded if the employee is completely relieved of duty for the purpose of eating a meal, and off-duty periods may be excluded if the employee is completely relieved from duty and is free to use the time effectively for his or her own purposes. §§ 785.16, 785.19. However, an employee who is required to remain on call on the employer's premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is considered to be working while on call and must be compensated for such time. § 785.17.

Concerning whether employers may pay an hourly rate or a flat overnight or daily rate to a live-in employee, the Department notes that the FLSA is flexible regarding the type of rate paid and only requires that employers pay the live-in domestic service employee at least the minimum wage for all hours worked, in accordance with our longstanding rules. For example, an employer may have an agreement to pay a live-in employee $125 per day, which exceeds the minimum wage required for 16 hours of work (compensable time), if the employee receives eight hours of uninterrupted sleep time off.

The Department also received several comments requesting clarification on the application and impact of the companionship services and live-in domestic service employee exemptions to shared living or roommate arrangements. The Department received many comments from advocacy groups that represent persons with disabilities, such as the NASDDDS, and third party employers, such as Community Vision, requesting that the Department clarify the wage and hour requirements on live-in arrangements provided under Medicaid-funded Home and Community-Based Services (HCBS) programs.

Specifically, NASDDDS described shared living services as ''an arrangement in which an individual, a couple or a family in the community share life's experiences with a person with a disability.'' Shared living arrangements may also be known as mentor, host family or family home, foster care or family care, supported living, paid roommate, housemate, and life sharing. Under a shared living program, consumers typically live in the home of an individual, couple, or family where they will receive care and support services based on their individual needs. NASDDDS stated that shared living providers receive compensation typically from a third party provider agency or directly from the state's Medicaid program. NASDDDS requested that the Department conclude that shared living providers meet the definition of performing companionship services under the proposed rule and thus that those providers are not entitled to minimum wage and overtime compensation.

NASDDDS also discussed Medicaid services described as ''host families.'' NASDDDS described a ''host family'' as a family that accepts the responsibilities for caring for one to three individuals with developmental disabilities. The host family helps the individual participate in family and community activities, and ensures that the individual's health and medical needs are met. Such services may include assistance with basic personal care and grooming, including bathing and toileting; assistance with administering medication or performing other health care activities; assistance with housekeeping and personal laundry; etc. NASDDDS noted that the provider typically must comply with state licensure or certification regulations. NASDDDS further noted that the provider is usually paid a flat monthly rate to meet the individual's support needs and the payment will typically be based on the intensity and difficulty of care. The provider may also be paid for room and board. NASDDDS suggested that the Department work with CMS and stakeholders to develop a greater understanding of the programs and financial structures for Medicaid HCBS waiver programs. One individual suggested that such living arrangements should fall under the Department's foster care exemption or should be exempt from the requirements under § 785.23.

Moreover, Arkansas Department of Human Services noted that many

individuals who receive supported living services under HCBS waivers rely on roommates or live-in scenarios where the individuals receive services in their own home or in that of a family member. Community Vision and other third party providers described live-in roommates as ''a major component of the support system of an individual with significant disabilities who live independently in their own home.'' Home Care & Hospice stated that live-in roommate arrangements include college students with Medicaid paid ''roommates'' who also attend college or individuals who work and take a caregiver to work with them, but who need an overnight live-in roommate to address intermittent needs. Home Care & Hospice was concerned that the Department's proposed regulations would put these programs at risk. Community Vision stated that live-in roommates are available in the rare case of an emergency or for infrequent support needs and that these individuals receive free or reduced rent and utilities in exchange for being a roommate who on occasion can provide support to the individual at night; the type of services provided by live-in roommates was not discussed. Community Vision requested that the exemptions from minimum wage and overtime continue for live-in roommates. It asserted that minimum wage and overtime pay would make the live-in roommates fiscally unsupportable for agencies and their clients, resulting in increased institutionalization of their clients with disabilities and a loss of housing for their employees.

The Department also received several comments that discussed the application of the companionship services and live-in domestic service employee exemptions to paid family caregivers. *See, e.g.,* Joni Fritz, ANCOR, and NASDDDS. Paid family caregivers are described as family members of an aging person or an individual with a disability who provide care and receive some income to provide support for their family member, and who—without pay—could not provide the needed support. *See* Joni Fritz. Some states have established payment systems under Medicaid that will pay a family member to provide intimate care and medically related support.[21] AARP noted that some HCBS waiver programs allow the individual to hire family caregivers to provide services and may permit them to provide more than 40 hours of assistance per week, assistance that is vital to keeping their loved one at home and out of an institution. AARP noted that family caregivers frequently live with the person for whom he or she provides services. AARP was concerned that requiring the payment of overtime in these cases, merely because public authorities or fiscal intermediaries are involved in making these programs possible, could prevent family caregivers from providing more than 40 hours a week in paid care and impact the ability of the individual to remain at home. In addition, AARP noted that the situation of a family caregiver who lives with the person for whom they provide services is analogous to the overtime exemption for live-in domestic service workers. AARP suggested that the Department not require the payment of overtime if: (1) The individual is receiving HCBS under a publicly financed consumer-directed program; (2) a third party such as a public authority or a fiscal intermediary is involved; and (3) a family caregiver who lives with the consumer is being paid under the consumer-directed program to provide services for the individual.

It appears that under these varied shared living arrangements, the live-in domestic service workers are living on the same premises with the consumer and would easily be able to meet the ''permanently reside'' or ''extended periods of time'' requirements and would therefore be exempt from overtime requirements. There is a question, however, whether the consumer is receiving services in a ''private home.'' As the determination whether domestic services are provided in a private home is fact-specific and is to be made on a case-by-case basis, the Department cannot state categorically whether a particular type of living arrangement involves work performed in a private home. In evaluating whether a residence is a private home (*see, supra,* private home discussion), the Department considers the six factors identified by the Tenth Circuit in *Welding* as well as the other factors identified in *Johnston, Linn,* and *Lott. See* Wage and Hour Opinion Letter, FLSA 2006–13NA (June 23, 2006).

The Department cannot address all shared living arrangements raised in the comments because the circumstances are different under countless factual scenarios. However, the Department is providing, as an example, the following guidance regarding how these established rules will likely apply under the most commonly raised shared living arrangement—live-in roommates. In the live-in roommate arrangement, the consumers appear to be living in their own home and a roommate moved in to the consumer's home in order to provide services on an as needed basis. It also appears that the person receiving services owns the home or leases the home from an independent third party. There is nothing in the comments to suggest that the state or agency providing the services maintains the residences or otherwise provides the essentials of daily living, such as paying the mortgage or rent, utilities, food, and house wares. Rather, either the service provider pays rent or the individual receiving services provides free lodging as part of the remuneration due the live-in roommate for providing services. The cost/value of the services does not appear to be substantial based on the comments that suggested that live-in roommates provide only intermittent or infrequent care services. Thus, the costs of the services provided appear to be a small portion of the total costs of maintaining the living unit. In addition, there is nothing to suggest that the service provider uses any part of the residence for its own business purposes. It also appears that the consumer hires the roommate and determines who will live in his or her home and is free to come and go as he or she pleases. Therefore, live-in roommate arrangements appear to be performed in a private home, and thus, the live-in domestic service employee overtime exemption will likely be available to the individual, family, or household using the worker's services. Any slight change in the specific facts of this scenario, however, may lead to a different result. However, as more fully discussed in the third party employment section below, the live-in domestic service employee exemption will not be available to a third party employer of the live-in roommate. Moreover, to the extent the live-in roommate meets the duties test for the companionship services exemption as outlined above (*see, supra,* companionship services section), the companionship exemption will likely also be available to the individual, family, or household using the worker's services. The overtime exemption for a live-in domestic service employee is a separate exemption available even when an employee does not meet the Department's duties test in the companionship services exemption. For example, an individual, household or family member employing a live-in nurse or a live-in direct care worker who provides cooking, driving, and cleaning services for more than 20 percent of the weekly hours worked, may still claim the live-in domestic

[21] In some instances a family member may also be paid for time spent performing some housekeeping services in addition to the medical and personal care services provided.

service employee exemption from overtime; if there is a third party employer involved, however, then the third party employer would be responsible for overtime compensation.

For many of the same reasons discussed above, the Department believes that in most circumstances a paid family caregiver is providing services in a private home. In the circumstances where the paid family caregiver lives with the consumer, the overtime exemption will be available to the individual, family, or household. If employed, jointly or solely, by a third party, the paid family caregiver would be entitled to overtime compensation for all hours worked over 40 from the third party employer subject to the analysis described later in this preamble discussing paid family and household caregivers. However, as noted above, not all time spent on the premises is necessarily considered hours worked and there may be circumstances where the third party will not be considered a joint employer of the paid family caregiver because the third party is not engaged in the factors that indicate an employer-employee relationship exists (*see, infra,* joint employment section).

The Department recognizes that people living with disabilities continue to explore innovative ways of eliminating segregation and promoting inclusion particularly through the provision of services and supports in home- and community-based settings. The Department appreciates that a number of commenters who care about the viability of such arrangements raised questions and concerns about the impact of the proposed rule on such arrangements, and the Department supports the progress that has allowed elderly people and persons with disabilities to remain in their homes and participate in their communities. As noted above, in the most common scenario described by commenters, the live-in roommate situation, depending on all of the facts of the arrangement, the roommate may be exempt from the overtime compensation requirements under the live-in domestic service employee exemption, and, depending on the roommate's duties, could also qualify for the companionship services exemption. In either case, the longstanding FLSA hours worked principles would apply, and time that is not work time under those principles would not have to be compensated.

The Department also recognizes that it is possible that certain shared living arrangements may fall within the Department's exception for foster care parents, provided specific criteria are met. *See* FOH § 10b29. In contrast to shared living arrangements that are not foster care situations, individuals in foster care programs are typically wards of the state; the state controls where the individuals will live, with whom they will live, the care and services that will be provided, and the length of the stays. For example, in Wage and Hour Opinion Letter WH–298, the WHD concluded that where a husband and wife agree to become foster parents on a voluntary basis and take a child into their home to be raised as one of their own, the employer-employee relationship would not exist between the parents and the state where the payment is primarily a reimbursement of expenses for rearing the child. *See* 1974 WL 38737 (Nov. 13, 1974). Of course, the Department recognizes that there is a continuum of shared living arrangements and a factual determination with respect to FLSA coverage must be made on a case-by-case basis.

As stated throughout this rule, the Department believes that the positions taken in the Final Rule are more consistent with the legislative intent of the companionship services and live-in exemptions and that protecting domestic service workers under the Act will help ensure that the home care industry attracts and retains qualified, professional workers that the sector will need in the future.

Recordkeeping Requirements

In the NPRM, the Department proposed to revise the recordkeeping requirements applicable to live-in domestic service employees, in order to ensure that employers maintain an accurate record of hours worked by such workers and pay for all hours worked in accordance with the FLSA. Section 13(b)(21) of the Act provides an overtime exemption for live-in domestic service employees; however, such workers remain subject to the FLSA minimum wage protections. Current § 552.102 allows the employer and employee to enter into an agreement that excludes from hours worked sleeping time, meal time, and other periods of complete freedom from duty when the employee may either leave the premises or stay on the premises for purely personal pursuits, if the time is sufficient to be used effectively. Paragraph 552.102(a) makes clear that if the free time is interrupted by a call to duty, the interruption must be counted as hours worked. Current § 552.102(b) allows an employer and employee who have such an agreement to rely on it to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. The employer is to maintain a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If there is a significant deviation from the agreement, a separate record should be kept or a new agreement should be reached.

The Department expressed concern in the NPRM that not all hours worked by a live-in domestic service employee are actually captured by such an agreement, which may result in a minimum wage violation. The Department stated that the current regulations do not provide a sufficient basis to determine whether the employee has in fact received at least the minimum wage for all hours worked. Therefore, the NPRM proposed to revise § 552.102(b) to no longer allow the employer of a live-in domestic service employee to use the agreement as the basis to establish the actual hours of work in lieu of maintaining an actual record of such hours. Instead, the proposal required the employer to keep a record of the actual hours worked. Consequently, the language suggesting that a separate record of hours worked be kept when there is a significant deviation from the agreement was proposed to be deleted, and proposed § 552.102(b) required entering into a new written agreement whenever there is a significant deviation from the existing agreement.

The Department also proposed to amend § 552.110 with respect to the records that must be kept for live-in domestic service employees. Current § 552.110(b) provides that records of actual hours worked are not required for live-in domestic service employees; instead, the employer may maintain a copy of the agreement referred to in § 552.102. It also states, however, that this more limited recordkeeping requirement does not apply to third party employers. No records are required for casual babysitters. Current paragraph 552.110(c) permits, when a domestic service employee works a fixed schedule, the employer to use the schedule that the employee normally works and either provide some notation that such hours were actually worked or, when more or less hours are actually worked, show the exact number of hours worked. Current § 552.110(d) permits an employer to require the domestic service employee to record the hours worked and submit the record to the employer.

Because of the concern that all hours worked are not being fully captured, the Department proposed in § 552.110(b) to no longer permit an employer to maintain a copy of the agreement as a substitution for recording actual hours

worked by the live-in domestic service employee. Instead, the NPRM proposed that the employer maintain a copy of the agreement and maintain records showing the exact number of hours worked by the live-in domestic service employee. Proposed § 552.110(b) expressly stated that the provisions of § 516.2(c), pertaining to fixed-schedule employees, do not apply to live-in domestic service employees, which meant that employers would no longer be permitted to maintain a simplified set of records for such employees. As a result, a conforming change was proposed in § 552.110(c), based on the Department's belief that the frequency of schedule changes for live-in domestic service employees simply makes reliance on a fixed schedule, with exceptions noted, too unreliable to ensure an accurate record of hours worked by these employees. In addition, because the proposed changes to third party employment in § 552.109 made moot the reference in § 552.110(b) to third party employers, it was removed from proposed § 552.110(b). The NPRM also proposed to revise § 552.110(d) to make clear that the employer of the live-in domestic service employee could not require the live-in domestic service employee to record the hours worked and submit the record to the employer, while employers of other domestic service employees could continue to require the domestic service employee to record and submit their record of hours worked. The proposal required the employer to be responsible for making, keeping, and preserving records of hours worked and ensuring their accuracy. Finally, the Department proposed to move the sentence stating that records are not required for casual babysitters, as defined by § 552.5, to a stand-alone paragraph at § 552.110(e).

The Department received a number of comments on the proposed recordkeeping requirements, discussed below. Based on comments indicating that the proposed change prohibiting employers from requiring live-in domestic service employees to record and submit their hours could create significant difficulties, particularly for those employers who have Alzheimer's disease, dementia or developmental disabilities, the Department modified the Final Rule to allow an employer to require the live-in domestic service employee to record the hours worked and submit the record to the employer. The Final Rule adopts the other changes as proposed.

The Department also received a number of comments that stated that the requirement for employers to keep a record of actual hours worked would cause problems. For example, several employers and their representatives, including CAHSAH, stated that it is unlikely that individual employers would be aware of the requirement or be able to comply with it, and that it would place an undue burden on an elderly employer receiving services to have to comply with recordkeeping requirements. AARP similarly stated that consumers who are ill or have cognitive impairments and need live-in long-term services and supports may not be able to monitor a worker's hours effectively or to keep proper records. Therefore, while AARP stated its belief that third party agencies could fulfill the requirement to record hours, it sought an adjustment where the individual or family directly hires the employee; AARP suggested allowing the agreement to control unless deviations are noted and allowing the employer to require the employee to record and submit hours. Other employers also expressed concern about the ability of consumers with Alzheimer's disease, dementia, or other disabilities to track hours, and they stated their preference for continuing to use a predetermined schedule agreement or requiring the employee to track hours. *See, e.g.,* North Shore Senior Services, Gentle Home Services, Harrison Enterprises, Inc., and Bright Star Healthcare of Baltimore. Home care companies and their representatives expressed concern about the additional paperwork burdens, stating that a household employer with a live-in domestic service worker would need to install a time clock, and that it would be difficult for employers to track sleep time versus awake time, or to track time spent taking a break versus helping the client. *See, e.g.,* VNAA, Visiting Nurse Service of New York (VNSNY), Angels Senior Home Solutions, Connecticut Ass'n for Home Care & Hospice, Arizona Ass'n of Providers for People with Disabilities, New York State Ass'n of Health Care Providers, and Home Care Ass'n of NY State. They indicated that the requirement will be burdensome to implement, particularly when consumers wake up frequently during the night and need assistance, because care workers will have to keep records of what time the person woke up, what help was needed, and how long their assistance was provided. They expressed concern that, because live-in domestic service workers are generally unsupervised, their third party employers have little ability to monitor or audit their records of meal and sleep periods versus work hours to determine their accuracy. One company, Elder Bridge, believed that using an electronic time management system was not feasible because such systems cannot account for the unpredictable down time of employees; therefore, the company suggested that caregivers should be allowed to document their break time manually in their care notes. A trade association, Home Care Alliance of Massachusetts, stated it had no objection to recording the exact number of hours worked, but it expressed confusion about how it would know that exact number if it could not require live-in domestic service employees to record their hours (*see* Harrison Enterprises, Inc.). An employee agreed, believing that employee-based reports would be more accurate. A Georgetown University Law Center student commented that recording deviations from an agreement was no more difficult than recording every hour as it happened and could be more accurate.

On the other hand, the Department received a number of comments that emphasized the importance of the changes in the proposed recordkeeping requirements for live-in domestic service workers. For example, National Council of La Raza stated that some care workers work more than 60 hours in a week, and that bolstering the recordkeeping requirements ''is an excellent first step in ensuring that these hardworking caregivers are accurately compensated for time on the job.'' The ACLU supported the change, stating that ''[i]t is common that live-in workers are required to work more than the hours they have contracted to perform.'' Professor Valerie Francisco similarly stated that her research shows that employers of live-in domestic workers do not keep accurate records of hours worked. Numerous commenters, including NELP, Workforce Solutions Cameron, COWS, and DCA, agreed, stating that the current rule's tolerance for use of an agreement has resulted in underpayments for time worked by live-in workers, who are isolated and may fear retaliation if they complain. NELP noted that ''experts estimate that one-third of the victims of labor trafficking are domestic workers.'' Other groups such as AFSCME, Women's Employment Rights Clinic and the Center, noted that the revised regulations will more effectively ensure that hours are properly recorded and that workers receive at least the minimum wage for all hours worked. The Center for Economic and Policy Research stated that the difficulties that arise in capturing live-in hours worked ''are not qualitatively different from monitoring issues that arise in other contexts.''

The Legal Aid Society, The Workplace Project, Care Group, Inc., the Brazilian Immigrant Center and DAMAYAN, asserted that live-in domestic workers are subject to exploitation and that requiring employers to track hours will help to create a fair environment. However, several of these advocacy groups viewed the requirement to track hours as inconsistent with the ability to obtain an agreement with the worker to exclude sleep time and other periods of complete freedom; they thought that such agreements only create confusion and undermine the requirement to track hours. Other individuals emphasized they wanted to ensure that employers of live-in domestic service workers keep records of the employees' rate of pay, total wages, and deductions, and they noted that employers can keep such records using technology like computers, smartphones, etc. Several consumers stated that they have always kept records of hours worked and wages paid and that it is easy to do. Finally, several commenters, including Care Group, Inc., National Domestic Workers Alliance, and The Workplace Project, suggested that the regulatory requirement to have a record of the employee's Social Security Number should also permit the use of an Individual Taxpayer Identification Number (ITIN).

In light of the comments indicating that it would be very difficult for many consumers of live-in services to monitor and record hours worked accurately, especially those who have Alzheimer's disease, dementia, or other conditions affecting memory, concentration, or cognitive ability, the Department has modified § 552.110(d) of the Final Rule to remove the proposed rule's restriction on employers of live-in domestic service employees being able to require such workers to record their hours worked and submit that record to the employer, thus, expanding the application of the current rule to all employers of domestic service employees.[22] Of course, even though employers may require their employees to create and submit time records, employers cannot delegate their responsibility for maintaining accurate records of the employee's hours and for paying at least the minimum wage for all hours worked. *See* § 552.102(a). *See, e.g., Kuebel* v. *Black & Decker, Inc.,* 643 F3d 352, 363 (2nd Cir. 2011) (employer's duty to maintain accurate records non-delegable); *Caserta* v. *Home Lines Agency, Inc.,* 273 F.2d 943, 946 (2nd Cir. 1959) (rejecting as inconsistent with the FLSA an employer's contention that its employee was precluded from claiming overtime not shown on his own timesheets, because an employer cannot transfer its statutory burdens of accurate recordkeeping, and of appropriate payment, to the employee). The Department modified the Final Rule because it agrees that employees are, in many situations, the individuals with the best knowledge of when they were working, and they may have the best ability to track those hours.

With regard to the comments suggesting that the Department continue to allow the use of a reasonable agreement reflecting the expected schedule to establish a live-in domestic service employee's hours of work, the Department does not agree that such a system is appropriate. First, as stated in the NPRM, the Department is concerned that not all hours actually worked are captured by such an agreement. Live-in domestic service employees, including those employed to provide care for the elderly or individuals with disabilities, have inherently variable schedules due to the often unpredictable needs of their employers. Therefore, reliance on the system in the current regulations does not provide a sufficient basis to determine whether the employee has in fact received at least the minimum wage for all hours worked. As the comments from employee representatives emphasized, live-in domestic service workers are in a vulnerable position due to their isolation, and many fear retaliation if they complain. Further, numerous commenters stated that live-in domestic service employees work more hours than they have contracted to perform. While some employer representatives expressed concern that tracking hours would be burdensome, others—such as the Home Care Alliance of Massachusetts and individuals who said they have tracked hours for their employees—stated they had no objection to this requirement. AARP stated that third party employers should be able to fulfill the requirement. The Department notes that, under current § 552.110(b), the simplified recordkeeping system does not apply to third party employers.

The Department believes that the modification made in the Final Rule allowing employers to require employees to record and submit their hours will further simplify the process. The Department notes that there is no need for an electronic time management system. *See* 29 CFR 516.1(a). Some employers might choose to develop their own recordkeeping forms that, for example, might require the employee to identify what tasks were performed and the hours spent in various activities; some employers might simply require employees to keep notes by hand of their hours worked; and some employers might decide to record the hours themselves. But whatever method is used, the Department believes that recording the actual hours worked will result in more accuracy than the current system of simply relying upon an agreement established months or years in the past. The recording of actual hours therefore will be, as many commenters stated, an effective tool to ensure that workers receive at least the minimum wage for all hours worked.

Several employee representatives expressed the view that the requirement to track actual hours worked was inconsistent with the ability under § 552.102(a) to have an employer-employee agreement to exclude sleep time, meal time and other periods of complete freedom from all duties. As discussed above, there is no inconsistency between these two provisions. The Department recognizes that live-in domestic service employees are not necessarily working all the hours that they are on the employer's premises and the regulations require that to exclude such time requires an agreement between the employer and employee. Therefore, the parties may agree to exclude sleep, meal and certain other relief periods from hours worked. *See* § 552.102(a). Nevertheless, all hours actually worked must be compensated, such as where the normal sleeping period or the normal meal period is interrupted by a call to duty. *Id.* The Final Rule simply clarifies that, although the parties may have an agreement that sets forth the parties' expectations regarding the normal schedule of work time, and they may agree to exclude sleep, meal and other relief periods from hours worked, that agreement does not control the compensation due each week; rather, records must be kept of the actual hours worked in order to ensure that the employee is properly compensated for all hours worked.

Finally, several commenters stated that the reference to Social Security Numbers in § 552.102(a) should include, as an alternative, an Individual Taxpayer Identification Number (ITIN); they also wanted to ensure that employers of live-in domestic service workers also keep records of rate of pay, total wages paid and deductions made. An ITIN is a tax processing number issued by the Internal Revenue Service (IRS). IRS issues ITINs to individuals who are required to have a U.S. taxpayer identification number for tax reporting

[22] The Department also made minor edits to § 552.110(b) and (d) to improve clarity.

or filing requirements but who do not have, and are not eligible to obtain, a Social Security Number. ITINs are issued regardless of immigration status, because both resident and nonresident aliens may have a U.S. filing or reporting requirement under the Internal Revenue Code. *See http://www.irs.gov/individuals/article/0,,id=96287,00.html.* The Department did not propose any changes to § 552.110(a), which simply mentions Social Security Numbers in its summary of the recordkeeping requirements in 29 CFR part 516 (*see, e.g.,* § 516.2, which also only mentions Social Security Numbers). The Department therefore does not think it is necessary to include this minor suggested change in the Final Rule, as it does not believe the failure to mention ITINs will cause any confusion. The recordkeeping requirements in § 516.2(a) and § 552.110(a) already require employers of nonexempt employees to maintain records such as hours worked each workweek, total wages paid, total additions to or deductions from wages and the basis therefore (such as board and/or lodging), and the regular hourly rate of pay when overtime compensation is due. Therefore, no further changes to the regulations in § 552.110 are necessary or appropriate.

D. Section 552.109 (Third Party Employment)

Section 552.109 addresses whether a third party employer, the term the Department uses to refer to an employer of a direct care worker other than the individual receiving services or his or her family or household, may claim the FLSA exemptions specific to the domestic service employment context. Current § 552.109(a) permits third party employers to claim the companionship services exemption from minimum wage and overtime pay established by § 13(a)(15) of the Act; current § 552.109(c) permits third party employers to claim the live-in domestic service employee exemption from overtime pay established by § 13(b)(21) of the Act. (Section 552.109(b) addresses third party employment in the context of casual babysitting, which is not a topic within the scope of this rulemaking.) In the NPRM, the Department proposed to exercise its expressly delegated rulemaking authority and bring the regulation in line with the legislative intent and the realities of the home care industry by revising current paragraphs (a) and (c) to prohibit third party employers from claiming these exemptions. Under the proposed regulation, only an individual, family, or household would be permitted to claim the exemptions in §§ 13(a)(15) and 13(b)(21) of the FLSA. In other words, where a direct care worker is employed by a third party, the individual, family or household using the worker's services could claim the exemptions, but the third party employer would be required to pay the worker at least the federal minimum wage for all hours worked and overtime pay at one and one-half the employee's regular rate for all hours worked over 40 in a workweek. For the reasons explained below, the Department is adopting § 552.109 as proposed.

Many commenters, including employees, labor organizations, worker-advocacy organizations, and consumer representatives, expressed strong support for the proposed change to § 552.109. *See, e.g.,* the Center; SEIU Healthcare Illinois Indiana; AFSCME; Legal Aid Society. The National Consumer Voice for Quality Long-Term Care explained that ''[e]ven though some individuals who hire their own workers may end up paying more under the proposed rules, consumers and advocates in our network believe that providing minimum wage, overtime, and pay for travel time for these crucial health care workers is the right thing to do.'' AARP noted that it ''strongly agrees'' with denying the exemptions to third party agencies and asserted that ''requiring all home care and home health care agencies to pay minimum wage and overtime to their employees is a centrally important component of the NPRM.''

Numerous commenters agreed with the Department's assertion that the proposed changes were consistent with Congressional intent. *See, e.g.,* PHI, NELP, and EJC. A comment signed by Senator Harkin and 18 other Senators stated that ''[a] close look at the legislative history of the 1974 changes establishes that Congress clearly intended to include today's home care workforce within the FLSA's protections.'' PHI argued that ''employment by a home care agency strongly suggests that the worker is providing home care services as a vocation and is a regular bread-winner responsible for the support of her family. Such a formal employment arrangement is inconsistent with the teenage babysitters and casual companions for the elderly that Congress intended to exclude.''

Additionally, many advocacy groups and others agreed with the Department's statements in the NPRM concerning the increased professionalization and standardization of the home care workforce. *See, e.g.,* DCA, Bruce Vladeck, NELP. The Westchester Consulting Group noted that third party employers ''are in the trade and business of providing services to the public and experience financial profit and loss'' while household employers are purchasing companionship services ''for their personal use to address their specific support needs.'' Similarly, PHI argued that one of the companionship services exemption's ''main goals'' was to ''limit application of [the] FLSA to workers whose vocation is domestic service (that is, not occasional babysitters and companions)'' and this concern is not ''relevant to agency-employed home care workers.'' The Legal Aid Society explained that ''the proposed regulations appropriately recognize that this work is not the kind of casual neighborly assistance that Congress had in mind when it created the companionship services exemption. Rather, these workers are professional caregivers, who work long hours for agencies that are businesses, whether for-profit or not-for-profit.'' Additionally, the ACLU and others observed that many members of this workforce, such as home health aides and personal care assistants, are now often subject to training requirements and competency evaluations.

Employers and employer associations, however, generally opposed the proposed revision of § 552.109. *See, e.g.,* CAHSAH, 24Hr Home Care, ResCare Home Care, NASDDDS, Texas Association for Home Care & Hospice, Inc. Many of these commenters asserted the proposal is contrary to Congress's intent as well as the Department's longstanding interpretation of the companionship services exemption. BrightStar franchisees, among others, argued that the use of the words ''any employee'' in §§ 13(a)(15) and 13(b)(21) of the Act demonstrates that Congress intended for the exemptions to apply based upon the activities of the employee rather than the identity of the employer. BrightStar franchisees wrote that ''floor debate included several statements related to concerns about the ability of working families to afford companionship services for their loved ones and keep them out of institutionalized nursing home care.'' A comment signed by Senator Alexander and 13 other Senators stated that the ''statute and history clearly demonstrate that Congress intended to provide a broad exemption from the FLSA minimum wage and overtime requirements for all domestic workers providing companionship services.'' Husch Blackwell further commented that ''Congress is certainly well aware of the exemption's application over these

last several decades, and has not taken action upon this issue during that time. Its failure to do so is clear evidence that the regulations as they currently stand appropriately state Congressional intent.'' *See also* Chamber of Commerce. CAHSAH and the National Association of Home Care & Hospice (NAHC), among others, questioned the propriety of the Department's shift in position as to this issue, especially since it defended the current regulation in *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158 (2007). Additionally, NRCPDS asserted that ''wages should be determined based upon the value of the tasks performed'' and that the ''idea that the same tasks are valued differently based solely upon the identity of the employer seems unjustifiable.''

Employers and employer representatives also asserted that the proposed revision to § 552.109 would be harmful to direct care workers because raising the cost of services provided through home care agencies would incentivize employment through informal channels rather than through such agencies. The Virginia Association for Home Care and Hospice stated that the proposed change would ''encourage workers to leave agencies and be hired directly by the client,'' and in this ''underground economy,'' taxes would not be withheld, Social Security would not be paid, and workers' compensation insurance would not be provided. See also CAHSAH. VNAA asserted that by discouraging joint employment, the proposed change could undermine Medicaid's efforts to expand the use of consumer-directed programs, which rely on agencies to assist consumers who are not capable of being solely responsible for managing a direct care worker's employment.

Numerous commenters sought clarification as to which employers would be considered ''third party employers'' and how the proposed revisions would affect various types of consumer-directed programs and other arrangements that have developed to provide home care—including registries, ''agency with choice'' programs, and ''employer of record'' or fiscal intermediary situations—in which third parties have roles such as handling tax and insurance compliance. *See, e.g.,* Private Care Association; Jim Small; ANCOR. Comments from these various types of entities requested guidance from the Department as to whether direct care workers under their particular programs could qualify for either exemption under the Final Rule. Additionally, several advocacy groups expressed confusion regarding whether the Department's proposed revision would hold consumers or their families jointly and severally liable for wages owed pursuant to the FLSA. For example, AARP noted that it ''strongly opposes the proposal to impose joint and several liability for FLSA compliance on consumers when the worker is supplied and employed by a third party employer such as an agency. When agencies are involved, they should be considered the sole employer.'' *See also* The National Consumer Voice for Long-Term Care.

The Department has carefully considered comments submitted regarding the proposed revisions to § 552.109(a) and (c) and has decided to adopt the regulation as proposed. The rulemaking record includes views from a broad and comprehensive array of interested parties: Academics studying this issue, advocates for the individuals who need home care services, home care agencies that currently claim the companionship services exemption, labor unions, associations representing direct care workers, and representatives of the disability community. As explained in the NPRM and for the reasons discussed below, the Department believes that the revised regulation is consistent with Congress's intent when it created these exemptions and reflects the dramatic transformation of the home care industry since this regulation was first promulgated in 1975.

As an initial matter, the Department observes that it is exercising its expressly delegated rulemaking authority in promulgating this rule. In creating the companionship services exemption, Congress ''left a gap for the agency to fill'' as to the meaning and scope of the exemption at section 13(a)(15), explicitly giving the Secretary authority to define and delimit the boundaries of the exemption. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984); *see Nat'l Cable & Telecomm Ass'n.* v. *Brand X Internet Servs.,* 545 U.S. 967, 980 (2005) (''Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.''). When Congress expressly delegates authority to the agency ''to elucidate a specific provision of the statute by regulation,'' any regulations promulgated pursuant to that grant of power and after notice and comment are to be given ''controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'' *Chevron,* 467 U.S. at 844; *see Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 165–68 (2007); *Gonzales* v. *Oregon,* 546 U.S. 243, 255–256 (2006) (*Chevron* deference is warranted ''when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority'' (internal quotation marks omitted)).

Accordingly, the Department is now adopting a revised regulation that is, as many commenters agreed, consistent with Congress's intent to provide the protections of the FLSA to domestic workers while providing narrow exemptions for workers performing companionship services and live-in domestic service workers. Prior to 1974, domestic service employees who worked for a placement agency that met the annual earnings threshold for FLSA enterprise coverage, but were assigned to work in someone's home, were covered by the FLSA. 39 FR 35385. However, the Department's 1975 regulations, by allowing those covered enterprises to claim the exemption denied those employees the Act's minimum wage and overtime protections. This Final Rule reverses this ''roll back''.

The legislative history makes clear that in passing the 1974 amendments to the Act, Congress intended to extend FLSA coverage to all employees whose ''vocation'' was domestic service, but to exempt from coverage casual babysitters and companions who were not regular breadwinners or responsible for their families' support. *See* House Report No. 93–913, p. 36. Indeed, it is apparent from the legislative history that the 1974 amendments were intended only to expand coverage to include more workers, and were not intended to roll back coverage for employees of third parties who already had FLSA protections (as employees of covered enterprises). The focus of the floor debate concerned the *extension* of coverage to categories of domestic workers who were not already covered by the FLSA, specifically, those employed by an individual or small company rather than by a covered enterprise. *See, e.g.,* 119 Cong. Rec. at S24800 (''coverage of domestic employees is a vital step in the direction of insuring that *all* workers affecting interstate commerce are protected by the Fair Labor Standards Act''); *see also* Senate Report No. 93–690 at p. 20 (''The goal of the Amendments embodied in the committee bill is to update the level of the minimum wage and to continue the task initiated in 1961—and further implemented in 1966 and 1972—to *extend* the basic protection of the Fair Labor Standards Act to additional workers and to reduce to the extent

practicable at this time the remaining exemptions.'' (emphasis added)).[23]

Further, there is no indication that Congress considered limiting enterprise coverage for third party employers providing domestic services. The only expressions of concern by opponents of the amendment related to the new recordkeeping burdens on private households. *See, e.g.,* 119 Cong. Rec. 18,155 (statement of Rep. Harrington); 119 Cong. Rec. 24,797 (statement of Sen. Dominick). Recognizing this intended expansion of the Act, the exemptions excluding employees from coverage must therefore be defined narrowly in the regulations to achieve the law's purpose of extending coverage broadly. This is consistent with the general principle that coverage under the FLSA is broadly construed so as to give effect to its remedial purposes, and exemptions are narrowly interpreted and limited in application to those who clearly are within the terms and spirit of the exemption. *See, e.g., A.H. Phillips, Inc.* v. *Walling,* 324 U.S. 490, 493 (1945). The Department is not persuaded by comments contending that because section 13(a)(15) has never been amended, the prior regulations were therefore consistent with Congressional intent. *See, e.g.,* Husch Blackwell; U.S. Chamber of Commerce. As the Supreme Court has observed, Congressional inaction ''is a notoriously poor indication of [C]ongressional intent.'' *Schweiker* v. *Chilicky,* 487 U.S. 412, 440 (1988); *see also Minor* v. *Bostwick Labs,* Inc., 669 F.3d 428, 436 (4th Cir. 2012). Therefore, the Department now acknowledges that the regulatory roll back of coverage for workers employed in private homes by covered enterprises that resulted from the 1975 version of § 552.109 was not in accord with Congress's purpose of expanding coverage.

By excluding direct care workers employed by third party covered enterprises from FLSA coverage, the Department's 1975 regulations created an inequity that has increased over time. As the home care workforce has grown, the impact of the Department's roll back, which is inconsistent with the 1974 amendments, has become even more magnified. As noted by many commenters, today, few direct care workers are the ''elder sitters'' envisioned by Congress when enacting the exemption. *See* 119 Cong. Rec. at S24801. Instead, direct care workers employed by third parties are the sorts of domestic service employees Congress specifically intended the FLSA to cover: Their work is a vocation. *See* Senate Report No. 93–690, p. 20; House Report No. 93–913, pp. 36. For example, a direct care worker who has sought out work through a private home care agency is engaged in a formal, professional occupation and he or she may well be the primary ''bread-winner'' for his or her family. Thus, it is the Department's position that employees providing home care services who are employed by third parties should have the same minimum wage and overtime protections that other domestic service and other workers enjoy.

Significantly, the Supreme Court explicitly affirmed the Department's authority to address the issue of third party employment in the domestic service context in *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158 (2007). The Supreme Court acknowledged that the statutory text and legislative history do not provide an explicit answer to the ''third party employment question.'' *Id.* at 168. Rather, the Court explained that the FLSA leaves gaps as to the scope and definition of statutory terms such as ''domestic service employment'' and ''companionship services,'' and it provides the Department with the power to fill those gaps. *Id.* at 167. In particular, the Court stated its belief that ''Congress intended its broad grant of definitional authority to the Department to include the authority to answer'' questions including ''[s]hould the FLSA cover *all* companionship workers paid by third parties? Or should the FLSA cover some such companionship workers, perhaps those working for some (say, large but not small) private agencies . . .? How should one weigh the need for a simple, uniform application of the exemption against the fact that some (but not all) third-party employees were previously covered?'' *Id.* at 167–68. Further, when the Department fills statutory gaps with any reasonable interpretation, and in accordance with other applicable requirements, the courts accept the result as legally binding and entitled to deference. *Id.* The Supreme Court explicitly recognized that the Department may interpret its ''regulations differently at different times in their history,'' and may make changes to its position, provided that the change creates no unfair surprise. *Id.* at 170–71. The Court also recognized that when the Department utilizes notice-and-comment rulemaking in an attempt to codify a new regulation, as it has done with this Final Rule, such rulemaking makes surprise unlikely. *Id.* at 170.

Although the commenters who noted that the Department is changing its position as to the proper treatment of third party employers in § 552.109 are correct, such a change is not only permissible, but also reasonable. The Department did argue in *Coke,* as well as in Wage and Hour Advisory Memorandum (''WHAM'') 2005–1 (Dec. 1, 2005) (found at *http://www.dol.gov/whd/FieldBulletins/index.htm*), that the third party regulation as written in 1975 was the Department's best reading of these statutory exemptions. In the past, however, the Department erroneously focused on the phrase ''any employee,'' instead of focusing on the purpose and objective behind the 1974 amendments, which was to expand minimum wage and overtime protections to workers employed in private households that did not otherwise meet the FLSA coverage requirements. The Supreme Court has ''stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'' *U.S. Nat'l Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455 (1993) (internal quotation marks omitted). Moreover, in view of the Supreme Court's conclusion that the text of the FLSA does not expressly answer the third party employment question, the statutory phrase ''any employee'' cannot, standing alone, answer the question definitively. Moreover, the WHAM failed to consider the industry changes that have taken place over the decades since the statutory amendment was enacted. After considering the purpose and objectives of the amendments as a whole, reviewing the legislative history, and evaluating the state of the home care industry, the Department believes that the companionship services exemption was not intended to apply to third party employers.

In addition, the Department does not believe commenters' concerns about the harmful effect of the change to § 552.109 are warranted because the Department did not identify or receive any information suggesting that such effects have occurred in the 15 states that already provide minimum wage and overtime protections to all or most third party-employed home care workers who may otherwise fall under the federal companionship services exemption.

[23] Several comments focused on statements made during floor debate concerning the cost of care and preventing nursing home placement. *See* BrightStar Care of Tucson; Visiting Nurse Service of New York. However, the Department notes that the floor debate cited by these commenters took place in 1972 on earlier domestic service legislation not containing the exemption that was considered by a different Congress than the one enacting the 1974 amendments. *See, e.g.,* 118 Cong. Rec. 24715 (July 20, 1972).

These states are Colorado, Hawaii, Illinois,[24] Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. In addition, Maine extends minimum wage and overtime protections to all companions employed by for-profit agencies. Some, but not all, privately employed home care workers in California are exempt from overtime requirements as ''personal attendants;'' all receive at least the minimum wage. Five more states (Arizona, Nebraska, North Dakota, Ohio, and South Dakota) and the District of Columbia provide minimum wage coverage to home care workers, including companions, employed by third parties. Significantly, several of the states, such as Colorado and Michigan, have instituted these protections in the last several years. The existence of these state protections diminishes the force of objections regarding the feasibility and expense of prohibiting third parties from claiming the companionship services and live-in domestic service worker exemptions. Indeed, the comments received did not point to any reliable data indicating that state minimum wage or overtime laws had led to increased institutionalization or stagnant growth in the home care industry in any state. Rather, the Michigan Olmstead Coalition reported ''we have seen no evidence that access to or the quality of home care services are diminished by the extension of minimum wage and overtime protection to home care aides in this state almost six years ago.'' PHI noted that the growth of home care establishments in Michigan ''is actually higher in the period after implementing wage and hour protections than before—41 percent compared to 32 percent.'' *See* PHI; *see also* Workforce Solutions (''There is no data showing that states with minimum wage and overtime protections for home care workers have higher rates of institutionalization.''). Indeed, as summarized by AARP, there is no strong correlation between states that have minimum wage and overtime protections with expenditures on HCBS versus institutionalized care.

Moreover, the Department does not believe that this rule will create or significantly expand an underground economy where workers hired directly by a consumer or a third party are not treated as employees and thus are not paid proper wages, income and FICA taxes are not withheld, and unemployment and worker's compensation insurance are not provided. Although difficult to predict, the Department anticipates that rather than significantly expanding any underground economy, this rule will bring more workers under the FLSA's protections, which in turn will create a more stable workforce by equalizing wage protections with other health care workers and reducing turnover. A more stable home care workforce also dilutes arguments that continuity of care would be negatively affected by the rule. This industry is currently marked by high turnover, which can be very disruptive to consumers. The Department believes that consumers would benefit from reduced turnover among direct care workers and the accompanying improvement in quality of care.

Joint Employment

The Department wishes to clarify how the third party regulation may apply in evaluating instances of joint employment, what constitutes a ''third party employer,'' independent contractors, and joint and several liability. Direct care workers and consumers explained that a variety of care arrangements have been developed in order to provide home care, many involving potential joint employment relationships. The Department notes that this regulation does not change any of the Department's regulations or guidance concerning the employment relationship and joint employment. In evaluating what constitutes a ''third party employer,'' a ''third party'' will be considered any entity that is not the individual, member of the family, or household retaining the services. However, what entity constitutes an ''employer'' is governed by long-standing case law from the U.S. Supreme Court and other federal appellate courts interpreting the language of the FLSA and applying the ''economic realities'' test discussed in greater detail below.

As the Department has previously explained, a single individual may be considered an employee of more than one employer under the FLSA. *See* 29 CFR Part 791. Joint employment is employment by one employer that is not completely disassociated from employment by other employers. Whether joint employment exists is to be determined based upon all the facts of the particular case. As an example, an individual who hires a direct care worker or live-in domestic service worker to provide services pursuant to a Medicaid-funded consumer directed program may be a joint employer with the state agency that administers the program. Generally, where a joint employment relationship exists, ''all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act.'' § 791.2(a). However, under the revised regulation, in joint employment situations the individual, member of the family or household employing the direct care worker or live-in domestic service worker will be able to claim an exemption provided that the employee meets the duties requirements for the companionship services exemption or the residence requirements for a ''live-in'' domestic service worker exemption. The third party employer will not be able to claim that exemption.

Determinations about the existence of an employment or joint employment relationship are made by examining all the facts in a particular case and assessing the ''economic realities'' of the work relationship. *See, e.g., Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 U.S. 28, 33 (1961). Factors to consider may include whether an employer has the power to direct, control, or supervise the worker(s) or the work performed; whether an employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s); the degree of permanency and duration of the relationship; where the work is performed and whether the tasks performed require special skills; whether the work performed is an integral part of the overall business operation; whether an employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers; whose equipment is used; and who performs payroll and similar functions. An economic realities test does not depend on ''isolated factors but rather upon the circumstances of the whole activity.'' *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 730 (1947). In the past, the Department has applied this economic realities principle when it promulgated regulations to clarify the definition of ''joint employment'' under the Migrant and Seasonal Agricultural Worker Protection Act, 29 CFR 500.20(h), and the Family and Medical Leave Act, 29 CFR 825.106, both of which incorporate the FLSA definition of ''employ.''

To illustrate how a home care services scenario may be assessed utilizing the economic realities test, consider the following example:

Example: Mary contacts her state government about receiving home care services. The state has a ''self-direction program'' that allows Mary to hire a direct

[24] In Illinois, 30,000 workers in the Home Services Program under the Illinois Department of Human Services are considered jointly employed by the state and the consumer and do not receive overtime pay.

care worker through an entity that has contracted with the state to serve as the ''fiscal/employer agent'' for program participants who employ direct care workers. The ''fiscal/employer agent'' performs tasks similar to those that commercial payroll agents perform for businesses, such as maintaining records, issuing payments, addressing tax withholdings, and ensuring that workers' compensation insurance is maintained for the worker, but is not involved in any way in the daily supervision, scheduling, or direction of the employee. Mary has complete budget authority over how to allocate the funds she receives under the Medicaid self-direction program, negotiates the wage rate with the direct care worker, is wholly responsible for day-to-day duty assignments, and has the sole power to hire and fire her direct care worker.

In the above scenario, the fiscal/employer agent is likely not an employer of the direct care worker, and the consumer is likely the sole employer. The fiscal/employer agent has no power to hire or fire, direct, control, or supervise the worker and cannot modify the pay rate or modify the employment conditions. The work is not performed on the fiscal/employer agent's premises, and the fiscal/employer agent has provided no tools or materials required for the tasks performed. However, any change in the specific facts of this scenario, such as if direct care workers are required to obtain approval from the fiscal/employer agent in order to arrive late or be absent from work or if the fiscal/employer agent sets the direct care workers' specific hours worked, may lead to a different conclusion regarding the employer status of the fiscal/employer agent.

The decision on joint employment would likely be different under the following scenario:

Example: Mary contacts her state government about receiving home care services. The state has a ''public authority model'' under which the state or county agency exercises control over the direct care workers' conditions of employment by deciding the method of payment, reviewing worker time sheets and determining what tasks each worker may perform. The agency also exercises control over the wage rate either by setting the wage rate.

In the above scenario, the state or county agency is likely an employer of the direct care workers under the FLSA. *See, e.g., Bonnette* v. *California Health & Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir. 1983). The state or county agency directs, controls, and supervises the workers, and can modify the pay rate and other employment conditions such as the number of hours worked and the tasks performed. In addition, the agency may be an employer of the direct care workers even if a private third party agency is also found to be an employer; such joint employment arrangements would result in the state or county agency and the private third party agency being jointly and severally liable for the direct care workers' wages.

It is critical to note that this fact-specific economic realities test will be applied to all situations when assessing an employment relationship or potential joint employment, regardless of the name used by the third party (*e.g.,* ''fiscal/employer agent,'' ''Agency with Choice,'' ''fiscal intermediary,'' ''employer of record'') or worker (*e.g.,* ''registry worker,'' ''independent provider,'' ''independent contractor''). As the Department has repeatedly noted, with respect to exemption status, job titles are not determinative. *See, e.g.,* § 541.2; FOH 22a04; Wage and Hour Fact Sheet #17A: Executive, Administrative, Professional, Computer and Outside Sales Employees Under the Fair Labor Standards Act. This principle holds true for determining employment status as well.

With regard to potential misclassification of employees as independent contractors or other non-employees, the Department will continue its efforts to combat such misclassification. As the Department has explained, there is no single test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. Rather, a number of factors must be considered, including the extent to which the services rendered are an integral part of the principal's business; the permanency of the relationship; the amount of the alleged contractor's investment in facilities and equipment; the nature and degree of control exerted by the principal; the alleged contractor's opportunities for profit and loss; the amount of initiative or judgment required for the success of the contractor; and the degree of independent business organization and operation. *See, e.g., Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1370 (9th Cir. 1981).

To further illustrate the economic realities test, consider this example:

Example: ABC Company advertises as a ''registry'' that provides potential direct care workers. The registry conducts a background screening and verifies credentials of potential workers, and assists clients by locating direct care workers who may be able to meet a client's needs. ABC Company informs Ann, a direct care worker, of the opportunity to work for a potential client. If Ann is interested in the opportunity, she is responsible for contacting the client for more information. Ann is not obligated to pursue this or any other opportunity presented, and she is not prohibited from registering with other referral services or from working directly with clients independent of ABC Company. The registry does not provide any equipment to Ann, and does not supervise or monitor any work Ann performs. ABC Company has no power to terminate Ann's employment with a client. ABC Company processes Ann's payroll checks according to information provided by clients, but does not set the pay rate.

In this scenario, Ann is likely not an employee of ABC Company. There is no permanency in the relationship between the registry and Ann. The registry does not provide any equipment or facilities, exercises no control over daily activities, and has no power to hire or fire. Ann is able to accept as many or as few clients as she wishes. The client sets the rate of pay and negotiates directly with Ann about which services will be provided. However, this does not mean that every ''registry'' will not be an employer. Rather, a fact-specific assessment must be conducted. Indeed, the Department has found registries to be employers under different facts. *See, e.g.,* Wage and Hour Opinion Letter, 1975 WL 40973 (July 31, 1975) (finding a nursing registry to be an employer when the registry maintained a log of assignments showing the shifts worked, established the rate which would be charged, and exercised control over the nurse's behavior and the work schedule).

Some of the comments demonstrated confusion about when a family or household employing a direct care worker may be jointly and severally liable for wages owed. *See, e.g.,* AARP; National Consumer Voice for Long-Term Care. The NPRM stated that ''if the employee fails to qualify as an exempt companion, such as if the employee performs incidental duties that exceed the 20 percent tolerance allowed under the proposed § 552.6(b), or the employee provides medical care for which training is a prerequisite, the individual, family or household member cannot assert the exemption and is jointly and severally liable for the violation.'' 76 FR 81198. There appeared to be a misperception that joint and several liability would attach in any joint employment relationship. However, as stated in the NPRM, an individual, family, or household would be jointly and severally liable for a violation *only* in instances when an employee fails to meet the ''duties'' requirement for the companionship services exemption or the residence requirements for the live-in domestic service worker exemption. This rulemaking is not altering the state of the law under such circumstances; if a domestic service employee is not providing companionship services or

does not meet the residence requirements for the live-in domestic service worker exemption, then the family and any third party employer are both responsible for complying with the FLSA's minimum wage, overtime, and recordkeeping requirements.[25] For example, under both the current regulations and this Final Rule, if a family and an agency jointly employ a home care worker, and that worker is required to spend 50 percent of her time cleaning the house, that worker is not exempt under the companionship services exemption and the family and the third party are jointly and severally liable for any back wages due. However, under this Final Rule, in those situations where an employee satisfies the duties test for the companionship services exemption, the individual, family or household member may claim the exemption, but the third party joint employer cannot. In those instances, the family or household member would not be subject to joint and several liability.

Similarly, under the Final Rule, if a family and an agency jointly employ a live-in domestic service employee, the family would be able to claim the overtime pay exemption under § 13(b)(21), but the third party employer could not. If there is overtime pay due,[26] the third party employer would be liable for overtime pay; however, the family would not be subject to joint and several liability, provided the worker satisfies the live-in worker requirements (namely, resides in the home the requisite amount of time).

Finally, the revised regulation refers to ''the individual or member of the family or household'' who employs the direct care worker or live-in domestic worker. It is the Department's intent that the phrase ''member of the family or household'' be construed broadly, and no specific familial relationship is necessary. For example, a ''member of the family or household'' may include an individual who is a child, niece, guardian or authorized representative, housemate, or person acting *in loco parentis* to the individual needing companionship or live-in services.

The Department will work closely with stakeholders and the Department of Health and Human Services to provide additional guidance and technical assistance during the period before the rule becomes effective, in order to ensure a transition that minimizes potential disruption in services and supports the progress that has allowed elderly people and persons with disabilities to remain in their homes and participate in their communities.

E. Other Comments

As noted in various sections of this preamble, the Department received a number of comments raising concerns about topics that are related to this rulemaking but are not within the scope of the revisions to the regulatory text. These issues are discussed below. First, the Department addresses comments expressing concern that the rulemaking will cause increased institutionalization. Second, the Department addresses comments raising questions about paid family caregivers. Finally, the Department responds to commenters' questions regarding FLSA principles that are relevant in determining the hours for which a non-exempt direct care worker must be paid but which are not changed by this Final Rule.

Community Integration and Olmstead

The Department received several comments from groups that advocate for persons with disabilities and employers that raised concerns that requiring the payment of minimum wage and overtime to direct care workers would increase the cost of home and community based services (HCBS) funded under Medicaid, which in turn would result in a reduction of services under those programs and increased institutionalization of the elderly or persons with disabilities. *See, e.g.,* ADAPT, National Disability Leadership Alliance (NDLA), Toolworks, Inc., National Council on Aging, and VNSNY. Specifically, ADAPT expressed concern that Medicaid reimbursement rates under HCBS programs will not increase to account for the additional costs for personal care services as a result of the Department's proposed rule, resulting in individuals going without essential assistance and eventually being forced into facilities. As a result, ADAPT asserted that the Department's proposed rule would promote institutionalization of such individuals.

These views were shared by NDLA, which stated that the Department's proposal would promote institutionalization because it would increase the cost of HCBS programs without a concurrent increase in Medicaid reimbursement rates or the Medicaid caps for available funding. As a result, NDLA expressed concern that persons with disabilities ''will be left with the choice of forgoing needed assistance or subjecting themselves to unwanted institutionalization and loss of community connection.'' In addition, VNSNY, without providing specifics, stated that the Department's proposed rule would be ''inconsistent with the efforts undertaken around the country by public agencies to comply with the Supreme Court's decision in *Olmstead* v. *L.C. ex rel. Zimring,* 527 U.S. 581 (1999).''

The Michigan Olmstead Coalition similarly stated that under the Americans with Disabilities Act (ADA) and the U.S. Supreme Court's decision in *Olmstead,* ''governmental policies must now support and promote inclusion, not segregation, of people living with disabilities'' and that ''[p]eople who need long-term supports and services should not be forced to receive those services in institutions rather than their own homes and apartments.'' However, the Michigan Olmstead Coalition stated that many direct care workers do the same work as workers in nursing homes and both should receive minimum wage and overtime protections. ''Without similar workplace compensation protections applied to institutions and home care, the home care industry faces another governmental policy that creates a disadvantage relative to nursing homes.'' In addition, the Michigan Olmstead Coalition stated that without minimum wage and overtime protections for direct care workers, ''nursing homes are better able to attract and retain staff creating additional burdens or competitive challenges on home care agencies.'' The Michigan Olmstead Coalition asserted that the proposal ''will help end another 'institutional bias' that favors nursing homes.''

Citing *Olmstead,* the SEIU similarly stated that the Department's proposed rule was unlikely to result in increased institutionalization of individuals because ''there has been a decisive policy shift toward home- and community-based long-term care in this country that is extremely unlikely to be reversed.'' The SEIU noted that it is ''difficult to imagine'' that publicly funded programs would reverse course from home and community based services to institutionalization simply because ''labor standards are brought up to those prevailing virtually everywhere else.'' The SEIU also noted that one of the reasons for the shift to home and community based services is due to the substantial cost savings associated with

[25] The Department notes that it is a good practice for individuals, family members or household members to keep a record of work performed in the household whether or not the individual, family or household member is an employer of the person performing the work.

[26] When an employee resides on his or her employer's premises, not all of the time spent on the premises is considered working time. *See* the Hours Worked section of this preamble for guidance on determining compensable hours worked.

non-institutional care. SEIU explained that these cost savings are not ''simply a difference in hourly labor costs, as is demonstrated by the fact that many of the states that are leaders in 'rebalancing' away from institutions are also leaders in setting adequate homecare labor standards.'' The advantages of home and community based services include that the services can be tailored to each individual's level of need and home and community based services do not include the overhead costs of maintaining a care facility.

The Department in no way meant to convey in the proposal that some increased levels of institutionalization would be considered acceptable. The Department fully supports the ADA's and *Olmstead's* requirement that government programs provide needed services and care in the most integrated setting appropriate to an individual, and recognizes the important role that home and community based services have played in making that possible. The Department agrees with the Michigan Olmstead Coalition's assertion that protecting direct care workers under the FLSA will benefit home and community based services by ensuring that the home care industry can attract and retain qualified workers, which will improve overall quality of care. As discussed in more detail below, in order to comply with the ADA and *Olmstead,* public entities must have in place an individualized process—available to any person whose service hours would be reduced as a result of the Final Rule—to examine if the service reduction would place the person at serious risk of institutionalization and, if so, what additional or alternative services would allow the individual to remain in the community.

Congress enacted the ADA in 1990 ''to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'' 42 U.S.C. 12101(b)(1). Congress found that ''historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.'' 42 U.S.C. 12101(a)(2). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities under Title II of the ADA:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. 12132.

Pursuant to Congressional authority, the Attorney General issued regulations implementing Title II of the ADA, which are based on regulations issued under section 504 of the Rehabilitation Act of 1973. *See* 42 U.S.C. 12134(a); 28 CFR 35.190(a); Executive Order 12250, 45 FR 72995 (1980), *reprinted in* 42 U.S.C. 2000d–1. The Title II regulations require public entities to ''administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'' 28 CFR 35.130(d). The preamble discussion to Title II explains that ''the most integrated setting'' is one that ''enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'' 28 CFR part 35, app. A (2010) (addressing § 35.130); *see also* Statement of the Dep't of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* at 2 (June 22, 2011) (Olmstead Enforcement Statement), *available at http://www.ada.gov/olmstead/q&a_olmstead.htm.* Moreover, ''integrated settings'' are described as ''those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities.'' Olmstead Enforcement Statement, at 3.

Giving deference to the Attorney General's regulations and interpretation of the ADA, the Supreme Court in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999), held that Title II prohibits the unjustified segregation of individuals with disabilities. *Id.* at 597–98. The Supreme Court concluded that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. *Id.* at 607. The Court explained that this holding ''reflects two evident judgments.'' *Id.* at 600. ''First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.'' *Id.* ''Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.'' *Id.* at 601.

The Department of Justice has issued guidance further clarifying the scope of a public entity's *Olmstead* obligations. Public entities may be in violation of the ADA's integration requirement when they: (1) Directly or indirectly operate facilities and/or programs that segregate individuals with disabilities; (2) finance the segregation of individuals with disabilities in private facilities; or (3) through planning service system design, funding choices, or service implementation practices, promote or rely upon the segregation of individuals with disabilities in private facilities or programs. Olmstead Enforcement Statement, at 3. ''[B]udget cuts can violate the ADA and *Olmstead* when significant funding cuts to community services creates a risk of institutionalization or segregation.'' *Id.* at 5. If budget cuts require the elimination or reduction of community services for individuals who would be at serious risk for institutionalization without such services, such cuts or reductions in services can violate the ADA's integration requirement. *Id.* at 6. Institutionalization need not be imminent or inevitable for a violation of the ADA's integration mandate to be found. *See M.R.* v. *Dreyfus,* 663 F.3d 1100, 1116–17 (9th Cir. 2011); *accord Pashby* v. *Delia,* 709 F.3d 307, 322 (4th Cir. 2013). Rather, an *Olmstead* violation can result when a public entity fails to provide community services or cuts services that ''will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.'' Olmstead Enforcement Statement, at 5.

To comply with the ADA's integration requirement, public entities must reasonably modify their policies, procedures or practices when necessary to avoid discrimination or unjustified institutionalization. 28 CFR 35.130(b)(7); *accord Pashby,* 709 F.3d at 322. The obligation to make reasonable modifications may be excused only where a public entity demonstrates that the modifications would ''fundamentally alter'' the programs or services at issue. *Id.; see also Olmstead,* 527 U.S. at 604–07. ''A 'fundamental alteration' requires the public entity to prove 'that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons with disabilities.' '' Olmstead Enforcement Statement, at 6 (citing *Olmstead,* 527

U.S. at 604). DOJ has further indicated that in order to raise a fundamental alteration defense, a public entity must show that it has developed a comprehensive, effectively working *Olmstead* plan and is implementing that plan accordingly. *Id.* at 7.

Several appellate courts have concluded that a fundamental alteration defense based solely on budgetary concerns is insufficient. *See, e.g., Pashby,* 709 F.3d at 323–24; *M.R.,* 663 F.3d at 1118–19; *Pa. Prot. & Advocacy, Inc.* v. *Pa. Dep't of Pub. Welfare,* 402 F.3d 374, 380 (3d Cir. 2005); *Radaszewski* v. *Maram,* 383 F.3d 599, 614 (7th Cir. 2004); *Fisher* v. *Oklahoma,* 335 F.3d 1175, 1181 (10th Cir. 2003). ''Even in times of budgetary constraints, public entities can often reasonably modify their programs by re-allocating funding from expensive segregated settings to cost effective integrated settings.'' Olmstead Enforcement Statement, at 7.

As previously noted, a public entity has an affirmative obligation to ensure its compliance with the ADA's integration mandate and take necessary steps to ensure its policies do not place individuals at risk of institutionalization. *See, e.g., Fisher,* 335 F.3d at 1181–84. The Department of Justice (DOJ) and the Office for Civil Rights (OCR) at the Department of Health and Human Services have taken the position that in order to comply with the ADA and the Supreme Court's decision in *Olmstead,* public entities must have in place an individualized process—available to any person whose service hours would be reduced as a result of the Final Rule—to examine if the service reduction would place the person at serious risk of institutionalization and, if so, what additional or alternative services would allow the individual to remain in the community. *See* October 22, 2012 Letter from DOJ and OCR *available at http://www.ada.gov/olmstead/olmstead_cases_list2.htm#mr.* It will be important for public entities to work closely with advocates and persons with disabilities to ensure that these processes address critical elements for determining whether a person is at risk and that persons with disabilities are aware of these processes.

For these reasons, the Department agrees with those commenters who argued that the proposed rule will further the goals of *Olmstead* and will not create needless institutionalization. However, we will monitor implementation of the rule and its impact on consumers.

Family or Household Care Providers

Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services

The Department received a number of comments discussing the potential impact of the proposed rule on paid family care providers. *See, e.g.,* Joni Fritz, ANCOR, ADAPT and the National Council on Independent Living, NASDDDS, Foothills Gateway, Inc. Arrangements in which a family member of the consumer is paid to provide home care services arise in certain Medicaid-funded and certain other publicly funded programs that allow the consumer (or the consumer's representative) to select and supervise the care provider, and further permit the consumer to choose a family member as a paid direct care worker. Family or household members may also be hired as paid direct care workers through other types of Medicaid-funded programs. The Department recognizes that consumers need not be homebound in order to qualify for home care services. Under these programs, the particular services to be provided and the number of hours of paid work are described in a written agreement, usually called a ''plan of care,'' developed and approved by the program after an assessment of the services the consumer requires and the consumer's existing supports, such as unpaid assistance provided by family or household members.

Some commenters expressed concern that the services paid family care providers typically perform, such as household work, meal preparation, assistance with bathing and dressing, etc., would not fall within the definition of companionship services under the proposed rule. *See, e.g.,* National Association of States United for Aging and Disabilities, ANCOR, NASDDDS. If paid family care providers are not performing exempt companionship services under the FLSA, these commenters wrote, the services they provide would become more expensive, and consequently, the options for employing family members through Medicaid-funded programs or for more than 40 hours per week would be severely limited. *Id.* Additionally, Foothills Gateway, Inc., a non-profit agency that provides Medicaid-funded services to individuals with developmental disabilities in Colorado, expressed concern that if paid family care providers are entitled to minimum wage and overtime for all hours during which they provide services to the consumer, including those that were previously unpaid, the costs of care would far exceed those Medicaid will reimburse, making the paid family caregiving model unsustainable.

The Department is aware of and sensitive to the importance and value of family caregiving to those in need of assistance in caring for themselves to avoid institutional care. It recognizes that paid family caregiving, in particular through certain Medicaid-funded and certain other publicly funded programs, is increasing across the country, and that such programs play a critical role in allowing individuals to remain in their homes. The Department also recognizes that some paid or unpaid caregivers who are not family but are household members, meaning they live with the person in need of care based on a close, personal relationship that existed before the caregiving began—for example, a domestic partner to whom the person is not married—are the equivalent of family caregivers.

The Department cannot adopt the suggestion of several commenters that the services paid family care providers typically perform be categorically considered exempt companionship services. Although as commenters stated, family care providers may often spend a significant amount of time providing assistance with ADLs and IADLs, the Department is defining companionship services to include only a limited amount of such assistance for the reasons described in the section of this Final Rule explaining the revisions to § 552.6. Furthermore, there is no basis in the FLSA for treating domestic service employees who are family members of their employers differently than other workers in that category. Congress explicitly exempts family members when it is its intention to do so. *See* 29 U.S.C. 203(e)(3); 203(s)(2); 213(c)(1)(A), (B). The provisions of the statute regarding domestic service and companionship services do not indicate intention to exempt family members. *See* 29 U.S.C. 206(f), 207(l), 213(a)(15).

Interpretation of ''Employ'' With Regard to Family or Household Care Providers

The Department recognizes the significance and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs as described above. In interpreting the economic realities test to determine when someone is employed (i.e., suffered or permitted to work, 29 U.S.C. 203(g)), the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services, all care provided by that

family or household member is part of the employment relationship. In such programs, as described above, the Department will not consider a family or household member with a pre-existing close, personal relationship with the consumer, to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided. The determination of whether such an agreement is reasonable includes consideration of whether it would have included the same number of paid hours if the care provider had not been a family or household member of the consumer.

The Department believes this interpretation follows from the application of the FLSA ''economic realities'' test to the unique circumstances of home care provided by a family or household member. Ordinarily, a family or household member who provides unpaid home care to another family or household member would not be in an employment relationship with the recipient of the support. But under the FLSA, family members *can* be hired to be domestic service employees of other family members, in which case, unless a statutory exemption applies, they are entitled to minimum wage and overtime for hours worked. *See* 29 U.S.C. 206(f), 207(l) (requiring the payment of minimum wage and overtime compensation to ''any employee engaged in domestic service'' without creating any exception for family members); *Velez* v. *Sanchez,* 693 F.3d 308, 327–28 (2d Cir. 2012) (explaining that a familial relationship does not preclude the possibility that the economic realities of the situation show that an individual is a domestic service employee). The decision to select a family or household member as a paid direct care worker through a Medicaid-funded or certain other publicly funded program creates an employment relationship under the FLSA, and the services paid family or household care providers perform in those circumstances likely will not, because of the nature of the paid duties and possibly also the involvement of a third party employer, be exempt companionship services. Ordinarily, under the FLSA, including in the domestic service employment context, if an employment relationship exists, all hours worked by an employee for an employer, as defined at 29 CFR part 785 and § 552.102 and discussed elsewhere in this Final Rule, are compensable. But in the case of certain Medicaid-funded and certain other publicly funded programs, different considerations apply where a prior familial or household relationship exists which is separate and apart from the creation of any employment relationship and where the relevant paid services are the provision of home care services. Specifically, in the context of direct care services under a Medicaid-funded or certain other publicly funded home care program, the FLSA ''economic realities'' test does not require that the decision to select a family or household member as a paid direct care worker means that all care provided by that person is compensable. In other words, in these circumstances, the Department does not interpret the law as transforming, and does not intend anything in this Final Rule to transform, all care by a family or household member into compensable work.

For example, a familial relationship, but not an employment relationship, would exist where a father assists his adult, physically disabled son with activities of daily living in the evenings. If the son enrolled in a Medicaid-funded or certain other publicly funded program and the father decides to become his son's paid care provider under a program-approved plan of care that funds eight hours per day of services that consist of assistance with ADLs and IADLs, the father would then be in an employment relationship with his son (and perhaps the state-funded entity) for purposes of the FLSA. As explained in the sections of this Final Rule addressing § 552.6 and § 552.109, based on the nature of the paid services and possibly also the involvement of a third-party employer, the father's paid work would not fall under the companionship services exemption. If the relevant requirements (described below) are met, including that the hours of paid work described in a plan of care or similar document are reasonable as described above, the father's employment relationship with his son (and, if a joint employment relationship exists, the state or certain other publicly funded employer administering the program) extends only to the eight hours per day of paid work contemplated in the plan of care; the assistance he provides at other times is not part of that employment relationship (or those employment relationships) and therefore need not be paid.

The limits on the employment relationship between a consumer and a family or household care provider and a third-party entity and that care provider arise from the application of the ''economic realities'' test, described in more detail in the section of this Final Rule discussing joint employment. Specifically, where a prior familial or prior household relationship exists separate and apart from any paid arrangement for home care services, the economic realities test applies differently to the two roles played by the family or household member. The Second Circuit has identified a number of useful factors for applying the economic realities test in the family domestic service employment context, calling for consideration of: ''(1) The employer's ability to hire and fire the employee; (2) the method of recruiting or soliciting the employee; (3) the employer's ability to control the terms of employment, such as hours and duration; (4) the presence of employment records; (5) the expectations or promises of compensation; (6) the flow of benefits from the relationship; and (7) the history and nature of the parties' relationship aside from the domestic labor.'' *Velez,* 693 F.3d at 330. Based on an analysis of these factors in the special situation of paid family or household care providers, an employment relationship would exist only as defined and limited by a written agreement developed with the involvement and approval of a Medicaid-funded or similar publicly funded program, usually called a plan of care, that reasonably sets forth the number of hours for which paid home care services will be provided.

Under an analysis of the economic realities of the work compensated under a plan of care or similar written agreement, the consumer or the entity administering the Medicaid-funded or similar publicly funded home care program (or perhaps both) are employers of the family or household care provider. (Again, whether the entity administering a program is a third party employer of the care provider is determined as described in the section of this preamble discussing joint employment.) The consumer, and/or the entity, recruit and hire the family or household member to provide the services described in the plan of care, may fire the family or household member from the paid position, and control the number of hours of work and the type of work the family or household member must perform. There is a clear expectation and promise of compensation, and employment records must be kept in order to receive payment. During the hours for which a family or household care provider is

compensated under a plan of care, the care provider is obligated to perform the services he or she was hired to provide. In addition, a paid family or household care provider is not permitted to substitute someone else to receive payment from Medicaid for services provided pursuant to the plan of care without employer approval.

On the other hand, during the time when the family or household care provider may perform similar services beyond the hours that he or she has been hired to work under the plan of care, an analysis of the economic realities of the situation leads to the conclusion that the caregiver is not employed, and that the consumer and any entity administering the Medicaid-funded or similar publicly funded program are not employers. The family or household member has not been hired to perform this additional care, nor was he or she recruited for a paid position performing them. The family or household member has no expectation of compensation, nor has any been promised, and there will not be employment records regarding any unpaid services. During this time, the family or household member's activities are not restricted by an agreement to provide certain services, and the family or household member can choose to come and go from the home and have other family members or other people provide the supports. Importantly, the unpaid support stems from a prior familial or household relationship that is separate and apart from the initiation of any employment relationship.

The discussion above addresses only the unique circumstances that exist in the context of domestic service employment by paid family and household member caregivers. The Department believes this bifurcated analysis is warranted because of the special relationships between family and household members and the special environment of the home. It does not apply outside the home care service context; the Department views work for a family business, for example, as subject to the typical FLSA law and regulations regarding the employment relationship and hours worked. This analysis also does not generally apply to relationships that do not involve preexisting family ties or a preexisting shared household. Therefore, except as noted below, it would *not* apply to a direct care worker who did not have a family or a household relationship with the individual in need of services prior to the individual's need arising or the creation of the plan of care. In other words, a direct care worker who becomes so close to the consumer as to be ''like family,'' or a direct care worker who becomes part of the consumer's household when hired to be a live-in employee, does not have a bifurcated relationship with the consumer. In those circumstances, all services the direct care worker provides fall within the employment relationship between the consumer and worker and between any third party employer and the worker; therefore, if those direct care services do not fall under the companionship services exemption, they must be compensated as required under the FLSA. By contrast, if the consumer and caregiver enter into a new family relationship during the course of an employment relationship (e.g., through marriage or civil union), then, although the family relationship did not predate the employment relationship, the bifurcated analysis described above would apply.

Additionally, the discussion above applies to third party employers that administer or facilitate the administration of certain Medicaid-funded or certain other publicly funded home care programs. These entities may be public agencies that run such programs or private organizations that have been designated to play a role in the functioning of the programs. These entities may benefit from this unique analysis only because of the entanglement with the special relationships between family and household members that necessarily result from the selection of family and household members as paid care providers through certain Medicaid-funded or certain other publicly funded programs.

Furthermore, the Department emphasizes that under this bifurcated analysis, the employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed and approved by certain Medicaid-funded or certain other publicly funded home care programs only if that agreement is reasonable. As noted above, a determination of reasonableness will take into account whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer. In other words, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable. For instance, the program may not reduce the number of paid hours in a plan of care because the selected care provider is a family or household member. For example, an older woman who can no longer care for herself may enroll in a Medicaid-funded program. The program is administered by the county in which she lives and she has been assessed to need paid services for 30 hours per week beyond the existing unpaid assistance she receives from her daughter and other relatives. If the hours in the plan of care are reduced by the county to 15 hours per week because the woman's daughter is hired as the paid care provider, the paid hours in the plan of care do not reflect the economic reality of the employment relationship and therefore will not determine the number of hours that must be paid under the FLSA. In addition, a program may not require an increase in the hours of unpaid services performed by the family or household care provider in order to reduce the number of hours of paid services. *See* 42 CFR 441.540(b)(5) (mandating that as to certain types of Medicaid-funded home care programs, unpaid services provided by a family or household member ''cannot supplant needed paid services unless the . . . unpaid [services] . . . are provided voluntarily to the individual in lieu of an attendant''); Final Rule, Medicaid Program; Community Choice First Option, Centers for Medicare and Medicaid Services, 77 FR 26828, 26864 (May 7, 2012) (explaining that unpaid services ''should not be used to reduce the level of [paid] services provided to an individual unless the individual chooses to receive, and the identified person providing the support agrees to provide, these unpaid [services] to the individual in lieu of a paid attendant''). Although the Department distinguishes between an unpaid familial or household relationship and a paid employment relationship between family and household members, it does not condone or intend to overlook subterfuges that may seek to treat family members less equally. This interpretation may not be used in a manner that interferes with the ability of all direct care workers to enjoy the full protections of the FLSA.

The ''economic realities'' analysis also applies to certain private pay home care situations, such as those funded by long-term care insurance, where a family or household member is paid for home care services. Specifically, where a program permits the selection of a family or household member as a paid home care provider, if a familial or household relationship existed prior to and separate and apart from any employment relationship, use of the bifurcated application of the economic realities test would be appropriate. Application of the factors for applying

the economic realities test in the family domestic service employment context described earlier in this section could lead to the conclusion that some of the hours of caregiving are part of an employment relationship and some hours are part of a familial or household relationship. How the divide between the two relationships is determined may vary depending on the structure of each program but, as in certain Medicaid and certain other publicly funded programs described above, the Department would look to a written agreement that reasonably sets forth the number of hours for which paid home care services will be provided.

FLSA ''Hours Worked'' Principles

Although the Department did not propose any changes to its existing rules defining what are considered hours worked under the FLSA, many commenters asked how the hours worked principles under the FLSA apply to domestic service employment. For instance, many commenters raised questions about when domestic service employees are considered to be working even though some of their time is spent sleeping, traveling, eating, or engaging in personal pursuits. The Department emphasizes that its regulations regarding when employees must be compensated for sleep time, travel time, meal periods or on-call time were not a part of this rulemaking, and they are unchanged by this Final Rule. Domestic service employees who do not qualify for the companionship services exemption or the live-in domestic service employee exemption are subject to existing rules on how to calculate hours worked, like any other employee covered under the FLSA. To address commenters' questions, however, the Department is providing the following guidance regarding the Department's established rules on compensable hours worked.

The Department received several comments requesting clarification on when sleep time, meal periods, or other off-duty periods would be compensable as hours worked under the FLSA. For example, a direct care worker requested that the Department define hours worked and differentiate between sleep time and other periods when the employee is awake. Another individual wanted to know whether a direct care worker who is on the job for a 24-hour period must be paid overtime while sleeping, eating a meal, watching television or making a personal telephone call. Other commenters suggested that the Department make clear that the final rules on companionship services and live-in domestic service employees do not alter the Department's longstanding regulations concerning the compensability of sleep time and meal periods.

The Department also received a number of comments expressing concerns about domestic service employees being paid for sleep time or meal periods. Several employers suggested that their direct care workers should not be paid overtime for sleep periods or for other periods when the employee is engaged in personal activities and is not actively working. *See, e.g.,* Husky Senior Care; Scott Shaw Enterprises; and Stephen McCollum. One individual, who was starting a home care business, stated that such companies should not be required to pay direct care workers for any time they are sleeping, eating, or attending to their own personal needs. Access Living stated that a direct care worker who stays overnight or is a live-in employee and assists the consumer by taking him or her to the bathroom or repositioning the client at night should only be paid for such activities and should not be compensated for the entire night or for periods when the direct care worker is asleep. Access Living requested clarification on the sleep time rules. VNAA stated that direct care workers who sleep over should not be paid overtime during periods when they are essentially ''standing by'' and not actively providing support services. VNAA urged the Department to provide greater flexibility in the rule for paying overtime to live-in or sleep-over employees.

Similarly, the Department received numerous comments from employers, non-profits, and advocacy organizations that serve persons with disabilities requesting that live-in roommates not be required to receive minimum wage and overtime pay for periods of sleep time. *See, e.g.,* Community Vision; TASH; Community Link; and Friends of Broomfield. Community Vision, a non-profit organization that provides support services for many adults with developmental disabilities, and many others stated that ''[r]equiring live-in roommates to be paid for sleep time puts solid agreements between individuals with significant disabilities and their live-in roommates at grave risk, and unintentionally results in an unnecessary burden for all interested parties.''

Both NELP and AARP recognized that the Department has regulations that address the compensability of waiting time, on-call time, and sleep time. AARP noted that for shifts of less than 24 hours, all hours are considered work hours even though the employee may sleep and engage in other personal activities (see discussion below of off-duty hours). AARP further noted that for a shift of 24 hours or more, the parties may agree to exclude a sleep period of eight hours, unless the sleep is interrupted to such an extent that the employee cannot get five hours of sleep during the night. In addition, NELP noted that live-in domestic service employees and their employers are permitted to come to an agreement to exclude sleep time, time spent on meals and rest breaks, and other periods when the employee is completely relieved of duty.

AARP stated that ''[s]ome slight modification [to the Department's rules] to account for the fact that both consumer and the worker may be asleep for most of the shift might make the new regulations more workable for both the employers and employees.'' AARP suggested that the Department allow employers to pay only the regular rate for sleep time even for overtime hours if the sleep time is largely uninterrupted or allow the parties to agree to an overnight flat rate of sufficient size to ensure that the worker is paid at least the minimum wage for all shift hours.

Sleep Time

While the Department carefully considered all of the comments received on when sleep time should be compensable, the Department notes that no changes were proposed to its longstanding interpretation regarding the compensability of sleep time discussed in 29 CFR 785.21–.23. The sleep time rules have been in effect for many decades and reflect case law, including Supreme Court decisions, that govern when time spent sleeping is work time. Under the Department's regulations, an employee who is required to be on duty for less than 24 hours is working even though he or she is permitted to sleep or engage in other personal activities when not busy. *See* § 785.21. Thus, an employee on duty for less than 24 hours, such as a security guard assigned to a hospital, would need to be paid for the entire period even though there may be times of inactivity when the employee may, for example, read a magazine. This general rule applies in the same way to domestic service employees who are on duty for less than 24 hours.

Where an employee is required to be on duty for 24 hours or more, the employer and employee may agree to exclude a bona fide meal period or a bona fide regularly scheduled sleeping period of not more than eight hours from the employee's hours worked

under certain conditions. *See* § 785.22. The conditions for the exclusion of such a sleeping period from hours worked are (1) that adequate sleeping facilities are furnished by the employer, and (2) that the employee's time spent sleeping is usually uninterrupted. When an employee must return to duty during a sleeping period, the length of the interruption must be counted as hours worked. If the interruptions are so frequent that the employee cannot get at least five hours of sleep during the scheduled sleeping period, the entire period must be counted as hours worked. *Id.; see also* Wage and Hour Opinion Letter, 1999 WL 1002352 (Jan. 7, 1999). Where no expressed or implied agreement exists between the employer and employee, sleeping time is compensable.

Where an employee resides on the employer's premises permanently or for extended periods of time, not all of the time spent on the premises is considered working time. *See* §§ 552.102, 785.23. Such an employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties where he or she may leave the premises for his or her own purposes. For a live-in domestic service employee, such as a live-in roommate, the employer and employee also may agree to exclude the amount of time spent during a bona fide meal period, sleep period and off-duty time. *See* §§ 552.102, 785.22, 785.23. However, if the meal periods, sleep time, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. In these circumstances, the Department will accept any reasonable agreement of the parties taking into consideration all of the pertinent facts. However, as more fully discussed above, the employer must track and record all hours worked by domestic service employees, including live-in employees, and the employee must be compensated for all hours actually worked notwithstanding the existence of an agreement.

It is not necessary to create a special exemption for live-in roommates. Both AARP and NELP recognized the Department's longstanding position on when employees who work 24 hours or more or are live-in employees. The Department believes that its existing sleep time rules discussed above address the concerns raised in the comments regarding when sleep time must be compensated. The Department's longstanding rules make clear that live-in roommates need only be compensated for hours worked and those hours exclude sleep time, meal-time, as well as other off-duty time if there is an agreement to exclude such time and the employees are not performing work.

The Department received a few comments expressing concern that if there is no express or implied agreement with respect to sleep time, all hours must be counted as work time. Under the existing sleep time rules, uninterrupted time spent sleeping need not be counted as work time so long as an agreement exists between the employer and employee. 29 CFR 785.22. Bright Star Healthcare of Baltimore, for example, expressed concern that it would not be allowed to enter into agreements with its current employees to exclude sleep time. Bright Star feared that it would be required to fire all of its employees before asking whether they will agree to enter into such arrangements voluntarily, and then rehire them on that condition. Bright Star stated that terminating current employees in order to enter into agreements to exclude sleep time would be a ridiculous hurdle for employers and employees, and would not be in the best interest of those parties.

The Department agrees that terminating employees and then requesting that they sign voluntary agreements to exclude sleep time would be a burdensome and unnecessary hurdle for employers and employees. Because many direct care workers may not have been previously subject to the sleep time rules due to application of the companionship services exemption, the Department recognizes that many employers may currently exclude sleep time, or wish to exclude sleep time, but do not have an agreement with their employees that would meet the regulatory requirements. The Department believes that sufficient time exists before the effective date of this Final Rule for the employer and employee to enter into an agreement to exclude a scheduled sleeping period of not more than 8 hours from the employee's hours worked (subject to the rules regarding interruptions to sleep described above) if adequate sleeping facilities are furnished by the employer and the employee's time spent sleeping usually is uninterrupted.

The general rule is where there was previously an express or implied agreement to exclude sleep time from compensable hours worked, the employee can unilaterally withdraw his or her consent, and the employer would then be required to compensate the employee for any future sleep time that may occur. *See* Wage and Hour Opinion Letter FLSA–1303, 1995 WL 1032483 (Apr. 7, 1995). While the employer may not terminate an employee for refusing to enter into an agreement or for otherwise withdrawing their consent, *see Cunningham* v. *Gibson County, Tenn.,* 108 F.3d 1376, 1997 WL 123750 (6th Cir. Mar. 18, 1997) (unpublished), the employer would not be required to agree to a continuation of the same terms and conditions of employment. The employer and employee are free to establish new conditions of employment such as rate of pay, hours of work, or reassignment. *See* Wage and Hour Opinion Letter FLSA–1303 (April 7, 1995). For example, if an employee refuses to enter into an agreement regarding the exclusion of sleep time, an employer might decide to assign that employee only to shifts of less than 24 hours.

With regard to AARP's suggestion that the Department allow employers to pay only the regular rate for sleep time even for overtime hours, assuming such time is otherwise compensable, the statute precludes the Department from adopting this proposal. Section 7 of the FLSA requires the employer to pay overtime compensation for hours worked over 40 in a workweek ''at a rate not less than one and one-half times the regular rate at which [the employee] is employed.'' 29 U.S.C. 207(a). Thus, allowing the employer to pay the regular rate or straight time pay instead of time and one-half of the regular rate of pay for sleep time that is otherwise compensable during overtime hours would require amending the FLSA.

AARP also suggested that the Department allow the employee and employer to agree to a flat rate for overnight hours so long as the employee receives at least the FLSA minimum wage for all shift hours. The FLSA already allows an employer to pay an employee a flat rate for work performed during overnight hours so long as the employee's regular rate of pay during the workweek is at least the FLSA minimum wage and any overtime pay is calculated at not less than time and one-half of the regular rate of pay for all hours worked over 40 in a workweek. The employer may also pay a domestic service employee a per diem rate (i.e., a day rate) under the FLSA, provided the employee's regular rate of pay is at least the FLSA minimum wage for all hours worked during the workweek and overtime is paid at not less than time and one-half of the regular rate of pay for all hours worked over 40 in a workweek. § 778.112.

Meal Periods

The Department carefully considered all of the comments received on

whether meal or eating periods should be compensable and reiterates that no changes were proposed to the Department's longstanding interpretation on the compensability of meal periods discussed in 29 CFR 785.19. An employer may exclude ''bona fide meal periods'' from a domestic service employee's hours worked. § 785.19. Bona fide meal periods are periods where the employee is completely relieved from duty for the purposes of eating a regular meal. *Id.* Meal periods are not considered hours worked if employees are completely relieved from their duties, are allowed to take their meals uninterrupted by the employer, and are provided sufficient time to eat their meal. It is not necessary that an employee be permitted to leave the premises during meal periods. *See* Wage and Hour Opinion Letter, FLSA 2004–7NA, 2004 WL 5303035 (Aug. 6, 2004).

Bona fide meal periods do not include coffee breaks or time for snacks; such short rest periods are compensable. Further, the employee is not relieved from duty if he or she is required to perform any duties while eating. For instance, a domestic service employee is not relieved from duty if he or she is eating with the consumer and is required to feed or otherwise assist that individual with eating. Generally, 30 minutes is considered sufficient time for a bona fide meal period; however, a shorter period may be sufficient under special circumstances. Section 31b23 of the Wage and Hour Field Operations Handbook (FOH) enumerates the factors considered on a case-by-case basis in determining whether a meal period of less than 30 minutes is bona fide including, for example, whether the employees have sufficient time to eat a regular meal, whether there are work-related interruptions to the meal period, and whether the employees have agreed to the shorter period. The FOH provides that periods less than 20 minutes will be specially scrutinized by Wage and Hour Investigators to ensure that the time is sufficient to eat a regular meal under the circumstances presented.

Off-Duty Time

While the Department did not receive any comments specifically addressing when employees are engaged in off-duty time, the Department is describing its current regulations in order to address any confusion about the definition of hours worked.

Under the Department's longstanding regulations, if an employee is completely relieved from duty and is free to use the time effectively for his or her own purposes, such time periods are not hours worked. § 785.16. Typically, the employee must be told in advance that he or she may leave the premises and will not have to resume work until a definite time. Whether the time is long enough to enable the employee to use the time effectively for his or her own purposes depends upon all of the facts and circumstances of each case. For example, a domestic service employee who is completely relieved of his or her duties from 1:00 p.m. to 5:00 p.m. and chooses to watch television or run personal errands is not performing compensable work and need not be paid for these hours. However, an employee who is required to remain on call on the employer's premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working while on call and must be compensated for such time. In contrast, an employee who is not required to remain on the employer's premises but is merely required to leave word where he or she may be reached is not working while on call. § 785.17.

Further, an employer and a live-in domestic service employee may exclude by agreement periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. § 552.102(a). These periods must be of sufficient duration to enable the employee to make effective use of the time. For example, a live-in direct care worker who assists her roommate in the morning for three hours, then goes to class at the local university, returns home to study, watches television, and does her own laundry before assisting the roommate for two hours in the evening, has only worked five hours; the hours spent engaged in personal pursuits are considered bona fide off-duty time and are not compensable hours worked.

Rest and Waiting Periods

As described above, the Department received a few comments suggesting that employees should not be paid unless actively engaged in providing services. The Department is not creating a special set of rules for determining compensable hours worked for domestic service employees, but will continue to determine work time in accordance with longstanding administrative and judicial interpretations of the FLSA. The FLSA generally requires compensation for ''all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.'' *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 690–91 (1946); *see* § 785.7 (compensable time ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place). Employers must typically pay for all time during the workday ''whether or not the employee engages in work throughout all of that period.'' 29 CFR 790.6(b). For example, a nurse who must watch over an ill patient and be available to assist the individual is on duty and must be paid for this time. Thus, an employee who reads a book, knits, or works a puzzle while awaiting assignments is working during the period of inactivity, because the employee must be on the premises and could be summoned to work at any moment. In such cases, the employee is ''engaged to wait.'' *See* § 785.14; *Skidmore* v. *Swift,* 323 U.S. 134 (1944).

As discussed above, there are exceptions to this principle for bona fide meal and sleep periods and off-duty time. However, rest periods of short duration, running from 5 to about 20 minutes, are counted as hours worked. *See* § 785.18; FOH § 31a01; *see also* Wage and Hour Opinion Letter, 1996 WL 1005233 (Dec. 2, 1996). Such periods promote the efficiency of the employee and are common in industry. Thus, when a domestic service employee—in the same manner as an office or hospital employee—takes a 10-minute rest break to drink coffee or make a phone call, such time must be counted as hours worked.

Travel Time

The Department also did not propose any changes to its longstanding travel time rules in the NPRM. Under the travel time rules, normal home-to-work travel is not compensable hours worked whether the employee works at a fixed location or at different job sites. § 785.36. On the other hand, travel time from job site to job site during the workday must be counted as hours worked. § 785.38. These existing rules apply to all employees, including domestic service employees, who are not otherwise exempt from the minimum wage and overtime requirements of the FLSA.

The Department received a number of comments about the requirement to pay direct care workers for travel time, exclusive of commuting time. Many worker advocacy organizations and individuals supported the requirement to pay direct care workers for travel time. *See, e.g.,* NELP and Worksafe. For example, The National Consumer Voice for Quality Long-Term Care and several individuals stated that direct care workers deserve FLSA protections, including compensation for travel time. Moreover, NELP recognized that the

''failure to pay for travel time suppresses workers' already low earnings and not infrequently drives their real hourly wages below the minimum wage.'' Worksafe similarly noted that when direct care workers are not paid for travel time, the employees are working more hours than they are paid for, which in turn drives down their wages and increases the length of their shifts. In addition, the IHS's Global Insight Survey (Survey) of home care franchisees concluded that 50 percent of the responding home care employers are already paying for the time spent by direct care workers traveling between clients. The Survey further found that many of these franchisees are paying for travel time between clients, even in states with no minimum wage and overtime requirements for these workers. The Department also received comments from employers stating that they were paying direct care workers for travel time. *See* Comfort Keepers and Home Care Partners. Further, AARP and Senator Tom Harkin and 18 other Senators stated that employers may be able to minimize travel costs through efficient scheduling.

Some third party employers as well as the Consumer Directed Personal Assistance Association of New York State (CDPAANYS) objected to added costs of paying employees for travel time between clients. For example, A–1 Health Care, Inc., a third party home care provider, indicated that over half of its employees spend an average of three hours per day traveling between clients for which they are not currently paid. This employer noted that if the Department's travel time rules applied to its employees, it would likely schedule these workers to avoid travel time. CDPAANYS suggested that because an employee working for two distinct employers, such as Macy's and the GAP, would not be compensated for travel time between the two jobs, a home care employee working for multiple clients of the same employer should not be compensated for time traveling between clients. CDPAANYS further speculated that the requirement to pay for travel time between clients may violate Medicaid or federal tax requirements, and other comments from advocacy groups that serve persons with disabilities and third party employers asked that the requirement to pay for travel time be re-evaluated because Medicaid may currently not pay for such time. *See, e.g.,* A–1 Health Care, Inc. and National Disability Leadership Alliance.

In addition, some employers, coalitions of employers, individuals with disabilities, and advocacy groups that serve persons with disabilities objected to compensation for travel time because they worried that potential increased costs may make travel for persons with disabilities who need the assistance of a direct care worker in order to travel—particularly overnight—for vacation or work, to visit family, or to attend conferences or medical appointments, cost-prohibitive. *See, e.g.,* S.T.E.P., California Foundation for Independent Living Centers (CFILC), and NDLA.

While the Department did not propose any changes to its longstanding travel time rules in the NPRM, all comments received concerning when direct care workers should be paid for travel time were considered. The general FLSA principles applicable to all employers on the compensability of travel time continue to be applicable under this rule and are discussed in §§ 785.33–.41.

Although the comment from CDPAANYS characterized time spent traveling between multiple clients of a single employer as ''commuting time'' for which compensation is not required, the Department has long distinguished between normal commuting time from home to work and travel time between worksites during the workday. *Compare* § 785.35, *with* § 785.38. CDPAANYS speculated that the requirement to pay for travel time between clients may violate federal tax requirements; however Internal Revenue Service regulations regarding the deductibility of the daily transportation expenses incurred by the individual during different commuting scenarios have no bearing on whether such commute time is compensable under the FLSA. IRS Publication 463 (2012). Under the Department's longstanding regulations, normal home-to-work travel is not hours worked regardless of whether the employee works at a fixed location or at different job sites. § 785.35; *see* Wage and Hour Opinion Letter, W–454, 1978 WL 51446 (Feb. 9, 1978). Thus, if a direct care worker travels to the first consumer site directly from home, and returns directly home from the final consumer site, this commuting travel time generally does not need to be paid. § 785.35; *see* Wage and Hour Opinion Letter, W–454, 1978 WL 51446 (Feb. 9, 1978). On the other hand, employees who travel to more than one worksite for an employer during the workday must be paid for travel time between each worksite. § 785.38; *see* Wage and Hour Opinion Letter, W–454, 1978 WL 51446 (Feb. 9, 1978). Travel that is ''all in the day's work'' must be compensated. § 785.38. For example, if a domestic service employee drives a consumer to a doctor's appointment or to the grocery store, that time is ''all in the day's work'' and must be compensated.

Thus, while an employee working for two different employers need not be compensated for time spent traveling between the two employers, an employee working for multiple consumers of a single employer must be compensated for the time spent traveling between those consumers because such travel is undertaken for the benefit of the employer. § 785.38. This Final Rule does nothing to alter this longstanding policy.

Example: Jeff is a direct care worker employed by a home care agency. At 8:00 a.m. he drives from his home to the home of his first client, Sue. Jeff arrives at Sue's home at 8:45 a.m. He works at Sue's home until 12:15 p.m. From 12:15 p.m. until 12:45 p.m., Jeff drives directly to the home of his second client, Gertrude. Jeff works for Gertrude until 4:45 p.m., the end of his shift. From 4:45 until 5:45 p.m. Jeff drives to his home. The home care agency must compensate Jeff for the time he spent driving from Sue's home to Gertrude's home. The agency need not compensate Jeff for the time spent traveling from his home to Sue's home in the morning or from Gertrude's home to his home at night because this time is spent in ordinary home-to-work commute.

Neither federal tax requirements nor Medicaid rules counsel a departure from normal FLSA travel rules for direct care workers. The FLSA requirement that employees be paid for time spent traveling between multiple clients of a single employer is longstanding and does not conflict with these laws. Though Medicaid may not provide reimbursement for time that an employee spends traveling between clients, nothing in the Medicaid law prevents a third party employer from paying for that time. Medicaid, however, may reimburse for the costs of travel, including the costs of overnight travel with an attendant when ''necessary . . . to secure medical examinations and treatment for a recipient.'' 42 CFR 440.170. Likewise, whether travel expenses may be deducted for tax purposes has no bearing on whether time spent traveling between clients is hours worked under the FLSA.

Further, the Department agrees with commenters, such as AARP and Senator Harkin, who wrote that employers may be able to minimize some of the cost of travel between clients through scheduling and thus have some control over the amount of travel costs incurred. Indeed, A–1 Health Care, Inc. stated that it will likely adjust its workers' schedules to avoid paying for travel

time. This issue is more fully discussed in the economic analysis.

Of particular concern to individuals with disabilities, their advocates, and employers was the requirement to pay for travel time for periods of extended travel. The Department fully supports the right of individuals with disabilities to participate in their communities and to travel for various personal and work-related purposes. The comments received demonstrate that, while traveling, direct care workers provide valuable personal care and related services to ensure the comfort, safety, and health of individuals with disabilities. For example, one direct care worker commented:

I even traveled with my client after her stroke so she could visit her friends. This was much harder because we had to have oxygen, get a hospital bed, and had to make sure the hotels would accept a hospital bed. I also had to be sure to have all her medications so we wouldn't run out. I ordered all of her personal care items, too. On one occasion we arrived late at night at the hotel [, and] the hospital bed was not set up. My client was tired after nine hours of travel and we had to get the bed set up fairly quickly.

The Department considers all travel ''that keeps an employee away from home overnight'' to be a special class of ''travel away from home.'' *See* § 785.39; *see also* Wage and Hour Opinion Letter (Dec. 14, 1979). ''Travel away from home is clearly work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties.'' § 785.39. Thus, if a direct care worker accompanies a consumer on travel away from home, the employee must be paid for all time spent traveling during the employee's normal work hours. On the other hand, the Department has adopted a non-enforcement policy for travel away from home as a passenger on an airplane, train, boat, bus or automobile if the travel occurs outside of the employee's normal work hours. § 785.39; *see* Wage and Hour Opinion Letter (Dec. 14, 1979). However, a direct care worker who is required to travel as a passenger with the consumer ''as an assistant or helper'' and is expected to perform services as needed is working even though traveling outside of the employee's regular work hours. *See* § 785.41.

Example: Steve, a direct care worker, ordinarily provides assistance to Beth on Monday–Friday from 8:00 a.m. to 5:00 p.m., his normal work hours. Steve agrees to provide home care services to Beth on a trip to Phoenix to visit her family for a week. Steve meets Beth at the airport at 11:00 a.m. on Sunday for a three hour flight. The time spent traveling is hours worked because it occurs during Steve's normal work hours of 8:00 a.m. to 5 p.m., even though the travel occurs on a Sunday, and Steve ordinarily works only Monday–Friday.

Example: Gina, a direct care worker, ordinarily works Monday–Friday from 8:00 a.m. to 5:00 p.m. providing services for Daren. Gina agrees to provide home care services on a weekend trip Daren takes to Tulsa for his college reunion. Gina meets Daren at the airport at 7:00 p.m. on Saturday and is expected to provide care services to Daren as needed throughout the four hour flight. During the flight, Gina is on duty for the entire trip and assists Daren with feeding and toileting and gives him an insulin shot; she spends the remainder of the flight time reading a book. Because Daren has asked Gina to accompany him on the flight to be on duty and assist or help as needed, Gina must be compensated for the entire flight, although she was able to spend some of the time reading. However, if Gina is completely relieved of duties for the entire flight and is able to use the time effectively for her own purposes, such as taking a nap or watching a movie, those hours would not be compensable.

Moreover, direct care workers must be compensated for all hours they work while traveling for the benefit of consumers in accordance with existing FLSA rules. *See* § 785.41 (''Any work which an employee is required to perform while traveling must, of course, be counted as hours worked.''). However, it is clear that not all time spent while away on travel is hours worked under the FLSA, and there may be significant periods of time while on travel that a direct care worker is not providing services to an elderly person or individual with disabilities and is not ''engaged to wait'' and need not be compensated. For example, periods when the direct care worker is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes are excluded from hours worked as off-duty time, as are bona fide meal and sleep periods, as discussed previously in this section. *See* Wage and Hour Opinion Letter (May 7, 1981).

Example: Horatio works as a direct care worker and accompanies his client, Jamie, to Washington, DC, where Jamie will attend a conference. In the morning, Horatio assists Jamie with toileting, bathing, and wound care. At 8:30 a.m., Horatio drives Jamie to the conference site, arriving at 9:00 a.m. From 9:00 a.m. until noon, Horatio is relieved of all duty and uses the time to go to a museum. At noon, Horatio meets Jamie at the site of the conference and resumes work. The time from 9:00 a.m. until noon is not hours worked under the FLSA, and Horatio need not be paid for that time.

As described above, not all time spent by an employee in travel is compensable hours work. Therefore, the Department believes that the comments received may overestimate the costs associated with overnight travel by a consumer with a direct care worker.

IV. Effective Date

The Department has set an effective date for this Final Rule of January 1, 2015. As discussed below, the Department believes that this effective date takes into account the complexity of the federal and state systems that are a significant source of funding for home care work and the needs of the diverse parties affected by this Final Rule (including consumers, their families, home care agencies, direct care workers, and local, state and federal Medicaid programs) by providing such parties, programs and systems time to adjust.

A number of commenters requested an extended phase-in period in order to allow for systemic changes at the state and local levels, to ensure that there is no adverse impact on access to home care services, and to accommodate the hiring of new workers and scheduling changes for the existing workforce. *See, e.g.,* VNAA, DCA, AARP, and NRCPDS. Specifically, the AARP noted that the changes to the Department's regulations would be new to direct care workers and consumers, as well as many third party employers, state Medicaid programs, consumer-directed programs, and other publicly financed programs. ''Because it may take some time for consumers and family caregivers to learn about what the changes would mean for them, take providers some time to prepare to comply (for instance by hiring additional staff), and take public programs some time to determine what the changes mean for them and implement them, AARP urges DOL to consider whether a reasonable transition period (e.g., a phase-in period or a grace period during which no penalties for noncompliance are assessed) might be advisable.'' *See* AARP; *see also* Small Business Administration's Office of Advocacy (Advocacy) (requesting a delayed effective date in order to ''allow small business to change their business practices'').

The length of time requested by commenters for any phase-in period varied significantly. For example, the VNAA requested an 18-month phase-in period ''to allow agencies to undertake an orderly process for adding new workers and that an accurate assessment of the costs involved be provided.'' The Direct Care Alliance cited similar reasons for a phase-in period, but recommended a time period of only 90 days, ''to allow time for consumers, workers and employers to make any adjustments that are necessary to comply with the overtime pay

requirements.'' *See also* PHI (requesting a 90-day phase-in period generally, and a 180-day phase-in period for publicly funded consumer-directed programs). Other commenters requested that the Final Rule become effective ''immediately'' or ''without delay.'' *See, e.g.,* 9to5, National Association of Working Women; Catherine Joaquin, Filipino Advocates for Justice; individual family caregiver Annette Heldeca.

Several commenters explicitly noted the rule's potential impact on consumer-directed programs and requested an extended phase-in period ''particularly for publicly-funded consumer-directed programs.'' *See, e.g.,* PHI. CDPAANYS asked that the Department carve out consumer-directed services from the scope of the regulations. In the alternative, CDPAANYS stated, ''[b]arring this, we urge you to delay implementation so that the numerous technical issues that were raised can be reexamined and worked through individually. This will prevent long-term damage to [consumer-directed programs] that ha[ve] successfully improved the quality of life for millions of Americans.'' Similarly, Disability Rights California asked the Department to delay the implementation of the change of regulations for consumer-directed programs so that states, such as California, can review and assess the impact of this Final Rule. Noting that state and program administrators will need to update service codes and definitions and establish new operations and monitoring systems to comply with the new regulations, NRCPDS recommended a 12-month period of non-enforcement, in order to allow ''states and program participants to identify solutions that minimize a negative impact on existing service delivery.''

The Department believes that because this Final Rule will extend the FLSA's basic minimum wage, overtime and recordkeeping protections to more workers, the rule should become effective as quickly as practicable. This position is consistent with the broad goals of the FLSA, a remedial statute designed to correct ''labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and the general well-being of workers.'' 29 U.S.C. 202(a). The statute requires that these corrections be made ''as rapidly as practicable . . . without substantially curtailing employment or earning power.'' 29 U.S.C. 202(b). The Department has determined that the regulations issued in 1975 no longer reflect Congress's intent in enacting the 1974 FLSA amendments given the changes in the home care industry that have taken place in the past 38 years.

Because of the unique circumstances surrounding this rule, however, the Department believes that a January 1, 2015 effective date is most appropriate. Specifically, this extended effective date is reasonable due to the integral role played by complex federal and state systems that are a significant source of funding for home care work, and the needs of the diverse parties affected by this Final Rule. The Department recognizes that the multiple federal and state programs that often fund, administer, and oversee direct care for consumers will require a period of time to adjust to the new regulations. Federal, state, and local agencies, as well as private entities, may need to implement new protocols, apply for changes to their Medicaid programs, adjust funding streams, and legislatively address budgetary and programmatic changes. States will need time to work with the Department of Health and Human Services (HHS) to review consumer-directed programs, make any needed programmatic changes, and prepare any necessary budget allocations, in order to maintain the important and growing role that consumer-directed programs fulfill. State and local entities will also need to work with consumers and their families to ensure they understand any adjustments that may occur on the provision of services. Furthermore, employers will have to make many of the usual adjustments associated with revised FLSA regulations—such as scheduling changes, hiring and training additional workers, and modifying service agreements—in conjunction with any adjustments made by federal, state and local agencies under the new regulations. In view of the unique nature of the publicly funded programs that support a significant portion of home care, the Department believes an extended effective date allows time for the regulated community to avoid disruptions to home care services because of the restrictions of federal or state budget processes or the need to comply with the HHS process for modifying Medicaid programs. Although not all home care is funded by these complex public systems, the Department is setting a single effective date for the entire regulated community to avoid the administrative burdens for employers, confusion amongst employees, and complications for enforcement that would result from accepting some commenters' suggestion that the rule's effect be delayed only as it applies to consumer-directed programs.

Additionally, the Final Rule's impact falls on populations that depend on home care services to remain in their communities and the Department anticipates that this effective date will allow time for state budgets and other components of the public funding systems that support home care to adjust. The Department also recognizes that there will be individuals, families and households who as employers will have new obligations under this Final Rule; an extended effective date will allow families additional time to become familiar with their responsibilities under the FLSA and evaluate scheduling or staffing needs in order to comply with the regulations.

Thus, a January 1, 2015 effective date provides time for these systemic changes to take place, and for employers to fully implement the Final Rule. This effective date exceeds the 30-day minimum delayed effective date required under the Administrative Procedure Act, 5 U.S.C. 553(d), and the 60-day delayed effective date for ''major rules'' under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A). Although the Department typically utilizes the legislatively required effective dates, as applicable, the Department has in the past, in response to comments, extended the effective date for a significant FLSA rule. For example, the 2004 update to 29 CFR part 541, the regulations that govern whether employees are executives, administrative personnel, professionals, outside sales or computer employees exempt from minimum wage and overtime requirements, adopted a delayed effective date of 120 days in response to public comments in that rulemaking, including one seeking a 180-day delayed effective date. *See* 69 FR 22126 (Apr. 23, 2004). For this Final Rule, the comments received concerning a proposed effective date ranged from a typical effective date to at least 18 months. The Department believes that an effective date of January 1, 2015, which falls well within the range suggested by commenters, is reasonable under these unique circumstances and responsive to the comments received from stakeholders, including employee and employer advocacy groups, as well as state agencies.

The Department will work closely with stakeholders and HHS to provide additional guidance and technical assistance during the period before the rule becomes effective, in order to ensure a successful transition for all involved parties.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi).

The Office of Management and Budget (OMB) has assigned control number 1235–0018 to the FLSA information collections. In accordance with the PRA, the December 27, 2011 NPRM solicited comments on the FLSA information collections as they were proposed to be changed. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FLSA information collections, in accordance with 44 U.S.C. 3507(d). On February 29, 2012, the OMB issued a notice that continued the previous approval of the FLSA information collections under the existing terms of clearance. The OMB asked the Department to resubmit the information collection request upon promulgation of the Final Rule and after considering public comments on the FLSA NPRM dated December 27, 2011. OMB has pre-approved the information collections and will take effect on the same date as this Final Rule.

Circumstances Necessitating Collection: The Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., sets the federal minimum wage, overtime pay, recordkeeping and youth employment standards of most general application. Section 11(c) of the FLSA requires all employers covered by the FLSA to make, keep, and preserve records or employees and of wages, hours, and other conditions and practices of employment. An FLSA covered employer must maintain the records for such period of time and make such reports as prescribed by regulations issued by the Secretary of Labor. The Department has promulgated regulations at 29 CFR part 516 to establish the basic FLSA recordkeeping requirements. The Department has also issued specific recordkeeping requirements in 29 CFR part 552 which is the subject of this collection. The Department has amended recordkeeping requirements in § 552.102 and § 552.110 regarding agreements for live-in domestic workers. The Department also notes that the amendments to the definition of companionship services results in fewer employees being exempt from the minimum wage and overtime requirements of the FLSA.

Public Comments: In addition to soliciting comments on the substantive recordkeeping provisions discussed above, the Department sought public comments regarding the burdens imposed by information collections contained in the proposed rule. As previously discussed, the Department received some general comments offering support for change to the regulations addressing recordkeeping requirements. Organizations such as EJC, Jobs with Justice, DCA and others expressed support for the revised recordkeeping rules.

The Department also received some general comments voicing opposition to recordkeeping requirements. Organizations such as the Visiting Nurse Service of New York, and Home Care Association of New York State expressed concern about burdens associated with the new recordkeeping requirements identified in the NPRM.

The National Federation of Independent Business (NFIB), for instance, asserted that the Department estimated that paperwork and recordkeeping associated with the proposed rule would cost in excess of $22.5 million per year. They expressed their view that this is a substantial burden that will disproportionately impact small businesses. The Department seeks to clarify the estimated $22,580,605 cost listed in the NPRM; this amount reflected the cost associated with the entire information collection that is required of all employers in the United States that are subject to the FLSA minimum wage and overtime requirements. As noted below, the cost associated with the changes resulting from this Final Rule is estimated to be approximately $8.96 million. The PRA, in order to reduce redundancy, requires a federal agency to view any given information collection requirement of a rule in light of other existing information collections that might meet the same purpose. The regulations implementing the PRA also require an agency to notify the public of the full burden of an information collection, including the burden imposed by unchanged information collections. 5 CFR 1320.5(a)(1)(iv)(B)(5). The PRA discussion in a regulatory preamble, therefore, will often include burdens that are unaffected by changes to the rule. This differs from how the overall regulatory impact analysis is summarized. The regulatory impact analysis calculates the burden only for the marginal changes of a rule. This rule addresses only employees who will newly be subject to the minimum wage and overtime requirements of the FLSA. The rulemaking also coincides with the periodic renewal required by the PRA of the entire information collection under the FLSA. The amount cited by NFIB reflects the estimated cost to the wider universe of all employers subject to the FLSA recordkeeping requirements, of which the overwhelming majority are not impacted by this rule but are included in the same information collection as other employers since the requirements are the same for those employers.

VNAA makes the general statement that the ''rule does not accurately reflect costs'' in recordkeeping. The organization indicates that the requirement to make, keep, and preserve a record showing the exact hours worked by each employee will increase recordkeeping responsibilities dramatically. The organization, however, does not provide alternate methodologies or explain how or why the recordkeeping requirements will impact their organization so significantly. Without alternative data, the Department believes it is appropriate to assign the same level of recordkeeping burden as experienced by other FLSA-covered employers to those employers that will newly be required to make, keep, and maintain records of hours worked and those employers that now must make, keep, and maintain records for previously exempt workers.

The National Association for Homecare & Hospice expressed concern that the Department of Labor fell short of the analysis required under the PRA but failed to identify in what way the methodology presented in the PRA section of the proposed rule did not address information collection requirements or burdens. Further, the commenter did not identify an alternative methodology with which to examine the burden associated with this rule.

In addition, the Department received a number of form letters that addressed the recordkeeping requirements. Some form letters made general comments in support of the recordkeeping requirements. Other form letters expressed concern about the additional costs associated with recordkeeping. No comments, however, directly addressed the methodology for estimating the public burdens under the PRA or offered alternative methods for calculating burden under the PRA. With respect to the concerns addressed about cost of recordkeeping regulations, the requirements to maintain records are no

different for the employers who are the subject of this rule than for other employers in the United States that are subject to the minimum wage and overtime pay requirements under the FLSA. Further, as noted in the economic analysis, most of the agencies that employ domestic workers have at least one employee who is already subject to FLSA recordkeeping requirements. As explained in the PRA materials submitted to OMB, the Department utilized a 1979 study of domestic service employees on the number of live-in workers and assumed for purposes of the PRA that a similar percentage of the current domestic service worker population is employed in live-in service today. The Department estimates that the total costs to employers of the Final Rule's information collection requirements is approximately $8.96 million of the total of $29.78 million in information collection costs of all employers subject to the FLSA.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department submitted the identified information collection contained in the proposed rule to OMB for review in accordance with the PRA under Control Number 1235–0018. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised FLSA information collection to OMB for approval, and the Department intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.reginfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble. A summary of the number of respondents, annual responses, burden hours and costs of all of the recordkeeping provisions of the FLSA follow.

OMB Control Number: 1235–0018.

Affected Public: Businesses or other for profit, Not-for-profit institutions

Total Respondents: 3,911,600 (272,000 affected by this Final Rule).

Total Annual Responses: 40,998,533 (710,240 from this Final Rule).

Estimated Burden Hours: 1,250,164 (376,008 from this Final Rule)

Estimated Time per Response: various, with an average of 1.8 minutes.

Frequency: various with an average of 10.54.

Total Burden Cost (capital/startup): 0.

Total Burden Costs (operation/maintenance): $29,778,906 ($3,755,997 from this Final Rule) ($8,956,511 in Year 1 from this Final Rule which drops substantially in Year 2 due to decrease in regulatory familiarization).

VI. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is economically significant within the meaning of Executive Order 12866, or a ''major rule'' under the Small Business Regulatory Flexibility Act. Therefore, the Office of Management and Budget has reviewed this rule. The Department believes that this rule will have a significant economic impact on a substantial number of small entities; therefore this Final Rule contains a final regulatory flexibility analysis.

A. Regulatory Impact Analysis of the Revisions to the Companionship Regulations

Background

The provisions of the FLSA apply to all enterprises that have employees engaged in commerce or in the production of goods for commerce and have an annual gross volume of sales made or business done of at least $500,000 (exclusive of excise taxes at the retail level that are separately stated); or, are engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, elementary or secondary school, or an institution of higher education (regardless whether such hospital, institution or school is public or private, or operated for profit or not); or, are engaged in an activity of a public agency.

There are two ways an employee may be covered by the provisions of the FLSA: (1) enterprise coverage, where any employee of an enterprise covered by the FLSA is covered by the provisions of the FLSA, and (2) individual coverage, where even if the enterprise is not covered, individual employees whose work engages the employee in interstate commerce or in the production of goods for commerce or in domestic service is covered by the provisions of the FLSA. Covered employers are required by the provisions of the FLSA to: (1) pay employees who are covered and not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment.

In 1974, Congress expressly extended FLSA coverage to ''domestic service'' workers performing services of a household nature in private homes not previously subject to minimum wage and overtime requirements. While domestic service workers are covered by the FLSA even if they work for a private household and not a covered enterprise, Congress created an exemption from the minimum wage and overtime compensation requirements for casual babysitters and persons employed in ''domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves,'' and an exemption from the overtime compensation requirement for live-in domestic service employees.[27]

Need for Regulation and Why the Department Is Considering Action

In 1974, Congress extended coverage of the FLSA to many domestic service employees performing services of a household nature in private homes not previously subject to minimum wage and overtime compensation requirements. Section 13(a)(15) of the Act exempts from its minimum wage and overtime compensation provisions domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' Section 13(b)(21) of the FLSA exempts from the overtime compensation provision any employee employed ''in domestic service in a household and who resides in such household.''

The Department issued regulations in 1975 to implement these exemptions. Since the 1975 regulations were promulgated, the home care industry has evolved and expanded in response

[27] 29 U.S.C. 202(a), 206(f), 207(l), 213(a)(15), and 213(b)(21).

to the increasing size of the population in need of such services, the growing demand for home- and community-based care instead of institutional care for persons of all ages, and the availability of public funding assistance for such services through public payers (including Medicare, Medicaid, and other federal programs such as the Veterans Health Administration, and other state and local programs).[28] As the industry has expanded, so has the range of tasks performed by workers providing home care services. The range now includes assistance with activities of daily living (ADLs), instrumental activities of daily living (IADLs), and paramedical tasks (such as catheter hygiene or changing of aseptic dressings).[29] Public funding programs do not typically cover services such as social support, fellowship or protection.[30] According to the U.S. Department of Health and Human Services (HHS), ''[s]imple companionship or custodial observation of an individual, absent hands-on or cueing assistance that is necessary and directly related to ADLs and IADLs, is not a Medicaid personal care service.'' [31]

The Department believes that the current application of the companionship services exemption in the home care industry is not consistent with the original Congressional intent. The scope of services provided to individuals in their homes has expanded beyond those provided in 1975 when the regulations were first promulgated. In addition, courts have interpreted the definition of ''companionship services'' to include a broad range of workers. For example, in *McCune* v. *Oregon Senior Services Division,* 894 F.2d 1107 (9th Cir. 1990), the Ninth Circuit held that certified nursing assistants were not ''trained personnel'' excluded from the regulatory definition of companionship services because, unlike registered nurses and licensed practical nurses, certified nursing assistants received only 60 hours of training. Comparably, the Seventh Circuit in *Cox* v. *Acme Health Servs, Inc.,* 55 F.3d 1304 (7th Cir. 1995), held that a home health aide who completed 75 hours of required training did not qualify as ''trained personnel'' subject to the Act's minimum wage and overtime compensation provisions and instead performed ''companionship services'' within the meaning of the term as defined in the Department's regulations.

Therefore, in the NPRM the Department proposed to modify, and the Final Rule does modify, the definition of companionship services to exclude personnel who perform medically related services that typically require and are performed by trained personnel, and to provide a 20 percent tolerance for care (assistance with ADLs and IADLs). As a result, to qualify for the companionship services exemption, workers must spend at least 80 percent of their time in activities that constitute fellowship or protection. Those workers who provide services that exceed the 20 percent tolerance for the provision of care (assistance with ADLs and IADLs) must be paid in accordance with federal minimum wage and overtime requirements.

Objectives and Legal Basis for Rule

Section 13(a)(15) of the FLSA exempts from its minimum wage and overtime compensation provisions domestic service employees who perform companionship services. Due to significant changes in the home care industry over the last 38 years, workers who today provide home care services to individuals often are performing duties and working in circumstances that were not envisioned when the companionship services regulations were promulgated. During the 1970s when the exemption was enacted such work was generally performed in institutional settings and not in the service recipient's private home.

Section 13(b)(21) provides an exemption from the Act's overtime compensation requirements for live-in domestic service workers. The current regulations allow an employer of a live-in domestic service worker to maintain a copy of the agreement of hours to be worked and to indicate that the employee's work time generally coincides with that agreement, instead of requiring the employer to maintain an accurate record of hours actually worked by the live-in domestic service worker. The Department is concerned that not all hours worked are actually captured by such agreement and paid, which may result in a minimum wage violation. The current regulations do not provide a sufficient basis to determine whether the employee has in fact received at least the minimum wage for all hours worked.

The Department has re-examined the regulations and determined that the regulations, as currently written, have expanded the scope of the companionship services exemption beyond those employees whom Congress intended to exempt when it enacted § 13(a)(15) of the Act, and do not provide a sufficient basis for determining whether live-in domestic service workers subject to § 13(b)(21) of the Act have been paid at least the minimum wage for all hours worked. Therefore, the Department's Final Rule amends the regulations to revise the definitions of ''domestic service employment'' and ''companionship services,'' and to require employers of live-in domestic service workers to maintain an accurate record of hours worked by such employees. In addition, the Final Rule limits the scope of duties that may be performed under the companionship services exemption, and prohibits third party employers from claiming the exemption for employees performing companionship services. The Final Rule also prohibits third party employers from claiming the overtime compensation exemption for live-in domestic service employees. The effective date for this Final Rule is January 1, 2015.

Summary of Public Comments on the Preliminary Regulatory Impact Analysis

A number of commenters, including Americans for Limited Government, International Franchise Association (IFA), the Private Care Association (PCA), the Private Duty Home Care Association (PDHCA) and the National Private Duty Association (NPDA),[32] submitted comments on the economic analysis included in the proposed rule. The comments focused on seven major topics: the terminology used to describe the market; the number of affected workers; the characterization of the home care services market, including the number of overtime hours worked; the price elasticity of demand used in the dead-weight loss analysis; the quasi-fixed costs associated with worker turnover and hiring; the managerial costs of regulatory familiarization and scheduling; and possible scenarios for management of overtime compensation costs.

This section will describe each of these concerns raised in the comments,

[28] Congressional Research Service. Memorandum dated February 21, 2012, titled ''Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair Labor Standards Act: Impact on Medicare and Medicaid,'' p. 3, WHD–2011–0003–5683.

[29] Seavey and Marquand, 2011, p. 7. WHD–2011–0003–3514. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[30] Seavey and Marquand, 2011, p. 8. WHD–2011–0003–3514. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[31] Smith, G., O'Keefe, J., et al. (2000). Understanding Medicaid Home and Community Services: A Primer, George Washington University, Center for Health Policy Research.

[32] Since the submission of the comments the NPDA has changed its name to the Home Care Association of America. This Final Rule will refer to the organization as the NPDA.

the Department's analysis and response to the comment, and any revisions made to the economic analysis.

Terminology

Several commenters, including AARP, California Association for Health Services at Home, and private citizens such as Sue Ostrowski, Robert Melcher, and Laurie Edwards-Tate, noted that the terms used in the Department's economic analysis are not consistent with industry usage and may be misinterpreted. The Department agrees and has revised the language in the economic analysis to be more precise. Specifically, the analysis uses the following terms:

''*Home care:''* The economic impact analysis has been revised to refer to the broader ''home care'' industry rather than ''home health care,'' which specifically covers medical assistance performed by certified personnel. Thus, the term home care industry includes the home health care industry. The current exemption has been applied to both types of services and, therefore, this Final Rule impacts both the home health care industry and the home care industry.

''*Direct care worker:''* The NPRM used a variety of terms to refer to the workers potentially affected by the rule change; commenters found this confusing. For example, AARP pointed out that the term ''caregiver'' is often used to refer specifically to ''family caregivers'' rather than other types of workers and recommended that the Department use the term ''direct care worker'' instead. Therefore the terminology has been refined to use direct care worker to refer to those workers who may be affected by the rule change because they may be currently treated as exempt companions. The term ''direct care worker'' will be used unless the Department is referring to a specific occupation (e.g., home health aide or personal care aide) as defined by our data sources or directly quoting from a comment.

''*Independent providers:''* Independent providers are direct care workers who may be hired directly by the consumer to provide home care services. Consumers may identify the direct care worker through a registry, referral service, advertising, or word of mouth. Employment arrangements may range from formal agreements with administrative, liability, and payroll services provided by a registry to informal agreements between the direct care worker and the consumer. Numerous commenters, including Members of Congress (Senator Lamar Alexander, Congressman Lee Terry), employers (Matched Caregivers Continuous Care, Angels Senior Home Solutions), and members of the public (Brandi Johnson, Lauren Reynolds, A. Miller, Ryan Heideman, Kimberly Flair and others) made it clear that the term ''grey market'' was easily misinterpreted to mean possibly illegal arrangements. Although difficult to predict, the Department anticipates this rule will bring more workers under the FLSA's protections, which in turn will create a more stable workforce by equalizing wage protections with other health care workers and reducing turnover. The Department has no basis for estimating the percentage of such arrangements where proper income and payroll taxes are paid versus those where they are not. In light of this, the analysis has abandoned the term ''grey market'' and now refers solely to independent providers.

''*Consumer:''* Several commenters objected to the use of the terms ''client,'' ''patient,'' and ''care recipient'' to describe individuals who purchase home care services. In particular, AARP noted that the term ''patient'' is inappropriate because not all consumers of home care services are receiving medical care. To be consistent with the terminology in the field, the analysis now refers to all such individuals as ''consumers.''

Number of Affected Workers

The Department also received comments concerning the estimated number of affected workers in two particular states.

The Illinois Department of Human Services explained that ''home health aide'' and ''personal care'' employees are exempt under state law if they are jointly employed by the state (for the purposes of collective bargaining) and the consumer. These exempt employees are currently covered by a collective bargaining agreement that does not include overtime. Other direct care workers in the state are covered by both minimum wage and overtime compensation requirements. They note that for the 30,000 workers in the program ''overtime pay, however, is not mandated by Illinois statute and has not been a benefit for these providers, as allowed by the exemption for FLSA, because of its cost to the state.''

The Department incorporated the 30,000 jointly-employed Illinois workers into the overtime analysis. The Department estimates national-level transfer payments based on national-level averages of wages and hours worked, not for particular states or subgroups of workers within states. Although Illinois data indicates that more than 12 percent of these 30,000 direct care workers exceed 40 hours, within any state or region, some direct care workers or groups of workers will exceed the national average while others will work less than the national average. At the national level, however, the average will accurately represent the burden of the rule despite this variance at the state and local level.

Finally, review of the data submitted by Illinois showed the data might not be completely reliable. For example, Illinois states that 10,000 HHAs and PCAs worked close to 3 million hours of overtime, and the cost of overtime compensation would exceed $32 million.[33] These figures suggest that the overtime compensation differential would be $10.67 per hour, which implies the underlying straight-time wage rate is approximately $21.34. However, the comment stated that the workers are paid $11.55 per hour or more. As a result of these ambiguities and inconsistencies, the Department chose to add these workers to the national overtime projection, but did not use Illinois' additional data.

A joint comment from the California Association of Counties (CSAC), County Welfare Directors Association of California (CWDA), California Association of Public Authorities for In-Home Supportive Services (CAPA), and California In-Home Supportive Services (IHSS) Consumers Alliance (CICA) points out that California provides overtime for some workers under the contract-agency mode, ''but it is not the case for individual providers who are paid by the IHSS Program. Out of approximately 440,000 IHSS cases in California, less than 2,000 are under the contract mode and the vast majority of IHSS workers are individual providers.'' Further, out of the 380,000 IHSS direct care workers, ''there are approximately 50,000 IHSS providers who routinely submit timesheets who work more than 40 hours a week.'' The comment further noted that a 1983 ''landmark ruling established that IHSS providers were employees of the state and counties for the purposes of the minimum wage provisions of the FLSA''.[34] Legal Aid Society-Employment Law Center and NELP also noted that most workers in California do not receive overtime. Based on the information received from the commenters, the Department adjusted the economic analysis to include California and add 380,000 IHSS workers to the analysis in the category of states not covered by

[33] State of Illinois DHS, WHD–2011–0003–7904.

[34] CSAC, CWDA, CAPA, and CICA. WHD–2011–0003–9420, pg. 2.

overtime provisions, as it appears that these workers were not included in BLS Occupational Employment Statistics data (as discussed in more detail in the Costs and Transfers section).

Characterization of the Home Care Services Market

The principal concerns about the definition of the home care market were related to the sources of funding used to pay for home care services, and the size of the non-medical, private pay market. More specifically, NPDA references the Navigant analysis of the NPRM which comments that the assessment of funding sources was made based on limited information, and that the private pay market is larger than estimated in the NPRM. Note, the industry describes this part of the home care market as both ''private duty'' and ''private pay,'' using the terms synonymously.[35] For the purposes of this discussion, the Department uses the term ''private pay'' to refer to the market for non-medical services that are paid for privately (i.e., out-of-pocket payment or payment by long-term care insurance).

Several industry organizations (IFA, National Association for Home Care and Hospice (NAHC), PDHCA, and NPDA) administered two surveys in response to the NPRM that suggest the existence of a larger private pay market, but these surveys failed to provide any conclusive empirical evidence in support of this claim. These surveys were fielded to IFA members; the overall response rates were fairly low, and respondents self-selected into the survey. This can lead to selection bias; in other words, the respondents who chose to participate in the survey may be different from the overall population in a way that shifts the results of the survey. For example, the IFA members that responded to the survey may have been particularly motivated to participate due to campaigns to raise awareness of the NPRM in specific states, and that would lead the results to include a greater proportion of members from those states than a random sample would include. As a result, it is not clear if the results are representative of IFA members or the industry as a whole.

In response to the comments on the characterization of the home care market in the NPRM, the Department examined alternative data sources. The Department reviewed the nationally representative source Medical Expenditure Panel Survey (MEPS), published by the Department of Health and Human Services, Agency for Healthcare Research and Quality, which addresses the home care market. The MEPS is intended to capture the use of long-term non-medical care (e.g., companionship and homemaker services) and short-term acute medical home care.

MEPS data offered little in terms of support for the premise that a large private pay market for home care services exists. Private pay appears to be more frequently used with independent providers, whereas Medicare and Medicaid pay for the majority of agency services. The data also showed only a relatively small percentage of consumers pay out-of-pocket for agency care. Therefore, the assertion that the Department underestimated the impact of increased overall costs on the purchase of home care services is generally not warranted.

Closely related to the previous issue, commenters also pointed out that Medicare and Medicaid programs will cover only home health care, but not home care services. The Department believes it is appropriate to include Medicare and Medicaid as funding sources for services potentially impacted by this Final Rule.

Medicare provides eligible individuals with skilled nursing services when the services are provided on a part-time or intermittent basis. Skilled nursing services are provided either by a registered nurse or a licensed practical nurse. Home health aide services may be Medicare-covered when given on a part-time or intermittent basis if needed as support services for skilled nursing care. Home health aide services must be part of the care for the identified illness or injury. Medicare does not cover home health aide services unless the individual is also receiving skilled care such as nursing care or other physical therapy, occupational therapy, or speech-language pathology services from the home health agency. Medicare does not pay for personal care services when that is the only care the individual needs.[36] The Department does not have data regarding the extent to which Medicare-certified agencies have availed themselves of the current companionship services exemption for home health aide or other services they provide; however, to the extent that such agencies have used the current exemption, the Department expects those agencies to be impacted by this Final Rule.

Medicaid is a federal-state partnership providing health coverage to identified populations, including seniors and persons with disabilities. States are required to cover home health benefits and may offer to cover personal care services, through Medicaid-funded programs. Such services may be provided through home and community-based services (HCBS) programs, including HCBS waivers, self-directed personal assistance services programs, Money Follows the Person programs and Community First Choice programs. The Department also expects this Final Rule to impact Medicaid-funded home health and personal care service providers.

A report by the Congressional Research Service states:

> ''Neither the Medicare nor the Medicaid program explicitly covers services termed 'companionship services'. However, to some extent these programs provide certain home care services to eligible beneficiaries through home health services (under Medicare and Medicaid) and personal care services (under Medicaid). Furthermore, federal statute, regulations, and guidance do not specify or regulate wage and employee benefit levels in Medicare (Title XVIII of the Social Security Act) or Medicaid (Title XVIX of the Social Security Act).'' [37]

Medicare and Medicaid directly reimburse the service provider a specified dollar amount to cover a specified quantity of services or defined episode of care. The agency uses this revenue to pay the direct care worker's wages (which may include straight time, overtime, and benefits), as well as to cover other costs of doing business (such as overhead and administrative fees). Medicare and Medicaid rates do not explicitly cover agency overhead, nor do they dictate that the entire amount must go to the direct care worker's wages. Thus, agencies are able to use Medicare and Medicaid reimbursement to cover training and overtime costs.

Industry commenters (IFA, NAHC, NPDA, and PCA) also stated that direct care workers work considerably more overtime than the impact analysis suggested, thereby underestimating the costs and impact of the rule. The centerpiece of this argument was the assertion that 24-hour care consumers

[35] See NPDA Web site, *http://www.privatedutyhomecare.org/sections/consumers/whatisprivate.php* (note: this Web site no longer exists, however, WHD has the archived version, which can be found at *http://web.archive.org/web/20120624032530/http://www.privatedutyhomecare.org/sections/consumers/whatisprivate.php).*

[36] Medicare and Home Health Care, pgs 8–10, Available at: *http://www.medicare.gov/Pubs/pdf/10969.pdf.*

[37] Congressional Research Service. Memorandum dated February 21, 2012, titled ''Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair Labor Standards Act: Impact on Medicare and Medicaid,'' WHD–2011–0003–5683.

are a principal component of the market and, because they prefer a single direct care worker, using multiple direct care workers to manage overtime costs may be difficult and result in reduced quality of care. These commenters asserted that paying overtime in this situation may make home care unaffordable, forcing consumers into nursing homes.

In these comments, industry groups appear to use the terms ''24-hour care'' and ''live-in care'' synonymously. These terms are not identical and make interpretation of at least some comments, statements, and reported survey results problematic. While 24-hour care implies a single direct care worker scheduled to cover a 24-hour period, the Department defines a ''live-in'' worker as one who resides on his or her employer's premises permanently or for an extended period of time (e.g., for at least five consecutive days or nights). Thus, while a live-in worker might provide 24-hour care, 24-hour care does not require a live-in direct care worker. The rules governing the determination of overtime differ significantly between the two types of direct care worker schedules, as will be discussed in more detail below. These differences may also have implications for projecting industry response to the rule.

For the NPRM, the Department calculated that 10 percent of affected direct care workers are employed 45 hours per week (5 hours of overtime), and an additional 2 percent are employed 52.5 hours per week (12.5 hours of overtime). These estimates are derived from the PHI analysis of National Home Health Aide Survey (NHHAS) and U.S. Census Bureau's Annual Social and Economic Supplement (ASEC) data on overtime worked in this industry. The NHHAS is a multistage probability sample survey sponsored by the Department of Health and Human Services' Office of the Assistant Secretary for Planning and Evaluation (ASPE) that was designed to provide nationally representative estimates of agency-employed direct care workers who assist with ADLs. The two-stage sampling process first randomly selected agencies with probability proportionate to size, then randomly sampled up to six direct care workers from each agency selected; a total of 3,377 workers were interviewed.[38]

As a result of comments on overtime estimates, the Department reviewed hours worked by direct care workers as reported in the 2007 NHHAS. When calculating overtime directly instead of using estimates based on summaries reported in publicly available analyses of the NHHAS, the Department found that those direct care workers who work for a single employer more than 40 hours, but less than 50 hours per week, average 6.4 hours of overtime, while those who work for a single employer 50 hours or more per week average 21.0 hours of overtime per week. Therefore, the Department made appropriate changes, described below, in the analysis.

Price Elasticity

Price elasticity represents the percentage change in quantity demanded induced by a percentage point change in labor cost, *i.e.,* how responsive the home care services market is to changes in workers' wages. Price elasticity of demand for labor is composed of two separate effects: the substitution effect, driven by the change in the cost of labor relative to its substitutes holding output constant, and the scale effect, driven by making labor more expensive relative to agency budget. PCA suggested that the NPRM's deadweight loss analysis for home care services only included the substitution effect. The Department reviewed this assertion and found that it was accurate, *i.e.,* the cited elasticity does not incorporate the industry scale effects. PCA also provided an alternative estimate that used aggregated state-level data on the average wages and employment of home health aides and personal care aides for the period between 2001 and 2009. While PCA's econometric estimate suggested that demand is price elastic[39] (responsive to changes in price), their estimate's validity is questionable. For example, the estimate did not pass a basic set of robustness checks designed to control for state-level differences in variation. Accounting for these differences rendered PCA's estimate statistically indistinguishable from zero. The Department attempted to use PCA's analysis with improved data and methods, but the analysis did not return a valid result.

In the absence of a reliable method to estimate the price elasticity of demand from existing data, the Department surveyed academic literature to find suitable substitutes. The Department accepts PCA's point that the market contains a private pay sector and a public-funds-reimbursed sector that might differ substantially in terms of consumer response to price changes. More specifically, the price elasticity of demand is considerably greater (in absolute terms) for consumers who pay for home care services predominantly out of pocket, though this segment is small relative to the overall home care market. Likewise, the Department believes that the demand for home care services reimbursed by a third party is highly inelastic.

The Department used the market for health care services, where the final consumer is only responsible for a relatively small fraction of the cost, to approximate the consumer response to changes in the price of home care services that are reimbursed by public funds. The RAND Health Insurance Experiment (HIE), which took place between 1974 and 1975 and covered 7,791 individuals in 6 U.S. cities, is still considered the ''gold standard'' in the estimation of demand for health care services because it remains to date the only large-scale study based on a randomized controlled trial. A study using HIE data estimated a -0.17 price elasticity of the demand for outpatient medical care for those paying for 0 to 25 percent of care out-of-pocket.[40] Similar non-experimental studies return comparable price elasticity values.[41]

The Department used the market for non-reimbursed nursing home care, where there are often considerable out-of-pocket costs, to approximate consumer response in the private pay sector. Long-term home care and nursing homes can be considered substitutes in the sense that long-term

[38] Bercovitz, A, Moss, AJ, et al. (2010). Design and Operation of the National Home Health Aide Survey: 2007–2008. National Center for Health Statistics. *Vital Health Statistics.* 1(49). Available at: *http://www.cdc.gov/nchs/data/series/sr_01/sr01_049.pdf.*

[39] By convention, if the price elasticity of demand lies between 0 and -1.0, economists call demand ''inelastic;'' if the price elasticity of demand lies between -1.0 and $-\infty$, demand is ''elastic.'' When demand is inelastic, a given change in supply, resulting from increased labor costs for example, will have relatively little impact on how much of the product or service is purchased, but will result in a relatively large increase in price. Conversely, if demand is elastic, then the equivalent change in supply will have a much larger impact on the quantity purchased, but a much smaller impact on price. Thus, the significance of PCA's estimated price elasticity of demand is that, if correct, it would result in a much larger decrease in home care services and a much larger deadweight loss as a result of the rule.

[40] Manning, W. et al. (1992). Health Insurance and the Demand for Medical Care: Evidence from a Randomized Experiment. *The American Economic Review,* 77(3), pp. 251–277.

[41] Mueller, C. and A. Monheit (1988), Insurance Coverage and the Demand for Dental Care: Results for Non-Aged White Adults, *Journal of Health Economics,* 7(1), pp. 59–72.

Smith, D. (1993). The Effects of Copayments and Generic Substitution on the Use and Costs of Prescription Drugs. *Inquiry,* 30(2), pp. 189–198.

Contoyannis, P. et al. (2005). Estimating the Price Elasticity of Expenditure for Prescription Drugs in the Presence of Non-Linear Price Schedules: An Illustration from Quebec, Canada, *Health Economics,* 14(9), pp. 909–923.

home care provides assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs) to those who would be unable to live independently in the absence of support services. Many elderly individuals and people with disabilities, often given limited options, have entered facilities such as a nursing home or assisted living community where those services are provided along with room and board. Some home care appears to be priced accordingly; the Department's calculations of flat fee home care (i.e., 24-hour care) rates charged to consumers show they are quite similar to published average daily nursing home rates.[42]

The National Long Term Care Survey, a nationally representative sample of elderly persons with disabilities living in community-based and institutional settings, has served as the basis for multiple analyses of the demand for nursing home care. In 1993, a study of survey data estimated a price elasticity of the hazard of nursing home entry of −0.7, and another study from 1998 found that the price elasticity of demand for institutionalized care is −0.98. Estimates of the price elasticity of demand for nursing home care based on state-specific data range from −0.69 to −3.85.[43] Although the range of estimated elasticities is large, three of the four studies found elasticities in the range −0.69 to −0.98. Therefore the Department judged that a value of −1.0 best represented the overall evidence on the price elasticity of demand for nursing home care, and thus the best proxy for private pay home care as well.

The use of proxies for the price elasticities of demand for reimbursed and unreimbursed home care services due to the lack of direct estimates creates uncertainty concerning their true value and the subsequent impacts of the rule on the market for these services. The numerical value of an elasticity is a function of the availability of reasonable substitutes for the product or service, amongst other things. Thus, to the extent that unpaid services provided by family members and/or the use of inferior quality caregivers are considered good substitutes for agency caregivers, the demand for reimbursed home care services might be more elastic than −0.17. Similarly, the extent to which a nursing home is an unacceptable substitute for unreimbursed home care services might make the demand for those services less elastic than −1.0.

Although both these statements concerning these elasticities may be true, the Department believes this will have relatively little effect on the results of the model. First, the specified elasticities create natural limits: although demand for reimbursed services might be larger than −0.17, it is unlikely to be larger than the demand for unreimbursed services, while the converse is true concerning the demand for unreimbursed services. Thus it is likely that the true values lie between −0.17 and −1.0. Second, if the demand for reimbursed home care services is more elastic, it will increase the impact of the rule (e.g., greater reduction in services utilized; larger deadweight loss); conversely, a less elastic demand for unreimbursed services will decrease the impact of the rule. Thus, if both statements are true, the impacts will be to some extent offsetting. Third, the total impact of the rule is essentially a weighted average of the two market components (reimbursed and unreimbursed home care services); increasing the elasticity of the reimbursed market segment and reducing it for the unreimbursed market segment is likely to result in a small change in the weighted average, and therefore would have a small effect on impacts.

In the NPRM, the Department stated that the overwhelming majority of home care (75 percent) is paid with public funds. Commenters such as NPDA, IFA, and the Small Business Administration's Office of Advocacy (Advocacy) expressed concern that the size of the non-medical, private pay market may be larger than the impact analysis suggests. More specifically, they argued there are a large number of small home care businesses in the private pay sector that are not adequately reflected in the economic analysis.[44] The Department surveyed several academic and industry sources in an attempt to gain a better understanding of the private pay market. However, we find no representative, national-level data that suggests that there exists a larger private pay market for which the Final Rule does not account.

To reflect the findings discussed about the price elasticity of demand and the market share of the private pay sector, the Department agrees that it is necessary to revise the method it used to project the deadweight loss caused by the Final Rule. The Department calculated separately the impacts for the market in which care is primarily reimbursed through public funds, which accounts for 75 percent of all direct care workers, and has a price elasticity of demand of −0.17, and the private pay market, which accounts for 25 percent of all direct care workers, and has a price elasticity of demand of −1.0.

The changes that the Department made in response to PCA's comments concerning the price elasticity of demand for home care services had a relatively small effect on the results of the analysis. First, the price elasticity for reimbursed services (−0.17) used in the final analysis is of a very similar magnitude to that used in the NPRM (−0.15); indeed the conceptual basis for selecting reimbursed medical care as a proxy is the same concept used in the NPRM, although in practice the derivation of the NPRM value was flawed. Second, although we use a price elasticity of demand for private pay home care that is close to the value found by PCA (−1.0 compared to PCA's estimate of −1.18), again the impact of using this value in the final analysis is relatively small because it applies to only 25 percent of the total market for home care services.

Quasi-Fixed Costs

According to PCA, the quasi-fixed costs are non-trivial and may account for up to 19 percent of annual wages.[45] Quasi-fixed costs are those that change with the number of workers hired rather than with the number of hours worked. Examples include hiring costs, training costs, social insurance and other private benefits.

[42] See discussion of private pay pricing structure in the ''Tasks, Wages, and Hours'' section of the analysis; agencies charge approximately $250 per day for 24-hour care while the average private nursing home rate in 2011 was about $240 per day according to the MetLife market Survey of Long-term Care Costs. However, the IHS Global Insight survey, Economic Impact of Eliminating the FLSA Exemption for Companionship Services, 2012, WHD–2011–0003–8952, shows that less than 10 percent of consumers cared for by survey respondents receive 24-hour home care, while 65 percent require less than 40 hours of care per week. Thus, for the vast majority of consumers, home care is less expensive than institutional care, and for the 10 percent (or less) of consumers receiving 24-hour home care, the cost is about the same as institutional care.

[43] Headen, A. (1993). Economic Disability and Health Determinants of the Hazard of Nursing Home Entry, *Journal of Human Resources,* 28(1), pp. 81–110.

Rechovsky, J. (1998). The Roles of Medicaid and Economic Factors in the Demand for Nursing Home Care, *Health Services Research,* 33(4 Pt 1), pp. 787–813.

Knox, K., E. Blankmeyer and J. Stutzman. (2006). Private Pay Demand for Nursing Facilities in a Market with Excess Capacity. *Atlantic Economic Journal.* 34(1), pp. 75–83.

Mukamel and Spector (2002).The Competitive Nature of the Nursing Home Industry: Price Mark Ups and Demand Elasticities.'' *Applied Economics,* 34(4), pp. 413–420.

[44] Small Business Administration (SBA) Office of Advocacy, WHD–2011–0003–7756.

[45] William Dombi, WHD–2011–0003–9595, pg. 25.

The Department believes that although this figure might be accurate for the home care industry in general, it is too large for companionship services. Recruiting and training costs appear to be small for direct care workers. For example, evidence from the 2011 Annual Private Duty Home Care Benchmarking Study indicates that the median initial training is between 4 and 9 hours, and less than 25 percent of establishments provide more than 9 hours. In the same source, employee referrals and listings on the Internet were cited as the two most popular recruiting methods. In addition, reductions in employee turnover rates may result in lower net costs associated with hiring and turnover, as discussed below in an analysis of turnover and hiring costs. However, the Department accepts that hiring costs constitute a direct cost, rather than a transfer from employers to employees, and includes these costs in determining the impacts of the Final Rule.

Managerial Costs of Scheduling

NPDA and others argued that the NPRM underestimated the cost of regulatory familiarization and the managerial cost of scheduling complications due to overtime. The Department assumed industry would incur minimal regulatory familiarization costs because most of the affected firms already have employees covered by the FLSA. For example, the BLS National Employment Matrix data report for Home Health Care Services (62–1600) in 2010 includes over 200 occupations including nursing aides, therapists, and health practitioners who provide services other than companionship services to consumers in their homes.[46] Therefore, the Department believes most agencies will already be well acquainted with the minimum wage and overtime compensation requirements of the FLSA, and will only need to familiarize themselves with the regulations that apply to one distinct group of workers. The regulatory text is quite limited in scope and length, and because agencies are third party employers and will not be eligible to claim the exemption, the time required for familiarization will be quite limited. Furthermore, the Department expects that many firms will rely on guidance and educational materials from the Department and industry to familiarize themselves with changes to the rule. Similarly, the Department believes that most firms already employ staff entitled to overtime compensation and must therefore manage these workers accordingly. In the NPRM, the Department requested information on the incremental time and cost of managing workers subject to the FLSA's overtime compensation requirement, but none was provided. In the absence of new evidence, the Department did not change its estimate.

Overtime Scenarios

Industry groups such as IFA and NPDA, and private citizens such as Martin Hayes, Henri Chazaud, and Melina Cowan expressed concern over the Department's handling of overtime. These comments typically focused on two aspects of overtime. First, many agencies stated they would engage in at least some form of overtime management to avoid paying for overtime. Second, while overtime management would typically involve scheduling additional direct care workers, industry group criticism also appears to rely on the implicit assumption that using multiple direct care workers is often not a realistic alternative because of the need for continuity of care.

However, continuity of care does not necessarily require a single direct care worker, but rather can involve a small group of direct care workers intimately familiar with the consumer and his or her needs. In this way care will not be disrupted if one of those direct care workers is no longer willing or able to provide the needed services. Moreover, although consumers may prefer single direct care workers, with an industry turnover rate apparently exceeding 40 percent, it is likely that many consumers already receive care from more than one worker or a combination of direct care workers and family members when other workers are unavailable. As previously discussed, 24-hour care is not necessarily synonymous with having a live-in direct care worker. Assuming at least two direct care workers are currently used to provide 24-hour care, 7 days per week, adding a third direct care worker may allow effective management of overtime while introducing relatively little disruption to continuity of care. For example, if one of the three direct care workers can get from 5 to 8 hours of non-compensable sleep time per 24-hour period, hours entitled to overtime compensation might vary from zero to 15 hours per week, compared to 18 to 46 overtime hours per week with two direct care workers.[47] Modifying work patterns to increase the number of direct care workers (and therefore reduce the need for overtime compensation) does not preclude the industry from offering consumers the option to pay a higher rate in return for fewer direct care workers.

Survey results submitted by the NAHC[48] distinguished whether respondents are currently required to pay overtime, i.e., are located in ''overtime states.'' These reports provide some support for the position that the rule will not be as onerous to the private pay market as claimed. For example, 15 to 20 percent of agencies that responded to the industry's surveys that operate in non-overtime states already pay overtime voluntarily. Moreover, firms operating in overtime and non-overtime states already have very similar characteristics. Firms operating in states requiring overtime compensation not only have a similar percentage of consumers receiving 24-hour care as firms operating in states without overtime compensation requirements, but actually have higher rates of overtime worked per employee than firms that do not have to pay the overtime wage differential.

In addition, firms in states without a state overtime compensation requirement anticipate considerably worse impacts than those actually experienced by firms in states with a state overtime compensation requirement. It is possible that state-specific conditions might result in different impacts in the states that have not yet implemented overtime compensation requirements than in those states that have already implemented such requirements. However, the 15 percent of survey respondents that voluntarily pay overtime compensation reported

[46] BLS National Employment Matrix, Home Health Care Services (62–1600) 2010. Available at: *http://www.bls.gov/emp/ep_table_109.htm*.

[47] With two direct care workers, one working three 24-hour shifts a week and the other working four 24-hour shifts a week, weekly overtime ranges from 18 to 46 hours. Each day, 24-hours are spent on site but between 6 and 10 hours are not compensated (for bona fide sleep and meal periods), resulting in between 14 and 18 hours worked per day. For the worker employed three days, weekly hours are between 42 and 54 hours. The worker employed four days a week works between 56 and 72 hours. Overtime ranges from 18 ((42 − 40) +(56 − 40)) to 46 hours ((54 − 40) + (72 − 40)). With three direct care workers, each works two 24-hour shifts a week, and two of the three split the remaining day into two 12-hour shifts. This results in one direct care worker being on site 48 hours a week, but once sleeping and eating time is deducted (between 12 and 20 hours) this worker is paid for between 28 and 36 hours per week, resulting in no overtime. The other two workers have the same schedule, plus one 12-hour shift. Shifts less than 24 hours are not entitled to deducted sleep time, but 0.5–1 hour is assumed to be deducted for meal breaks. Therefore, these two workers will work between 39 and 47.5 hours a week, resulting in between no overtime and 15 hours of overtime per week.

[48] WHD–2011–0003–9496.

impacts similar to those reported by agencies that were required to pay overtime. For example, 86 percent of firms in non-overtime states report they intend to limit overtime, but only 62 percent of firms in overtime states and 60 percent of voluntary overtime compensation payers found it necessary to do so. Likewise, 76 percent of firms in non-overtime states anticipate a significant increase in cost due to overtime requirements, but only 40 percent of firms in states that already require overtime compensation, and 34 percent of voluntary payers reported experiencing a significant increase in cost. Unfortunately, the term ''significant increase'' is not defined in the survey and therefore this experience cannot be used for projecting costs and impacts.

Empirical research has also found that employers are likely to respond to mandated overtime premiums by making adjustments so as to not absorb the entire cost of overtime.[49] For example, similar to the NAHC survey, the IFA survey found 95 percent of respondents in states where there are no overtime regulations stated they would eliminate all scheduled overtime hours, while two percent said they would reduce overtime hours and three percent said they would make no changes to current scheduling.[50] In view of the research, employer comments and industry survey evidence, the Department believes employers responding to the Final Rule changes by paying for 100 percent or 0 percent of overtime are highly unlikely scenarios. Therefore, in the Final Rule the Department adjusted OT Scenario 1 to reflect 60 percent of overtime paid, OT Scenario 2 to reflect 40 percent of overtime paid, and OT Scenario 3 to reflect 10 percent of overtime paid. The latter two scenarios represent the more aggressive responses to the rule indicated in the industry surveys and comments. Based on the combination of two industry surveys, empirical research, and employer comments, the Department believes that OT Scenario 2 reflects the most likely impacts of the Final Rule, and therefore focuses on the results of that scenario in the following analysis.

Travel Time Compensation

Several industry groups, including IFA and PDHCA, expressed concern over the method used to estimate travel time between consumers, which under the revised rule must be compensated. The Department based its ratio of travel time compensation to overtime compensation on New York City's amicus brief for the U.S. Supreme Court case, *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158 (2007). The Department received criticism that this ratio (travel time compensation as 19.2 percent of total overtime compensation) underestimated the true cost of travel time compensation. The estimate relies on New York City data and, therefore, the geographic scope is limited; travel time compensation may be higher in other locations, such as remote rural areas. Additionally, since travel time compensation is proportional to estimated overtime compensation, the reliability of this estimate is dependent upon accurately estimated overtime compensation.

Although the Department requested additional data on travel time, commenters did not provide alternative methods or data to estimate travel time. The Department considered alternative sources, most notably the National Home Health Aid Survey (NHHAS).[51] The NHHAS is a nationally representative survey of agency-employed home health aides who assist with ADLs. The NHHAS reports travel time for the last day worked; however, attempts to estimate weekly and annual travel time from these data suffer from several limitations. These limitations include evident reporting error (such as reporting travel time between consumers when the respondent cares for a single consumer) and the lack of some data necessary to estimate cost (such as days worked per week). Due to lack of confidence in its estimate of travel time from NHHAS data and a lack of alternative data sources, the Department continues to rely on the ratio provided by New York City in its amicus brief for the Final Rule analysis. Moreover, although the Department revised the overtime scenarios for the Final Rule, the Department continues to project travel time based on the proposed rule's overtime scenario in which agencies compensate 100 percent of all overtime hours. Thus, travel time estimates in the Final Rule are conservative estimates which significantly overestimate the cost of travel time.

[49] Barkume, Anthony. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs, *Industrial and Labor Relations Review,* 64(1), pp. 128–142.

[50] The IFA survey does not compare anticipated business responses in states without current overtime regulations with actual business responses in states with current overtime regulations. However, other responses provided in the IFA survey (WHD–2011–0003–8952) show similar patterns to the NAHC survey. First, respondents in states that require overtime do not differ substantially from those in states without such requirements in terms of customers receiving live-in care, customers receiving more than 40 hours of care per week, and average overtime worked per week by employees. Second, among respondents in states without current overtime regulations, 18 percent already pay overtime premiums and 50 percent already pay travel time voluntarily. Third, other questions demonstrate considerable inconsistencies in their responses. For example, many respondents anticipate raising the rates charged to their customers; on average, the reported rate increases would be an amount in excess of that needed to offset the cost of any overtime pay incurred. However, if 95 percent of firms are eliminating all overtime, there will be little reason to increase fees. Thus, although the Department agrees that employers will likely respond so as not to absorb the entire cost of overtime, industry survey responses concerning the anticipated magnitude of this affect cannot be accepted at face value.

[51] United States Department of Health and Human Services. Centers for Disease Control and Prevention. National Center for Health Statistics. National Home Health Care Survey, 2007.

Summary of Impacts

Table 1 illustrates the potential scale of projected costs, transfer effects and other impacts of the revisions to the FLSA regulations implementing the companionship services exemption. The Department projects that the average annualized direct costs of the rule will total about $6.2 to $6.8 million per year over 10 years (depending on how firms handle overtime and additional hiring).[52] In addition to the direct cost to employers of the rule, there are also transfer effects resulting from the rule. The primary impacts shown in Table 1 are income transfers to direct care workers in the form of: Compensation for time spent traveling between consumers (average annualized value of $104.3 million per year); and payment of an overtime premium when hours worked exceed 40 hours per week. Because overtime compensation depends on how employers adjust scheduling to eliminate or reduce overtime hours, the Department considered three adjustment scenarios resulting in payment of: 60 percent of current overtime hours worked (OT Scenario 1, with an average annualized value of $326.3 million per year); 40 percent of current overtime hours worked (OT Scenario 2, with an average annualized value of $217.5 million per year); and 10 percent of current overtime hours worked (OT Scenario 3, with an average annualized value of $54.4 million per year).[53] As discussed in the previous section, this represents a change from the overtime scenarios in the NPRM, which used payment of 100 percent, 50 percent, and 0 percent to represent possible adjustments. The Department revised these scenarios in response to the many comments, including comments from International Franchise Education Association, NPDA and private citizens, indicating agencies would respond to the rule by eliminating overtime from direct care worker schedules. While 100 percent payment of overtime remains a theoretical upper bound estimate, it is so unlikely that it loses validity in representing projections of how the market might adjust and the costs it might incur. Therefore, the Department selected payment of 60 percent of current overtime hours to represent the upper bound of overtime compensation (OT Scenario 1). Similarly, it would be more costly for agencies to completely eliminate overtime than pay at least some overtime when unavoidable, such as when the cost of hiring a new worker might exceed the cost of paying overtime. In addition, comments on the NPRM, such as the survey results submitted by NAHC, indicated some agencies already pay overtime in states with no overtime requirements. Thus, no overtime compensation seemed equally unlikely to occur, and the Department now uses OT Scenario 3, in which agencies pay 10 percent of baseline overtime, for its lower bound overtime cost scenario.

Although the transfer of income to workers in the form of higher wages is not considered a cost of the rule from a societal perspective, higher wages do increase the cost of providing home care services, potentially resulting in the provision of fewer services. This potential reduction in the provision of services may cause market inefficiency if it raises marginal labor costs and if we consider the current labor market to be in a competitive equilibrium, and this allocative inefficiency is a cost from a societal perspective. On the other hand, marginal labor cost may rise by less than the amount of the wage change because higher wages for workers may result in lower turnover rates and reduced recruitment and training costs for firms. With a 7 percent real rate, the Department measures the range of average annualized deadweight loss attributable to this allocative inefficiency as $177,000 when 60 percent overtime compensation adjustment is assumed, $99,000 when 40 percent overtime compensation adjustment is assumed and $24,000 when a 10 percent adjustment in overtime compensation is assumed. In perspective, the deadweight loss represents approximately 0.0001 percent of industry revenue with an associated disemployment impact of 0.06 percent of workers under OT Scenario 2. The relatively small deadweight loss occurs because both the demand for and supply of home care services appear to be inelastic in the largest component of this market, in which public payers reimburse home care; thus, the equilibrium quantity of home care services is not very responsive to changes in price. Average annualized benefits from reduced turnover range from $10.1 million per year under OT Scenario 3 to $34.1 million per year under OT Scenario 1, with average annualized net benefits ranging from $3.9 million per year (Scenario 3) to $27.3 million per year (Scenario 1). Under OT Scenario 2, which the Department believes to be the most likely outcome, average annualized benefits total $23.9 million per year with average annualized net benefits of $17.1 million per year.

[52] As will be explained in further detail, the Department examined three scenarios on how firms adjust overtime hours worked in response to the overtime compensation premium requirement; within each of these overtime scenarios, we consider three benchmarks for reallocating overtime hours between new hires and current part time workers, for a total of 9 combinations of overtime and hiring decisions. However, to simplify the presentation, we include only three combinations of overtime adjustment and new hiring in the tables; these are: OT Scenario 1: 60 percent of current overtime hours are paid the overtime premium, and of the remaining 40 percent of overtime hours, 30 percent are allocated to new hires while 70 percent are redistributed to current part-time employees; OT Scenario 2: 40 percent of current overtime hours are paid the overtime premium, and of the remaining 60 percent of overtime hours, 20 percent are allocated to new hires while 80 percent are redistributed to current part-time employees; OT Scenario 3: 10 percent of current overtime hours are paid the overtime premium, and of the remaining 90 percent of overtime hours, 10 percent are allocated to new hires and 90 percent redistributed to current part-time employees. Under this combination of overtime and hiring decisions, OT Scenarios 1 and 2 incur the same hiring costs in year 1 as shown in Table 1.

[53] Estimated total overtime hours, and therefore total overtime wage premiums, are larger for the Final Rule than for the proposed rule. This results from four factors. First, the Department increased its estimate of average overtime worked for that fraction of direct care workers who work overtime (we now estimate 12 percent of workers average 8.8 hours of overtime per week instead of 6.3 hours per week as in the proposed rule). Second, the Department determined that 26,000 of California's agency-employed direct care workers that were considered entitled to overtime under the proposed rule are not, in fact, entitled to overtime compensation under state law. Third, the 380,000 direct care workers in California's In-Home Supportive Services (IHSS) program are also not generally entitled to overtime compensation; 50,000 of these workers routinely exceed 40 hours per week. Finally, 30,000 direct care workers considered jointly employed by the state of Illinois and the consumer are not currently entitled to overtime compensation. The total number of all overtime hours being worked by workers without overtime coverage is estimated to be 73.5 million hours. Thus estimated overtime costs increased substantially due to both an increase in the estimated number of overtime hours worked, and an increase in the number of those who work overtime.

TABLE 1—SUMMARY OF IMPACT OF CHANGES TO FLSA COMPANIONSHIP SERVICES EXEMPTION

	Year 1 ($ mil.)	Future years ($ mil.) [a]		Average annualized value ($ mil.)	
		Year 2	Year 10	3% Real rate	7% Real rate
Costs [i]					
Regulatory Familiarization:					
Agencies	$6.9	$0.6	$0.6	$1.3	$1.4
Families Hiring Self-Employed Workers	$5.4	$2.8	$3.6	$3.4	$3.5
Hiring Costs [b]:					
30% OT remaining in OT 1	$8.4	$0.8	$0.8	$1.6	$1.8
20% OT remaining in OT 2	$8.4	$0.8	$0.8	$1.6	$1.8
10% OT remaining in OT 3	$6.3	$0.6	$0.6	$1.2	$1.3
Total costs (30% of OT 1)	$20.6	$4.2	$5.0	$6.4	$6.7
Total costs (20% of OT 2)	$20.6	$4.2	$5.0	$6.4	$6.7
Total costs (10% of OT 3)	$18.6	$4.0	$4.8	$6.0	$6.2
Transfers					
Minimum Wages (MW) [c]:					
to Agency-Employed Workers	$0.0	$0.0	$0.0	$0.0	$0.0
to Self-Employed Workers	$0.0	$0.0	$0.0	$0.0	$0.0
Travel Wages	$68.1	$78.1	$151.8	$107.1	$104.3
Overtime Scenarios:					
OT 1 [d]	$213.2	$244.2	$474.8	$335.2	$326.3
OT 2 [e]	$142.1	$162.8	$316.5	$223.5	$217.5
OT 3 [f]	$35.5	$40.7	$79.1	$55.9	$54.4
Total Transfers by Scenario					
MW + Travel + OT 1	$281.3	$322.3	$626.5	$442.3	$430.5
MW + Travel + OT 2	$210.2	$240.9	$468.3	$330.6	$321.8
MW + Travel + OT 3	$103.7	$118.8	$230.9	$163.0	$158.7
Deadweight Loss ($ millions)					
MW + Travel + OT 1	$0.116	$0.132	$0.257	$0.182	$0.177
MW + Travel + OT 2	$0.065	$0.074	$0.144	$0.101	$0.099
MW + Travel + OT 3	$0.016	$0.018	$0.035	$0.025	$0.024
Total Cost of Regulations [g]					
RF + HC + DWL(OT 1)	$20.8	$4.3	$5.2	$6.6	$6.8
RF + HC + DWL(OT 2)	$20.7	$4.2	$5.1	$6.5	$6.8
RF + HC + DWL(OT 3)	$18.6	$4.0	$4.8	$6.0	$6.2
Disemployment (number of workers)					
MW + Travel + OT 1	1,086	1,184	1,976	1,531	([h])
MW + Travel + OT 2	812	885	1,477	1,144	([h])
MW + Travel + OT 3	400	436	728	564	([h])
Benefits from Reduced Turnover [b g]					
OT 1	$40.3	$34.9	$30.9	$33.8	$34.1
OT 2	$30.2	$24.7	$20.7	$23.6	$23.9
OT 3	$14.9	$10.7	$7.7	$9.9	$10.1
Net Benefits [g]					
OT 1	$19.6	$30.6	$25.7	$27.3	$27.3
OT 2	$9.4	$20.5	$15.5	$17.1	$17.1
OT 3	−$3.7	$6.7	$2.9	$3.9	$3.9

[a] These costs represent a range over the nine-year span. Costs are lowest in Year 2 and highest in Year 10 so these two values are reported.

[b] We use three scenarios under which agencies redistribute overtime hours to either current part-time workers or new hires to manage overtime costs: 40 percent of overtime hours are redistributed under OT Scenario 1, 60 percent under OT Scenario 2, and 90 percent under OT Scenario 3. Of this redistributed overtime, various percentages are redistributed to part-time workers and new hires: New hires constitute 30 percent of redistributed hours under OT Scenario 1 (12 percent of total overtime), 20 percent under OT Scenario 2 (12 percent of total), and 10 percent under OT Scenario 3 (9 percent of total).

[c] 2011 statistics on HHA and PCA wages indicate that few workers, if any, are currently paid below minimum wage (i.e., in no state is the 10th percentile wage below $7.25 per hour). See the BLS Occupational Employment Statistics, 2011 state estimates. Available at: *http://stats.bls.gov/oes/.*

[d] Of the total, about 31 percent (e.g., $66.6 million in Year 1) is attributable to IHSS direct care workers; 30 percent of IHSS costs (e.g., $20.0 million in Year 1) are included in the turnover and deadweight loss analyses.

[e] Of the total, about 31 percent (e.g., $44.4 million in Year 1) is attributable to IHSS direct care workers; 30 percent of IHSS costs (e.g., $13.3 million in Year 1) are included in the turnover and deadweight loss analyses.
[f] Of the total, about 31 percent (e.g., $11.1 million in Year 1) is attributable to IHSS direct care workers; 30 percent of IHSS costs (e.g., $3.3 million in Year 1) are included in the turnover and deadweight loss analyses.
[g] Results based on the combination of overtime scenario and hiring costs presented under Hiring Costs.
[h] Annual average.
[i] Excludes paperwork burden, estimated in Section V.

Note that there are additional impacts that are not presented in this table because they could not be quantified; these include impacts such as the opportunity cost of managerial time to optimize worker schedules to reduce or avoid overtime hours or reduce travel time. The Department also acknowledges the potential costs to direct care workers who may receive fewer hours from their home care agency employers and therefore will have to search for and coordinate multiple jobs for an increased number of consumers. The Department anticipates that these impacts will likely in the long run be small compared to the impacts presented in Table 1. First, most impacted employers already employ workers subject to the FLSA and are familiar with scheduling such workers. Second, high industry turnover rates suggest that agencies frequently have openings and are looking to hire new workers. Furthermore, if most agencies respond to the rule by reducing overtime hours worked by current employees and hiring additional employees to work those hours, the number of job openings can be expected to increase. Thus, the Department expects direct care workers who lose hours at one agency will readily be able to find an opening at another agency. Likewise, the Department has not attempted to quantify potential benefits such as decreased injury rates, or transfers such as the change in reliance on public assistance.

Also not captured in Table 1 are the special circumstances surrounding entities that administer Medicaid-funded or other publicly funded programs that would, under the Final Rule, be subject to the provisions relating to third-party employers because they qualify as employers under the FLSA's economic realities test (as described in the section of this preamble discussing joint employment). For example, in the short run, continuation of direct care workers' current work schedules that exceed 40 hours per week may be infeasible for such entities, thus potentially resulting in reduced continuity of care for high-needs consumers. Other effects may also result from this Final Rule. Such consequences may be avoidable in the long run if Medicaid and other relevant programs adapt to allow overtime billing. Further, as discussed elsewhere in this preamble, long-term continuity of care may improve as a result of this Final Rule due to both decreased turnover rates and reduced disruption, because another worker already familiar to the consumer is available as a substitute when the primary direct care worker is temporarily unavailable.

Regulatory Alternatives

The Department believes it has chosen the most effective option that updates and clarifies the Application of the Fair Labor Standards Act to Domestic Service Final Rule. Based on the commenters' suggestions, among the options considered by the Department but not described in the NPRM, the least restrictive option was taking no regulatory action. A more restrictive option was to add to the provisions being finalized a limit on the personal care services that can be performed. NELP and the National Council on Aging among others suggested that the Department require an initial assessment be conducted to determine if a direct care worker is performing primarily fellowship and protection for the consumer. They suggested that if it is found that the direct care worker is not engaged primarily in fellowship and protection, then the subsequent list of personal care services should not be considered at all and the worker should not be considered exempt. The National Council on Aging further expressed the view that toileting, bathing, driving, and tasks involving positioning and/or transfers be excluded from the list of permissible duties. ANCOR suggested that the list be made exclusive and include fewer tasks. The commenter added that the Department should consider providing an allowance for household work defined as no more than one hour in a seven day period. AFSCME expressed the view that those workers who regularly engage in mobility tasks should not be considered companions. The Department carefully considered such views in the development of this Final Rule. The Department ultimately settled on a broader set of permissible care services than initially proposed as well as less restrictive than options suggested by some of these commenters. The Department views inclusion of assistance with activities of daily living and instrumental activities of daily living as a balanced approach that allows for some delivery of care services by the direct care worker under the companionship services exemption while at the same time recognizing and making an effort to address the health and safety concerns of direct care workers and consumers. Taking no regulatory action does not address the Department's concerns discussed above under Need for Regulation. The Department found the most restrictive option to be overly burdensome on business.

Pursuant to the OMB Circular A–4, the Department considered several other approaches to accomplish the objectives of the rule and minimize the economic impact on home care entities and other employers, including those suggested in comments on the NPRM as well as more traditional approaches.

Many commenters indicated a concern with the cost of overtime compensation and less of a concern with the FLSA's minimum wage provision. *See e.g.,* Henry Chazuad, ANCOR. One suggested alternative was to maintain the exemption from overtime compensation for third party employers of live-in workers, consistent with the laws in at least three states (Michigan, Nevada, and Washington). The Department recognizes that this approach would represent incremental progress towards narrowing the exemption for this set of workers and result in a very small economic impact on the industry from the Final Rule. However, the Department believes this approach is inconsistent with Congress's intent to provide FLSA protections to domestic service workers, while providing a narrow exemption for live-in domestic service workers. It is apparent from the legislative history that the 1974 amendments were intended to expand coverage to include more workers, and were not intended to roll back coverage for employees of third parties who already had FLSA protections as employees of covered enterprises. Moreover, this approach does not support the objectives of the rule or the purposes of the overtime requirements of the FLSA, one of which is to spread employment.

Another alternative suggested was to allow employers to exclude some nighttime hours from ''hours worked'' to

reduce the potential burden of overtime compensation to workers providing care on higher hour cases (12- or 24-hour shifts). For example, Minnesota and North Dakota state laws exclude up to eight hours from the overnight hours (from 10:00 p.m. to 9:00 a.m.) from the ''hours worked'' for purposes of minimum wage and overtime calculations. This Final Rule does not include revisions to the longstanding regulations applicable to all FLSA-covered employers addressing when sleep time constitutes hours worked and when sleep time may be excluded from hours worked. Therefore, employers still have the opportunity to exclude bona fide sleep hours; however, there would be no basis under the FLSA for treating sleep time hours differently for domestic service workers than for other employees. The Department's existing regulations already provide for the exclusion of sleep time from compensable hours worked under certain conditions. As previously discussed in the Hours Worked section of this preamble, under the Department's existing regulations, an employee who is required to be on duty for less than 24 hours is working even though he or she is permitted to sleep or engage in other personal activities when not busy. *See* § 785.21. Where an employee is required to be on duty for 24 hours or more, the employer and employee may agree to exclude a bona fide meal period or a bona fide regularly scheduled sleeping period of not more than eight hours from the employee's hours worked under certain conditions. *See* § 785.22. The conditions for the exclusion of such a sleeping period from hours worked are (1) that adequate sleeping facilities are furnished by the employer, and (2) that the employee's time spent sleeping is usually uninterrupted. When an employee must return to duty during a sleeping period, the length of the interruption must be counted as hours worked. If the interruptions are so frequent that the employee cannot get at least five hours of sleep during the scheduled sleeping period, the entire period must be counted as hours worked. *Id.; see also* Wage and Hour Opinion Letter, 1999 WL 1002352 (Jan. 7, 1999). Where no expressed or implied agreement exists between the employer and employee, the eight hours of sleeping time constitute compensable hours worked. This description of these longstanding rules in the Final Rule's preamble is provided to help to educate small business employers regarding their ability to exclude sleep time from hours worked. *See* § 785.22. However, because there would be no basis under the FLSA for treating sleep time hours differently for domestic service workers than for other employees, the commenters' suggestion was not adopted.

Another approach suggested would be to calculate overtime compensation based on a different rate of pay than straight time; for example, under New York state law overtime hours are paid at one and a half times the minimum wage rather than the worker's regular rate of pay for some workers. Again, there is no legal basis in the FLSA for calculating overtime compensation at a rate other than one-and-one-half times the employee's regular rate of pay. Moreover, the Department does not believe that this supports the objective of the rule or the spread of employment under the Act. In terms of economic burden, this alternative could reduce the cost to employers of overtime by approximately 25 percent under OT Scenario 2; however, 15 states currently require payment of overtime at time and a half of regular pay with no evidence of significant economic burden. Quoting the Michigan Olmstead Coalition ''we have seen no evidence that access to or the quality of home care services are diminished by the extension of minimum wage and overtime protection to home care aides in this state almost six years ago.''

Another alternative discussed by commenters is to exclude travel time from hours worked in order to decrease the burden of overtime compensation. However, the comments provided little justification for a departure from the general FLSA principles applicable to all employers on the compensability of travel time set forth in 29 CFR 785.33-.41. Excluding travel time that is ''all in the day's work'' from compensable hours worked, for example, would be inconsistent with the Portal-to-Portal Act amendment to the FLSA and inconsistent with how such travel time is treated for all other employees. §§ 785.38; 790.6. Furthermore, the analysis above suggests that travel time adds a relatively small amount to the burden of this rulemaking.

The Department also considered several traditional alternatives. Those alternatives include:

- Informational measures rather than regulation. The Department has made a variety of informational and educational assistance materials related to this Final Rule available on its Web site and will add to those materials during the period in which employers are reviewing and revising their policies and practices to come into compliance with this Final Rule. In addition, WHD offices throughout the country are available to provide compliance assistance at no charge to employers. The Department has planned robust outreach efforts and will make every effort to work with employers to ensure compliance.
- Differing requirements based on size of firm or geographic region. The FLSA sets a floor below which employers may not pay their employees. To establish differing compliance requirements for businesses based on size or geographic location would undermine this important purpose of the FLSA. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore the Department declines to establish differing compliance requirements based on the size or location of a business.
- Use of performance rather than design standards. Under the Final Rule, the employer may achieve compliance through a variety of means. The employer may: hire additional workers and/or spread employment over the employer's existing workforce to ensure employees do not work more than 40 hours in a workweek, and/or pay employees time and one-half for time worked over 40 hours in a workweek. In addition, the FLSA recordkeeping provisions require no particular order or form of records to be maintained so employers may create and maintain records in the manner best fitting their situation. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.
- Compliance periods of various lengths. The Department has set an effective date for this Final Rule of January 1, 2015. The Department believes this delayed effect date takes into account the complex federal and state systems that are a significant source of funding for home care work, and the needs of the diverse parties affected by this Final Rule (including consumers, their families, home care agencies, direct care workers, and local, state, and federal Medicaid programs) by providing such parties, programs and systems time to adjust. The Department considered application of a 60-day delayed effective date, the minimum legally permitted effective date for a major rule (Congressional Review Act, 8 U.S.C. 801(a)(3)). A 60-day delayed effective date would most expeditiously extend the FLSA's protections to workers affected by this rule; however, the Department was concerned that such an effective date would not be sufficient for Federal, state, and local agencies, as well as private entities, to implement new protocols, apply for

changes to their Medicaid programs, adjust funding streams, and legislatively address budgetary and programmatic changes. The Department also considered a delayed effective date of two years. While a two-year delayed effective date would, in the Department's view, provide more than ample time for Federal, state, and local entities to complete any necessary programmatic changes, the workforce affected by this rule would continue to be without the wage protections available to most other workers, contributing to high turnover rates which negatively impact continuity of care. The Department believes that the January 1, 2015 effective date for this rule appropriately balances the needs of workers and the consumers utilizing their services.

B. State Law Requirements

There are numerous state laws pertaining to direct care workers; as the industry has grown and expanded over the past 38 years the laws have increased in number and complexity to match the demands placed on workers. The State Medicaid Manual requires states to develop qualifications or requirements (such as background checks, training, age, supervision, health, literacy, or education, or other requirements) for Medicaid-financed personal care attendants. These state programs can each have multiple delivery models, including agency-directed or consumer-directed with care given by agencies or independent providers. These delivery models are not necessarily mutually exclusive. In general, for the purposes of this analysis, we refer to independent providers as workers who are hired directly by the consumer, and therefore they are not counted in the statistics on home care providers used as the basis for this analysis, with the exception of independent providers who advertise their availability through state registries.

When Congress created the companionship services exemption in 1974, a ''companion'' was likely to be a family member or friend with the time for and interest in providing support to an elderly family member or friend or a family member or friend with a disability. A direct care worker today must meet a more extensive and expanding set of criteria—such as background checks and training—to provide services in most states. A 2006 report by the HHS Office of the Inspector General (OIG) found that states have established multiple sets of worker requirements that often vary among the programs within a state and among the delivery models within programs, resulting in 301 sets of requirements nationwide.[54] Four of the consumer-directed programs in the OIG review had no attendant requirements.

Furthermore, states define these requirements differently, and specify different combinations of requirements in different programs. The most common requirements include: background checks; training; supervision; minimum age; health; education/literacy; and other, such as meeting state motor vehicle and licensure requirements if providing transportation.

The number of states that included each requirement in at least one program and the number of state program sets that include each requirement are summarized in Table 2.

TABLE 2—SIX MOST COMMON ATTENDANT REQUIREMENTS

Requirement	Number of States that utilized requirement in at least one program	Number of sets containing requirement (of 301 sets)
Background Checks	50	245
Training	46	227
Age	42	219
Supervision	43	198
Health	39	162
Education/Literacy	31	125

Source: DHSS OIG, 2006. p. 9.

States' laws also vary in whether they extend minimum wage and overtime provisions to direct care workers. In many states ''companions'' are not explicitly named in the regulations, but workers providing such services often fall under those regulations that apply to domestic service employees.

Fifteen states extend minimum wage to most, and overtime coverage to some, direct care workers who would otherwise be excluded under the current Federal regulations: Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. However, in some states certain types of these workers remain exempt, such as those employed directly by households or by non-profit organizations. In Illinois, 30,000 personal care and home health aide workers in the Home Services Program under the Illinois Department of Human Services do not receive overtime compensation. Additionally, New York's overtime law provides that workers who are exempt from the FLSA and employed by a third party agency need only be paid time and one-half the minimum wage (as opposed to time and one-half of the worker's regular wage).[55] Minnesota's overtime provision applies only after 48 hours of work.

Six states (Arizona, California, Nebraska, North Dakota, Ohio, and South Dakota) and the District of Columbia extend minimum wage, but not overtime, protection to direct care workers. There are again some exemptions for those workers employed directly by households or who live in the household. Per Wage Order 15 in California, some direct care workers in California receive overtime; others are exempt from overtime requirements as ''personal attendants'' based upon the duties they perform; all receive minimum wage.

Twenty-nine states do not include direct care workers in their minimum wage and overtime provisions: Alabama,

[54] U.S. Department of Health and Human Services (HHS) Office of the Inspector General (OIG). (2006). States' Requirements for Medicaid-Funded Personal Care Service Attendants, available at: *http://oig.hhs.gov/oei/reports/oei-07–05–00250.pdf.*

[55] Under the 2010 Domestic Workers Bill of Rights, most New York direct care workers employed directly by the household in which they work receive full time-and-a-half overtime protections. The law applies to third party employers if any household services, such as cleaning, are performed.

Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.[56]

Of the 21 states plus the District of Columbia that extend the minimum wage to at least some direct care workers, 12 have a state minimum wage that is higher than the current federal minimum wage of $7.25 an hour.[57] These state laws are summarized in Table 3.

TABLE 3—STATE MINIMUM WAGE AND OVERTIME COVERAGE OF NON-PUBLICLY EMPLOYED DIRECT CARE WORKERS

State	State minimum wage [a]	MW	OT	Neither	Analysis and citations [b]
AL				x	
AK	$7.75			x	
AZ	$7.80	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. No state overtime law. See Ariz. Rev. Stat. Ann. §§ 23–362, 23–363; see also Office of the Attorney General of the State of Arizona, Opinion No. I07–002 (Feb. 7, 2007).
AR	$6.25			x	
CA	$8.00	x			All companions as defined in the FLSA are entitled to minimum wage. Privately employed direct care workers who are classified as ''personal attendants'' employed by either ''a private householder or by any third party employer recognized in the healthcare industry to work in a private household'' and paid family caregivers are exempt from overtime requirements. Whether home care employees are exempt ''personal attendants'' is fact-specific and based upon the duties performed by the workers. Generally home care employees who are part of California's In-Home Supportive Services program are not entitled to overtime. Industrial Welfare Commission Order No. 15–2001; *see also* State of California, Department of Industrial Relations, Opinion Ltr. ''Interpretation of IWC Wage Order 15: Definition of 'personal attendant' '' (Nov. 23, 2005).
CO	$7.78	x	x		Minimum wage and overtime coverage for third party-employed direct care workers who do work beyond Colorado's definition of ''companion.'' Colorado's definition of ''companion'' is much narrower than the FLSA definition. Companions may not help to bathe and dress the person, do any amount of housekeeping, or remind the person to take medication. People who do those tasks are more than just ''companions'' they are ''personal care'' attendants. Personal care attendants are entitled to minimum wage and overtime. However, PCAs employed directly by private households are exempt from minimum wage and overtime. Colorado Minimum Wage Order No. 26 § 5; 7 Colo. Code Regs. § 1103–1:5.
CT	$8.25			x	
DE	$7.25			x	
DC	$8.25	x			Minimum wage for companions as defined in the FLSA. D.C. Mun. Regs. tit. 7, § 902.1, 902.3, 902.4 (West 2011).
FL	$7.79			x	
GA	$5.15			x	
HI	$7.25	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for those employed directly by private households. Haw. Rev. Stat. § 387–1.
ID	$7.25			x	
IL	$8.25	x	x		Minimum wage and overtime coverage for any person whose primary duty is to be a companion for individual(s) who are aged or infirm or workers whose primary duty is to perform health care services in or about a private home. The 30,000 personal care and home health aide workers in the Home Services Program under the Illinois Department of Human Services do not receive overtime compensation. Those employed solely by private households may be exempt under a general exemption for employers with fewer than four employees. 820 Ill. Comp. Stat. § 105/3(d); Ill. Adm. Code § 210.110.
IN	$7.25			x	
IA	$7.25			x	
KS	$7.25			x	
KY	$7.25			x	
LA				x	
ME	$7.50	x	x		Minimum wage and overtime coverage for all companions as defined in the FLSA. No relevant exemptions. Me. Rev. Stat. Ann. tit. 26, §§ 663, 664.

[56] National Employment Law Project (NELP). 2012. WHD–2011–0003–9452, Fair Pay for Home Care Workers, available at: *http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf?nocdn=1.*

[57] U.S. Department of Labor (DOL). 2013. Minimum Wage, available at: *http://www.dol.gov/whd/minwage/america.htm#Consolidated.*

TABLE 3—STATE MINIMUM WAGE AND OVERTIME COVERAGE OF NON-PUBLICLY EMPLOYED DIRECT CARE WORKERS—Continued

State	State minimum wage [a]	MW	OT	Neither	Analysis and citations [b]
MD	$7.25	x	x		Minimum wage coverage for all companions as defined in the FLSA. Overtime coverage for most direct care workers but exemption for workers employed by non-profit agencies that provide ''temporary at-home care services''. Md. Code Ann., Lab. & Empl. § 3–415.
MA	$8.00	x	x		Minimum wage and overtime coverage for all companions as defined in the FLSA. No relevant exemptions. Mass. Gen. Laws Ch. 151, § 1.
MI	$7.40	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for live-in workers. Mich. Comp. Laws § 408.394(2)(a). Exemption for workers employed solely by private household as a result of exemption for employer with fewer than two employees. Mich. Comp. Laws § 408.382(c).
MN	$6.15 or $5.25 for employers grossing under $625,000 per year.	x	x		Minimum wage and overtime coverage after 48 hours for all companions as defined in the FLSA, but nighttime hours where companion is available to provide services but does not actually do so need not be compensated. Minn. Stat. § 177.23(11).
MS				x	
MO	$7.35			x	
MT	$7.80	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for those employed directly by private households. Mont. Code. Ann. § 39–3–406(p).
NE	$7.25	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. No state overtime law. De facto exemption for most households as a result of general exemption for employers with fewer than four employees. Neb. Rev. Stat. §§ 48–1202, 48–1203.
NV	$8.25 [c]	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for live-in workers. Also, business enterprises with less than $250,000 annually in gross sales volume need not pay overtime. Nev. Rev. Stat. § 608.250(2)(b).
NH	$7.25			x	
NJ	$7.25	x	x		Minimum wage and overtime coverage for all companions as defined in the FLSA. No relevant exemptions. N.J. Stat. Ann.§ 34:11–56a et seq.
NM	$7.50			x	
NY	$7.25	x	x		Minimum wage coverage for all companions as defined in the FLSA. N.Y. Labor Law § 651(5). There is overtime coverage for all companions but those employed by third party agencies receive overtime at a reduced rate of 150% of the minimum wage (rather than the usual 150% of their regular rate of pay). N.Y. Labor Law §§ 2(16), 170; N.Y. Comp. Codes R. & Regs. tit. 12, § 142–2.2. Overtime coverage for live-in workers after 44 hours/week (rather than the usual 40 hours) at the same rates detailed above. *Id.*
NC	$7.25			x	
ND	$7.25	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. However, companions who are certain first or second-degree relatives of the person receiving care do not receive minimum wage. Additionally, nighttime hours where companion is available to provide services but does not actually do so need not be compensated. N.D. Cent. Code § 34–06–03.1.
OH	$7.85	x			Minimum wage but not overtime coverage for companions as defined in the FLSA. Ohio Rev. Code Ann. § 4111.03(A), § 4111.14 (West 2011). Additional overtime exemptions for live-in workers. *Id.* § 4111.03(D)(3)(d).
OK	$7.25			x	
OR	$8.95			x	
PA	$7.25	x	x		Minimum wage and overtime coverage for companions as defined in the FLSA, but exemption for those employed solely by private households. Pa. Stat. Ann. tit. 43, § 333.105(a)(2). *Bayada Nurses* v. *Commonwealth of Pennsylvania,* 8 A.3d 866 (Pa. 2010).
RI	$7.75			x	
SC				x	
SD	$7.25	x			Minimum wage but no overtime coverage for companions as defined in the FLSA. No state overtime law. S.D. Codified Laws §§ 60–11–3, 60–11–5.
TN				x	
TX	$7.25			x	
UT	$7.25			x	
VT	$8.60			x	
VA	$7.25			x	

TABLE 3—STATE MINIMUM WAGE AND OVERTIME COVERAGE OF NON-PUBLICLY EMPLOYED DIRECT CARE WORKERS—Continued

State	State minimum wage [a]	MW	OT	Neither	Analysis and citations [b]
WA	$9.19	x	x		Washington minimum wage and overtime coverage for most companions as defined in the FLSA, but exemption for live-in workers. Wash. Rev. Code § 49.46.010(5)(j).
WV	$7.25			x	
WI	$7.25	x	x		Minimum wage and overtime coverage for most companions as defined in the FLSA, but overtime exemption for those employed directly by private households, Wis. Admin. Code § 274.015, and those employed by non-profit organizations. Wis. Admin. Code §§ 274.015, 274.01. Companions who spend less than 15 hours a week on general household work and reside in the home of the employer are also exempt from minimum wage. Wis. Admin. Code § 272.06(2).
WY	$5.15			x	

Abbreviations: MW = Minimum Wage, OT = Overtime, FLSA = Fair Labor Standards Act.
Sources: [a] DOL, 2013; [b] NELP, 2011. [c] Nevada minimum wage is $7.25 per hour for employees to whom qualifying health benefits have been made available by the employer.

C. Data Sources

The primary data services used by the Department to estimate the number of workers, establishments, and customers likely to be impacted by the rule include:

2011 Bureau of Labor Statistics (BLS) Occupational Employment Survey, employment and wages by state for SOC codes 39–9021 (Personal Care Aides) and 31–1011 (Home Health Aides);
2011 BLS Quarterly Census of Employment and Wages, for NAICS 6216 and 62412;
2010 BLS National Employment Matrix;
2007 Statistics of U.S. Businesses, for NAICS 6216 and 62412; and
2007 Economic Census, by state for NAICS 6216 and 62412.

BLS does not have a separate Standard Occupational Classification (SOC) code for ''Companions;'' instead, workers who provide companionship services are often classified as Personal Care Aides (PCAs; SOC 39–9021). However, considerable overlap exists between the duties of PCAs and Home Health Aides (HHAs; SOC 31–1011). While HHAs are trained to provide more medicalized care (*e.g.,* wound care) than PCAs, they may also provide personal care services and assistance with ADLs.[58] The Seventh Circuit Court of Appeals has found home health aides to qualify for the companionship services exemption. *Cox* v. *Acme Health Servs, Inc.,* 55 F.3d 1304 (7th Cir. 1995). Therefore, the Department selected these two occupations to represent the universe of potentially affected direct care workers.

For the purposes of this analysis, the Department further assumed that all HHAs and PCAs included in the analysis currently are treated as exempt under the companionship services exemption, but that none of them will qualify for the companionship services exemption under this Final Rule. Making these assumptions is likely to result in an overestimate of the projected costs and other impacts of the rule. First, although the Department is able to make some adjustments to the data to better identify the potentially affected worker population (*e.g.,* including only HHAs and PCAs employed in states with no minimum wage and overtime compensation laws applicable to workers who provide companionship services to individuals in their homes rather than facilities and including only the percentage of HHAs and PCAs who likely work in private homes), it has insufficient data to determine how many direct care workers who are treated as exempt under the current companionship services exemption will qualify for exemption under the revised definition of companionship services. Because of this data limitation, and by assuming that 100 percent of HHAs and PCAs included in the analysis will no longer qualify for the exemption, the Department has overestimated the number of direct care workers who are currently not protected by the Act's minimum wage and overtime compensation provisions but who will receive these protections as a result of this rule.

An additional limitation of this set of data sources stems from the fact that the Department's best estimate of agency-employed direct care workers is based on the 2011 BLS Occupational Employment Statistics, and its best estimate of independent providers directly employed by families is based on the 2010 BLS National Employment Matrix. The Occupational Employment Statistics (OES) is employer based, and does not collect data from the self-employed. The National Employment Matrix (NEM) obtains estimates on the self-employed from the Current Population Survey. However, it is not possible to match the OES estimates by subtracting the estimated number of self-employed workers from the NEM. Because these two estimates cannot be completely reconciled, the Department uses each source as the best estimate for one segment of the labor market and acknowledges there is some inconsistency between the two. In practice, the effect of that inconsistency on the analysis is likely to be quite small. In addition, the Congressional Research Service performed an analysis of the potential number of workers affected by the NPRM solely using data from the Current Population Survey Annual Social and Economic Supplement that resulted in comparable estimates of the numbers of workers affected by the minimum wage and overtime provisions.[59]

D. Consumers and Demand for Services

Demand for home care services is anticipated to continue to grow in the next few decades with the aging of the ''baby boomer generation.'' According to PHI:

Nearly one out of four U.S. households provides care to a relative or friend aged 50 or older and about 15 percent of adults care for a seriously ill or disabled family member. Over the next two decades the population

[58] See *http://www.bls.gov/oes/current/oes399021.htm* and *http://www.bls.gov/oes/current/oes311011.htm;* most recently accessed May 18, 2013.

[59] Congressional Research Service. Memorandum dated March 2, 2012, titled ''The Fair Labor Standards Act: Proposed Changes to the Exemptions for Employees Who Provide Companionship Services and Live-In Domestic Workers,'' pgs. 11 and 13.WHD–2011–0003–7820.

over age 65 will grow to more than 70 million people [the U.S. population 65 years and older was estimated at 40 million in 2009 [60]]. Additionally, with significant increases in life expectancy and medical advances that allow individuals with chronic conditions to live longer, the demand for caregiving is expected to grow exponentially. The growth in the demand for in-home services is further amplified by an increasing preference for receiving supports and services in the home as opposed to institutional settings. This emphasis has been supported by the increased availability of publicly funded in-home services under Medicaid and Medicare as an alternative to traditional and increasingly costly institutional care.[61]

While many consumers of home care services are elderly, about two-fifths of those in need of these services are under 65 and include those with varying degrees of mental, physical, or developmental disabilities. This group of consumers is also anticipated to grow rapidly as more individuals opt for home-based care over institutional care.[62] It is estimated that the demand for direct care workers will grow to approximately 5.7 to 6.6 million workers in 2050, an increase in the current demand for workers of between 3.8 and 4.6 million (200 percent and 242 percent respectively).[63] The home care industry has grown significantly over the past decade and is projected to continue growing rapidly; for example:

The number of establishments in Home Health Care Services (HHCS) grew by 101 percent between 2001 and 2011; during that same period, the number of establishments in Services for the Elderly and Persons with Disabilities (SEPD) grew by 466 percent.[64]

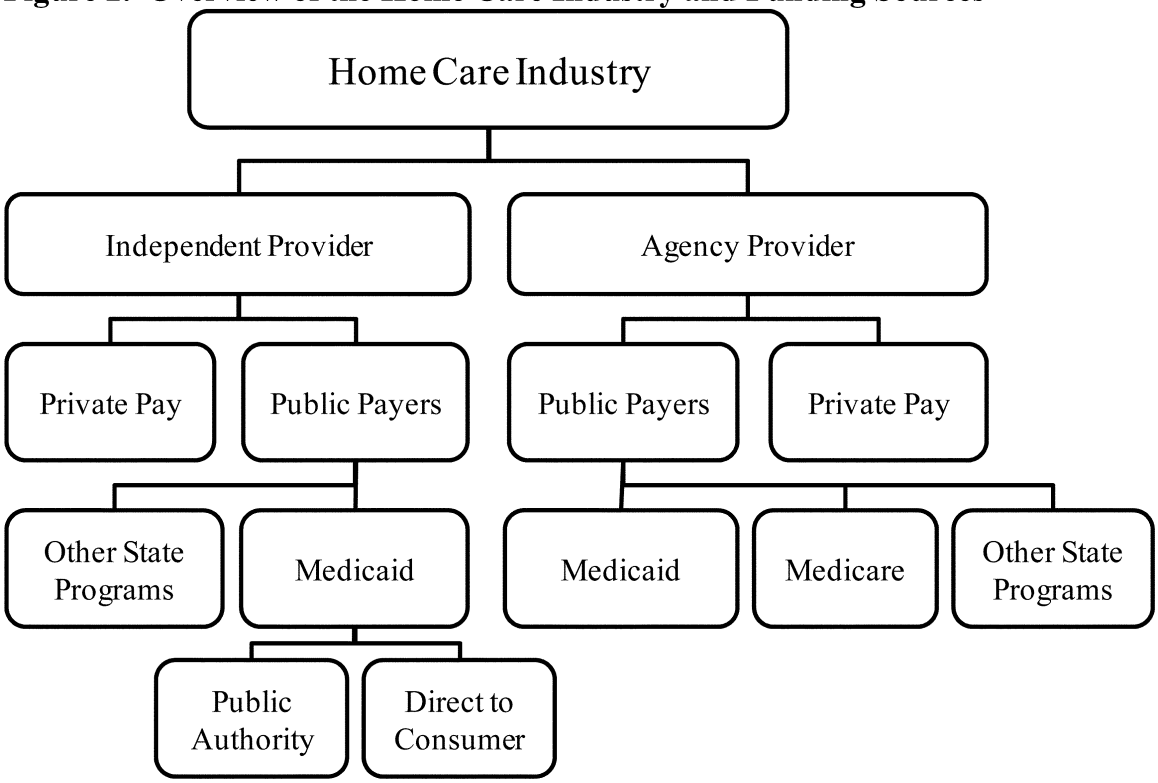
Between 2010 and 2020 the number of home health aides is projected to increase by 69 percent and the number of personal care aides by 70 percent.[65]

Employers

This section focuses on the employers of workers who are currently classified as exempt under the companionship services exemption and common sources of funding for the services they provide; the next section describes the workers and the work they do. Services in the home care industry are provided through two general delivery models: Agencies and consumer-directed (which often use independent providers and family caregivers).

Figure 2 provides a visual overview of the home care industry and the two primary models for service provision, which are discussed in more detail in the sections that follow.

Figure 2. Overview of the Home Care Industry and Funding Sources



Agency Model

Under the agency model a third party provider of home care services (usually a home health care company) employs the direct care workers and is responsible for ensuring that services authorized by a public program or contracted for by a private party are in

[60] 2011 Statistical Abstract, U.S. Census Bureau.

[61] National Alliance for Caregiving and the American Association of Retired Persons. (1997). Family Caregiving in the U.S.: Findings from a National Study. Available at: *http://assets.aarp.org/rgcenter/il/caregiving_97.pdf.* See also Center for Health Care Strategies, Inc. Medcaid-funded Long-term Care: Toward more Home- and Community-based Options. May 2010. Available at: *http://www.chcs.org/usr_doc/LTSS_Policy_Brief_.pdf.*

[62] PHI, 2003. The Personal Assistance Services and Direct-Support Workforce: A Literature Review. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/CMS_Lit_Rev_FINAL_6.12.03.pdf.*

[63] United States Department of Health and Human Services (2003). The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation: Report to Congress, p. v. Available at: *http://aspe.hhs.gov/daltcp/reports/ltcwork.pdf.*

[64] Bureau of Labor Statistics, U.S. Department of Labor, Quarterly Census of Employment and Wages (QCEW). NAICS 6216 and 62412. Available at *http://www.bls.gov/cew/.*

[65] Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2012–13 Edition, Home Health and Personal Care Aides. Available at: *http://www.bls.gov/ooh/healthcare/home-health-and-personal-care-aides.htm* (visited February 15, 2013).

fact delivered.[66] There are currently about 89,400 establishments providing these services. These establishments also provide a variety of other health-related services, in addition to or concurrently with companionship services. In the following paragraphs we describe the industry as a whole since detailed information by the service provided is not available.

Agencies providing home care services are covered by two primary industries: Home Health Care Services (HHCS, NAICS 6216), and Services for the Elderly and Persons with Disabilities (SEPD, NAICS 62412).[67] HHCS is dominated by for-profit agencies that are Medicare-certified and depend on public programs for three-quarters of its revenue.[68] SEPD is a rapidly growing industry that is dominated by small enterprises. Table 4 provides an overview of these two industries in terms of number of establishments and estimated revenues.

The services provided by HHCS and SEPD are paid for through either public programs such as Medicaid, Medicare, or state programs, or through private sources such as private health insurance or out-of-pocket payments. In 2009, public programs (Medicare, Medicaid, and other government spending) accounted for about 75 percent of the annual revenue dispersed to the home health care services industry.[69] [70] A review of funding sources by the CRS confirmed this finding but attributed a higher percentage of spending, 89 percent ($96.3 billion), to public payers (including Medicare, Medicaid, and other public programs such as the Veterans Health Administration and other state and local programs).[71] Due to data limitations we cannot identify funding sources for individual services provided (*e.g.,* companionship services only) and therefore the Department analyzes funding for the establishments as a whole.

TABLE 4—SUMMARY OF HHCS AND SEPD, 2011

Industry	Establishments	Estimated revenue ($ mil.)
SEPD + HHCS	89,400	90,800
SEPD	61,100	32,600
HHCS	28,300	58,000

Sources: BLS QCEW 2011; BLS NEM, 2010.

These two industries primarily employ workers as home health aides (HHAs) and personal care aides (PCAs) in addition to other occupations (e.g., nursing aides, orderlies, administrative personnel). However, not all of the HHAs and PCAs employed by these agencies perform companionship services as defined under the current exemption; these agencies provide a variety of health-related services that may be delivered in private homes (potentially companionship services) or in public or private facilities (not domestic service employment and therefore not companionship services). Additionally, the job duties of some HHAs and PCAs make them ineligible for the current companionship services exemption. Simply put, only a fraction of the workers employed by these establishments are currently performing companionship services and therefore may see changes in their wages and/or work schedules as a result of this Final Rule.

Within these two industries there are two broad employer types: Home health care companies and private pay home care companies. Home health care companies provide medically-oriented home health care services and non-medical home care or personal assistance services. Some of these agencies are Medicare-certified; those that avoid obtaining certification do so because they do not provide the skilled nursing care required by Medicare. These companies also derive a significant portion of their revenue from the provision of medical devices to customers.[72]

Private pay agencies are smaller, emerging employers that primarily provide non-medical care for consumers and typically earn a large percentage of their revenues from private sources (e.g. out-of-pocket, long-term health insurance).[73] Although some agencies characterized as private pay are Medicare-certified, many do not provide substantial skilled health care services but instead focus on paramedical services as well as support services such as personal care, homemaker services, and companionship services (as defined by the current regulations).[74] As of 2009, 28 states required private pay agencies to be licensed, but due to the variation in license requirements at least some of those agencies are likely to be Medicare-certified, or provide services to Medicaid beneficiaries, causing double-counting when identifying private pay agencies.[75] Based on a very limited sample, perhaps one-third of private pay agencies are not-for-profit.[76]

Private pay agencies comprise a small fraction of the total market. Some industry sources suggest the number of private pay agencies might range from 15,000 to 17,000, but admit it is difficult

[66] Seavey and Marquand, 2011, p. 26. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[67] These two industries are the primary employers of workers who currently perform companionship services; however, based on data reported by BLS in the National Employment Matrix there are approximately 33 other industries that also employ these workers. Since these other industries employ so few of the workers under consideration here, they will be minimally affected by this Final Rule.

[68] Seavey and Marquand, 2011, pgs 20–22. WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[69] Seavey and Marquand, 2011, pgs 22, 23. WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[70] Data is not available for the Services for the Elderly and Persons with Disabilities industry.

[71] The figures are based on CRS analysis of CMS National Health Expenditure Account data for 2009. Congressional Research Service. Memorandum dated February 21, 2012, titled ''Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair Labor Standards Act: Impact on Medicare and Medicaid,'' p. 4. WHD–2011–0003–5683.

[72] Seavey and Marquand, 2011, p. 15. WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[73] Seavey and Marquand, 2011, p. 18, WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[74] Seavey and Marquand, 2011, page 18. BLS data also support this: 2011, Employment and Wages from Occupational Employment Statistics (OES) survey, Multiple occupations for one industry: Home Health Care Services (NAICS code 621600) and Services for the Elderly and Persons with Disabilities (NAICS code 624120). Available at: *http://data.bls.gov/oes/.* Accessed April 20, 2012.

[75] Leading Home Care. 2010. 2010 Private Pay in Home Health Care Benchmarking and State of the Industry Report, p. 17.

[76] Leading Home Care. 2010. 2010 Private Pay in Home Health Care Benchmarking and State of the Industry Report, p. 22.

to determine the overlap with other types of home care agencies.[77] Since in some states private pay agencies do not need to be licensed, it is difficult to determine the exact size of this market. Of these private pay agencies, 4,100 to 4,700 are franchises; however, this segment of the market is growing quickly, and perhaps fewer than 150 started operating before 2000.[78] Therefore, the importance of this segment of the industry may grow over time.

Comments on the NPRM indicated many private pay agencies do not provide the types of skilled services that Medicare reimburses and rely on private pay for the majority of their revenues.[79] BLS data supports this contention that private pay agencies provide fewer skilled care services; however, it is difficult to determine the degree of specialization in non-skilled support care because data are unavailable to determine how many of these agencies are Medicare-certified or are associated with Medicare-certified agencies.[80] In addition, the Companionship Services Exemption Survey (CSES) showed that private pay agencies rely on private pay and in addition the survey showed over 50 percent of respondents provided services covered by public payers such as Medicare, Medicaid, and the Department of Veterans Affairs (VA). With a focus on less skilled home care services, agencies in the private pay sector generally appear to be more reliant on private payers than home health care companies are, but the degree of reliance is unclear.[81]

Consumer-Directed Models

Under the consumer-directed models, the consumer or his/her representative has more control than in the agency-directed model over the services received, as well as when, how, and by whom the services are provided. Some consumer-directed services are purchased privately—that is, out-of-pocket or with private long-term care insurance; however, most consumer-directed services are paid with public funds, primarily Medicaid waiver and state plan programs.[82] The following discussion provides an overview of Medicaid-funded consumer-directed programs.

There are two distinct types of Medicaid-funded ''consumer-directed services'' programs: ''employer authority'' and ''budget authority''. The ''employer authority'' model gives consumers and their representatives choice and control only with respect to the employment of ''independent providers'' of direct care in the consumer's home. The ''budget authority'' model gives consumers a ''budget'' (usually a monthly allowance, but unspent funds may be carried month-to-month within the year) that may be used to purchase a range of goods and services of the consumer's choosing that include, but are not limited to, human assistance from directly hired workers, and other goods and services that may include, for example, assistive devices, home modifications, home-delivered meals, and transportation.[83]

Both models permit self-directing consumers and/or their representatives (usually family caregivers) to hire/fire, schedule, and supervise individual independent providers (direct care workers) to provide home care. The direct care workers are often recruited from among existing networks of the consumer's family, friends, and neighbors. In addition, consumers train or participate in training the direct care workers they employ. They also participate in paying their direct care workers, most typically by co-signing their direct care workers' timesheets before they are submitted to the public program for payment, certifying that the work was performed in accordance with the information on the timesheet, which serves as the direct care worker's bill or claim for reimbursement. The budget authority model differs from the employer authority model primarily in giving consumers more flexibility to determine how many hours of direct care service they wish to obtain and to make agreements directly with their direct care workers regarding hourly wages and benefits, so long as the cost of consumer-directed home care services does not exceed the amount of funds available in the consumer's budget.

The budget authority model of consumer direction is often referred to colloquially as ''cash and counseling'', based on the name of former, special, time-limited Medicaid research and demonstration (''1115'') waiver programs. These and subsequent programs based on the cash and counseling model are now fully integrated into the Medicaid programs in their respective states and operate under ongoing state plan or HCBS waiver authority, and some states have incorporated elements of budget authority consumer direction in programs funded by CMS' Money Follows the Person grants to states. Other HCBS programs that rely exclusively or primarily on public funding sources other than Medicaid have also incorporated consumer-directed options patterned after original cash and counseling programs.

Although consumer-direction of HCBS is not new,[84] a number of developments greatly spurred growth in consumer-directed services programs in the 2000s. Medicaid-funded budget authority consumer-directed programs did not exist until the first three Cash & Counseling demonstration programs (in Arkansas, Florida, and New Jersey) began in the late 1990s. Favorable evaluation findings from these early demonstration programs led to changes to Medicaid law, regulation, and policy specifically designed to facilitate and encourage states to offer budget authority consumer-directed services

[77] Home Care Pulse. 2011. 2011 Annual Private Duty Home Care Benchmarking Study. Highlights Edition, p. 5; Leading Home Care. 2010. 2010 Private Pay in Home Health Care Benchmarking and State of the Industry Report, p. 17. In addition, the industry benchmark reports appear to double-count licensed agencies; thus the number might be significantly smaller.

[78] Home Care Pulse. 2011. 2011 Annual Private Duty Home Care Benchmarking Study. Highlights Edition, pp. 5 and 21.

[79] Private Duty Homecare Association. (2012). Companionship Services Exemption Survey (CSES), January 23. WHD–2011–0003–9175.

[80] Bureau of Labor Statistics. May 2011. Employment and Wages from Occupational Employment Statistics (OES) survey, Multiple occupations for one industry: Home Health Care Services (NAICS code 621600) and Services for the Elderly and Persons with Disabilities (NAICS code 624120). Available at: *http://data.bls.gov/oes/*. Accessed April 20, 2012. Leading Home Care. (2010). 2010 Private Pay in Home Health Care Benchmarking and State of the Industry Report.

[81] Comments on the NPRM indicated many private pay agencies do not provide the types of skilled services that are Medicare reimbursable and rely on private pay for the majority of their revenues (e.g., Private Duty Homecare Association. (2012). Companionship Services Exemption Survey (CSES), January 23, WHD–2011–0003–9175). BLS data supports this contention that fewer skilled care services are provided (*id.*). However, it is difficult to determine the degree of specialization in non-skilled support care because data are unavailable to determine how many of these agencies are Medicare-certified or are associated with Medicare-certified agencies (Leading Home Care. 2010. 2010 Private Pay in Home Health Care Benchmarking and State of the Industry Report). In addition, the same survey that showed these agencies rely on private pay also showed over 50 percent of respondents provided services covered by public payers such as Medicare, Medicaid, and the Veterans Administration (CSES).

[82] ''Growth and Prevalence of Participant-Direction: Findings from the National Survey of Publicly-Funded Participant-Directed Services Programs, by Mark Sciegaj and Isaac Selkow, available at *http://web.bc.edu/libtools/details.php?entryid=340*.

[83] Doty, P., Mahoney, K.J. & Sciegaj, M. 2010 (January). New State Strategies to Meeting Long-term Care Needs. *Health Affairs,* 29 (1) 49–56.

[84] California's In-Home Supportive Services program, which currently has 440,000 participants, began in 1973, and other sizable programs in Washington, Oregon, Michigan, and Massachusetts began in the late 1970s or early 1980s.

options.[85] In addition, Older Americans Act funding for the National Family Caregiver Support program provided an impetus to consumer-directed services that allow family caregivers more choice and control in accessing respite services.[86]

A major characteristic of consumer-directed services programs is that they permit public program participants to hire direct care workers who are family members, friends, and neighbors and research has found that most consumers choose to recruit direct care workers who are relatives or individuals with whom they were previously acquainted. A minority of consumers in consumer-directed programs locate individuals known to them who are seeking work as providers of home care services via referrals from worker registries, through newspaper ads, or through internet social media and advertising sites.

According to the comment from the California State Association of Counties (CSAC), County Welfare Directors Association of California (CWDA), California Association of Public Authorities for In-Home Supporting Services (CAPA) and California IHSS Consumers Alliance (CICA) on the NPRM, approximately 70 percent of all IHSS providers in California are family members of the consumer.[87] Research projects conducted by HHS also show that consumers often hire their family members as direct care workers. For example, in the original Cash & Counseling Demonstration programs, 58 percent of directly hired workers in Florida, 71 percent in New Jersey, and 78 percent in Arkansas were related to the consumer. About 80 percent of those directly hired workers had provided unpaid care to the consumer before the demonstration began and continued to provide additional unpaid care after becoming paid workers.[88] In addition, since the passage of the National Family Caregiver Support Program enacted under the Older Americans Act Amendments of 2000, Medicaid and other state-funded programs have provided the bulk of public financing to support family caregiving.[89] A survey of state consumer-directed and family caregiving programs found that:

- Over one-half (86 out of 150, or 57 percent) of the programs in 44 states and the District of Columbia allow family members to be paid to provide care. Only six states (Alaska, Delaware, Mississippi, Nevada, Pennsylvania, and Tennessee) did not allow payments to family members in any of their programs at the time of the study.[90]
- Of the 86 programs that allow relatives to be paid providers, 73 percent allow family members to provide personal care, 70 percent allow family members to provide respite care, 20 percent allow family members to act as homemakers or do chores, and 6 percent allowed family members to provide any service needed.[91]
- Some programs place restrictions on what type of family members are allowed to be paid providers. Among these 86 programs, 61 percent do not permit spouses to be paid providers, while others do not permit parents/guardians (37 percent), primary caregivers (18 percent), legal guardians (8 percent), children 18 and under (6 percent), or other relatives (4 percent).[92]

As noted in the research, while many consumer-directed programs allow paid family caregivers, some consumer-directed programs place restrictions on the employment of relatives. Such restrictions are usually limited to prohibiting paid caregivers who are ''legally responsible'' relatives—that is, those who may have financial obligations to public program participants (consumers) under state laws, such as spouses, parents of minor children, and guardians, especially when their income could be counted in determining the program participant's future eligibility for means-tested public benefits.

Of those states that offer Medicaid-funded consumer-directed services, some have implemented a ''public authority'' design. The public authority design applies to both the employer authority and budget authority models of consumer-directed programs. Under the public authority design, the public authority or some other governmental or quasi-governmental entity (often termed a ''home care quality commission'' or ''workforce council'') plays a role in setting compensation and providing other benefits of employment for the direct care worker, who is compensated by public funds. In an effort to connect participants in consumer-directed programs with direct care workers, some states and public authorities have created matching registries. While use of these registries is voluntary on the part of consumers and direct care workers, these systems provide some insight into how consumers identify care providers to meet their needs. Depending on the registry, consumers can either search the worker database online, or speak to trained staff who conduct the search and report the results to the consumer. Some registries may also offer worker screening and orientation, access to consumer and worker training, and recruitment and outreach to potential workers.[93] Others stipulate that providers in the database have not been pre-screened in any way and such responsibilities lie with the consumer. The Department also identified private sector registries that operate under a number of models. For example, one not-for-profit registry[94] recruits, screens, and checks the references of local care providers, but the care workers are self-employed and work as independent providers. Other private sector entities refer to themselves as registries,[95] [96] [97] [98] but appear to be operated under an agency or quasi-agency model, with the consumer paying the company a weekly or bi-weekly registry fee in addition to paying the direct care worker, or with the company receiving some portion of the direct care worker's hourly rate.

The public authority or other governmental or quasi-governmental

[85] Doty, Mahoney and Sciegaj, Health Affairs, January 2010.

[86] Feinberg, L. & Newman, S. (2005). Consumer Direction and Family Caregiving: Results from a National Survey, State Policy in Practice. Available at: *http://www.hcbs.org/files/79/3926/Consumer Direction&FamilyCaregivingNWEB.pdf.* Feinberg, L. et al. (2004). The State of the States in Family Caregiver Support: A 50-State Study. San Francisco, CA: Family Caregiver Alliance. Available at: *http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=1276.*

[87] WHD–2011–0003–9420

[88] U.S. Department of Health and Human Services. (2005). Experiences of Workers Hired Under Cash and Counseling: Findings from Arkansas, Florida and New Jersey. Available at: *http://aspe.hhs.gov.daltcp/reports/workerexp.pdf.;* Foster, Leslie, Dale, Stacy B.& Brown, Randall S. 2007 (February). How Caregivers and Workers Fared in Cash and Counseling. Health Services Research 42(1) Part II: 510–532.

[89] Feinberg, L. & Newman, S. (2005). Consumer Direction and Family Caregiving: Results from a National Survey, State Policy in Practice. Available at: *http://www.hcbs.org/files/79/3926/Consumer Direction&FamilyCaregivingNWEB.pdf.* Feinberg, L. et al. (2004). The State of the States in Family Caregiver Support: A 50-State Study. San Francisco, CA: Family Caregiver Alliance. Available at: *http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=1276.*

[90] Feinberg & Newman, 2005. p. 8.

[91] Feinberg & Newman, 2005. p. 8.

[92] Feinberg & Newman, 2005. p. 9.

[93] PHI, 2011a. The PHI Matching Services Project. Available at: *http://phinational.org/policy/the-phi-matching-services-project/.*

[94] Meals on Wheels and Senior Outreach Services. (2011). Home Care Registry. Available at: *http://www.mowsos.org/about-us/.*

[95] Experienced Home Care Registry. (2011). About Us. Available at: *http://www.experiencedhomecare/about-experienced-home-care/.*

[96] Angelic Nursing & Home Care Registry, Inc. (2011). Home Care Services for Seniors in Tolland and Hartford Counties in Connecticut. Available at: *http://www.linkedin.com/company/angelic-nursing-&-home-health-care-services-registry-inc-.*

[97] Golden Care Co. Inc. 2011. Billing Policy. Available at: *http://www.goldencareco.com/.*

[98] American HealthCare Capital. (2011). $1.5 Million Oregon Private Pay Homecare Registry for Sale. Available at: *http://www.americanhealthcare capital.com/listings/completed-listings/.*

entity acts as the ''employer-of-record'' of consumer-directed workers for the purpose of engaging in collective bargaining with a union representing consumer-directed workers. Direct care workers in this system have the option to select representatives for collective bargaining with the state. Direct care workers providing services to consumers through consumer-directed programs in states such as California, Washington, Oregon, Illinois, and Massachusetts have collective bargaining rights. In those states, unions may engage in collective bargaining with the state over wages and benefits for workers whose wages and benefits are paid for with Medicaid funding. In other states, unionization of consumer-directed home care workers has been authorized by the legislature and the process is underway but collective bargaining over Medicaid provider rates has not yet been implemented.[99] In some states with consumer-directed programs, consumer-directed home care workers do not have collective bargaining rights.

Funding Sources

There are a variety of different funding sources for provision of home care services of all types. Table 5 provides an overview of these funding sources, consumer eligibility requirements, and types of home care services covered. Public funding sources such as Medicare and Medicaid provide a majority of the reimbursement for services.[100] In 2009, Medicare and Medicaid accounted for 73 percent of home care services revenue, followed by 14 percent from private insurance coverage, 4 percent from consumers paying out-of-pocket, and the remaining 8 percent contributed by a mix of other sources.[101]

TABLE 5—SUMMARY OF HOME CARE SERVICE PAYERS AND SERVICE COVERAGE

Payer	Description	Eligibility	Home care service coverage
Public			
Medicare	Federal government program to provide health insurance coverage, including home health care, to eligible individuals who are disabled or over age 65.	Individual is under the care of a doctor and receiving services under plan of care; has a certified need for intermittent skilled nursing care, physical therapy, speech-language pathology services, continued occupational therapy; and must be homebound.	Intermittent skilled nursing care, physical therapy, speech-language pathology services, continued occupational therapy.
	The program pays a certified home health agency for a 60 day episode of care during which the agency provides services to the beneficiary based on the physician approved plan of care.	HHA providing services is Medicare-certified; services needed are part-time or intermittent, and are required <7 days per week or <8 hours per day over 21 day period.	Does not cover 24 hr/day care at home; meals delivered to home; homemaker services when it is only service needed or when not related to plan of care; personal care given by home health aides when it is only care needed.
Medicaid	A joint federal-state medical assistance program administered by each state to provide coverage for low income individuals..	Eligibility and benefits vary by state. In general, states provide health care coverage to low income families with dependent children; pregnant women; children; and aged, blind and disabled individuals. Beginning in 2014, states have the option to extend coverage to additional non-elderly low-income individuals.	Coverage of home health services must include part-time nursing, home care aide services, medical supplies and equipment. Optional state coverage may include audiology; physical, occupational, and speech therapies; and medical social services.
	The program pays home health agencies and certified independent providers.	States also have the option to provide home and community-based services to individuals who meet eligibility for institutional care or meet state-defined criteria based on need.	Coverage is provided under: Medicaid Home Health, State Plan Personal Care Services benefit, and Home and Community-Based state plan services and waivers.
Older Americans Act.	Provides federal funding for state and local social service programs that provide services so that frail, disabled, older individuals may remain independent in their communities.	Must be 60 yrs of age or older	Home care aides, personal care, chore, escort, meal delivery, and shopping services.
Department of Veterans Affairs.	Home health care services provided by VA employees and contractors.	All enrolled Veterans and Veterans who can receive outpatient care without enrollment.	Interdisciplinary Home Based Primary Care, Skilled home health care services, home hospice and palliative care, home respite, and homemaker and home health aide services.
Social Services Block Grant.	Federal block grants to states for state-identified service needs.	Varies by state	Often includes program providing home care aide, homemaker, or chore worker services.

[99] Seavey and Marquand, 2011, p. 28. WHD–2011–0003–3514. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[100] Congressional Research Service. Memorandum dated February 21, 2012, titled ''Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair Labor Standards Act: Impact on Medicare and Medicaid,'' p. 4. WHD–2011–0003–5683.

[101] Seavey and Marquand, 2011, p. 23. WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

TABLE 5—SUMMARY OF HOME CARE SERVICE PAYERS AND SERVICE COVERAGE—Continued

Payer	Description	Eligibility	Home care service coverage
Community organizations.	Some community organizations provide funds for home health and supportive care.	Varies by program	Covers all or a portion of needed services. Vary by program.
Private			
Commercial Health Insurance Companies.	Many policies cover home care services for acute, and less often, long-term needs.	Varies by policy	Varies by insurance policy.
Supplemental Insurance.	May cover some personal care services when a Medicare beneficiary is receiving covered home health services.	Varies by policy; not required for standard Medigap insurance.	
Private pay	The individual receiving the services pays ''out of pocket.''	Individuals who are not eligible for covered services under third party public or private payers.	Services that do not meet the eligibility criteria of other payers.

Sources: National Association for Home Care. 1996. Who Pays for Home Care Services? Available at: *www.nahc.org/consumer/wpfhcs.html;* Centers for Medicare and Medicaid Services (CMS). Medicare and Home Health Care. Available at: *http://www.medicare.gov/publications/pubs/pdf/10969.pdf.*

Industry commenters (NPDA, IFA) suggest that Medicare covers little provision of companionship services. However, the Department believes the key to understanding Medicare reimbursement of these types of services lies not in the ''does not cover'' statements in the Table 5 summaries, but rather in the qualifying clauses that clarify that Medicare does not reimburse: ''homemaker services *when it is only service needed or when not related to plan of care;* personal care given by home health aides *when it is only care needed''* [emphasis added]. Analysis of the 2009 Medical Expenditure Panel Survey (MEPS) showed that of 14.4 million home care episodes paid for by Medicare (and no Medicaid), the consumer received care from an HHA, PCA, Companion or Homemaker in 6.1 million episodes (42.5 percent).[102] As noted above, the workers performing this work may be classified as exempt from the FLSA's minimum wage and overtime compensation requirements under the current companionship services exemption. Although the percent of care provided by these workers during each episode cannot be determined from MEPS, the Department believes these data are sufficient to show that services frequently provided by direct care workers commonly classified as ''Companions'' (who may meet the current companionship exemption) may be included in a Medicare-covered episode of care in certain circumstances though provision of such services is not separately billed or paid by Medicare.

In 2012, HHS outlays for Medicare programs were projected to total $591 billion and HHS and state outlays in support of Medicaid totaled $459 billion. Under Medicare, an estimated $34.1 billion went to home health programs.[103] Medicaid expenditures on home care programs are concentrated in three types of programs: State Home Health, State Personal Care Services (PCS), and Home and Community-Based Services (HCBS) 1915(c) waiver programs. In 2009, Medicaid spent approximately $50.0 billion of $374 billion in total expenditures on these programs, including $5.3 billion on Home Health, $11 billion on PCS, and $33.7 billion on HCBS waiver programs.[104] [105] Thus, payments for home care programs composed approximately 6 percent of Medicare spending, and about 13 percent of Medicaid spending.

Both Medicare and Medicaid pay the service provider directly. The Medicare program uses a prospective payment system (PPS) to reimburse home health agencies a pre-determined base payment for an episode of care; this base payment is adjusted for the condition and needs of the beneficiary as well as geographic variation in wages.[106] Under Medicaid, the state agency implementing the program pays the service provider directly except under certain consumer-directed programs.

The Medicare and Medicaid programs also work together to provide services for a group of consumers referred to as ''dual eligibles,'' that is, consumers that are eligible for both Medicare and Medicaid coverage. Studies have found that individuals covered by both Medicare and Medicaid are among the most expensive groups to cover and are more likely to use more Medicare-covered home care services than Medicare home care consumers not also covered by Medicaid. Also, states with low Medicaid spending appear to shift costs to the Medicare home care program spending.[107] Most of the public matching registries are funded by the state, with a few receiving federal dollars through reimbursement for Medicaid administrative costs or receiving initial funding through federal Medicaid Systems Transformation grants.[108]

Just focusing on raw percentages of services paid through public funding, however, obscures an important characteristic of private pay account

[102] For Medicaid with no Medicare, MEPS shows 5.04 of 8.71 million episodes (57.9 percent) of home care utilized an HHA, PCA, Companion or Homemaker; for consumers paying any out-of-pocket for home care, 1.05 of 4.19 million episodes (25 percent) used at least one of those categories of workers.

[103] Centers for Medicare and Medicaid Studies, Office of the Actuary, National Health Expenditure Projections, 2011–2021. Available at: *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/Proj2011PDF.pdf.*

[104] Detailed Medicaid data by type of home care are not yet available past 2009.

[105] Kaiser commission on Medicaid and the Uninsured. 2012 Medicaid Home and Community-Based Services Programs: 2009 Data Update.

Note, not all of the HCBS goes to personal care services; a more detailed breakdown of this spending is not available. For additional data, see Kaiser Family Foundation, State Health Facts, p. 2: *http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7720-06.pdf.* Centers for Medicare and Medicaid Studies, Office of the Actuary, National Health Expenditure Projections, 2011–2021.

[106] For additional detail see Center for Medicare & Medicaid Services (CMS). 2011a. Home Health PPS. Available at: *http://www.cms.gov/HomeHealthPPS/.*

[107] Center for Medicare & Medicaid Services (CMS). 2011b. Home Health Study Report: Literature Review, pg.16. Available at: *http://www.cms.gov/HomeHealthPPS/Downloads/HHPPS_LiteratureReview.pdf.*

[108] Seavey & Marquard, 2011.

home care, i.e., that any single episode of home care service utilization appears to be paid almost completely by a single payer. The Department found that data from MEPS provided insight into this issue. MEPS is a set of large-scale surveys of families and individuals, their medical providers, and employers across the United States published by AHRQ. MEPS collects data on the specific health services that Americans use, how frequently they use them, the cost of these services, and how they are paid for, as well as data on the cost, scope, and breadth of health insurance held by and available to consumers. The Home Health section of the survey asks whether: (1) The care was medical or non-medical; (2) the direct care worker was from an agency, an independent provider, or an informal direct care worker; (3) the care resulted from specific or general health problem (including ''old age''); (4) the consumer received care associated with activities of daily living or personal care; and (5) the direct care worker provided companionship. The Department therefore believes that private pay home care services provided by private pay agencies are captured by this survey.

In MEPS the Department found that of 9.8 million episodes of care for which Medicaid paid any amount, Medicaid paid for almost 94 percent and Medicare paid for almost 6 percent of all expenditures; less than 1 percent of expenditures were paid for by other sources. Similarly, of the 14.4 million episodes of care for which Medicare paid some amount (after excluding those episodes for which Medicaid was paid), Medicare paid for over 97 percent of expenditures. Although only 3.2 million episodes of home care were paid for primarily out-of-pocket (after excluding episodes in which any part of expenditures were paid by Medicare or Medicaid), almost 99 percent of expenditures on those services were paid out-of-pocket.[109]

This pattern of payments affects the impact of increased costs resulting from this rule on the providers (e.g., agencies and independent providers) and consumers of home care services. To the extent that providers' costs increase, but Medicare and Medicaid reimbursement rates do not increase, part of the impact may be incurred by the providers in the form of a smaller profit margin for these services. Consumers paying out-of-pocket, however, might be more sensitive to a rate increase because the individual pays the entire amount, and the provider risks inducing a reduction in demand for its services. The majority of the direct care workers documented in the MEPS data are agency-employed, and the agency would not be able to claim the exemption under the Final Rule; however, in the event that the consumer has selected an independent provider as the direct care worker, the worker would continue to be considered exempt, provided the direct care worker meets the duties requirements for the exemption, and therefore the consumer may not experience an increase in costs.

E. Direct Care Workers

This section provides an estimate of the total number of direct care workers who may be impacted by the Final Rule as well as the characteristics of these workers, the services they provide, and the wages they receive for their work.

Number of Affected Workers

The workers who will be directly affected by the change to the companionship exemption are concentrated in two occupations: Home Health Aides (SOC 31–1011) and Personal Care Aides (39–9021). These workers are concentrated in two industries: Home Health Care Services (NAICS 6216) and Services for the Elderly and Persons with Disabilities (NAICS 62412).

These workers are predominantly women in their mid-forties or older, minorities, with a high school diploma or less education but this varies highly by region. A similar percentage of PCAs are Black and Hispanic (22 percent and 18 percent, respectively), but a much higher percentage of HHAs are Black (35 percent) than Hispanic (8 percent). One in four (23 percent) PCAs are foreign-born, with higher percentages (over 45 percent) in certain regions of the country, e.g., California and New York. California also has a high percentage of direct care workers who are paid family members.[110]

Direct care workers are called by a variety of titles, including: Home health aides, home care aides, personal care aides, personal assistants, home attendants, homemakers, companions, personal care staff, resident care aides, and direct support professionals. They are tracked by the following occupational titles.[111]

Personal Care Aides (SOC 39–9021): ''Assist the elderly, convalescents, or persons with disabilities with daily living activities at the person's home or in a care facility. Duties performed at a place of residence may include keeping house (making beds, doing laundry, washing dishes) and preparing meals. May provide assistance at non-residential care facilities. May advise families, the elderly, convalescents, and persons with disabilities regarding such things as nutrition, cleanliness, and household activities.'' The BLS does not have a separate SOC for ''Companions, elderly''; they are classified as PCAs.

Home Health Aides (SOC 31–1011): ''Provide routine individualized healthcare such as changing bandages and dressing wounds, and applying topical medications to the elderly, convalescents, or persons with disabilities at the patient's home or in a care facility. Monitor or report changes in health status. May also provide personal care such as bathing, dressing, and grooming of patient.''

Companionship services as defined in this Final Rule are separate from the services provided by home health and personal care aides as defined by BLS above and outlined in detail below. For the reasons described in the summary of public comments, throughout this analysis the Department refers to HHAs and PCAs when referring to the workers that fit the occupational definitions above, and uses the more general term ''direct care workers'' to refer to the broader group of workers (e.g., HHAs, PCAs, and companions) providing the types of services described above.

The Department uses BLS' employer-based OES estimates of the number of workers in the HHA and PCA occupational categories as its best estimate of the number of direct care workers employed by agencies that might be affected by the Final Rule. There were approximately 1.75 million direct care workers employed by agencies in 2011, composed of

- 924,700 HHAs, and
- 820,600 PCAs.[112]

These data do not include workers providing these services as independent providers who may be affected by the Final Rule. As described above, the Department determined that an estimated additional

- 24,000 HHAs, and
- 158,700 PCAs[113]

[109] ERG analysis of MEPS data. Agency for Healthcare Research and Quality (AHRQ). Medical Expenditures Panel Survey. 2009. Available at: *http://meps.ahrq.gov/mepsweb/data_stats/download_data_files.jsp*. Accessed March, 2012.

[110] Seavey and Marquand, 2011, pgs. 11 and 29. WHD–2011–0003–3514. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf*.

[111] BLS. 2011. Standard Occupational Classification, available at: *http://www.bls.gov/soc/home.htm*.

[112] 2011 BLS Occupational Employment Survey, employment and wages for SOC codes 39–9021 and 31–1011.

[113] BLS, NEM 2010, adjusted to reflect 2011 values.

can be considered independent providers directly employed by families. Thus, we estimate

- 948,600 HHAs, and
- 979,300 PCAs

for a total of 1.93 million direct care workers who might be affected by the Final Rule.

However, not all 1.93 million of these HHAs and PCAs are employed as FLSA-exempt companions, and some of these workers are already covered by minimum wage and overtime provisions at the state level. Many of these workers are employed at agencies that provide a variety of health-related services that may or may not be provided in the home; HHAs and PCAs employed in facilities, such as nursing homes and hospitals, are not engaged in domestic service employment and cannot be classified as providing companionship services. Furthermore, HHAs and PCAs who work in the home might be employed to perform services that fall outside the definition of companionship services, and therefore, do not qualify for the companionship services exemption. As will be discussed in further detail below, direct care workers in these occupational classifications provide a similar range of services, but the services provided by any specific direct care worker vary in emphasis and intensity depending on the specific job or consumer. Thus, this category of direct care worker might best be thought of as providing a mix of services along a continuum ranging from one end of the spectrum that focuses more on medicalized care, to the opposite end that might consist primarily of providing fellowship and protection. Those direct care workers at the more medicalized end of the spectrum may not be performing services considered to be companionship services and might not currently be employed under the companionship services exemption (although the case law interpreting the current exemption allows for the performance of significant medical duties). Thus, the Department considers the category of direct care workers used as the basis for this analysis, composed of HHAs and PCAs employed in the home, as an upper-bound estimate of the number of direct care workers employed as companions. An unknown, but potentially significant, percentage of these workers are not currently employed under the existing companionship exemption and will not be affected by this rulemaking. The Department will estimate the number of workers directly affected by both the minimum wage and overtime compensation provisions of the Final Rule.

While many agency-employed direct care workers might work in various facilities that make them ineligible for the FLSA companionship services exemption, there is little information available concerning independent providers, particularly independent providers who provide services to consumers in consumer-directed programs. Because these sometimes informal arrangements are made directly between the consumer and the direct care worker/independent provider, there are limited data on the total number of consumers and limited information on the total number of providers. The Department estimated the number of independent providers in 2011 using BLS National Employment Matrix (NEM) data for 2010 and inflating the values to reflect 2011 (the base year in the model). Approximately 92,200 PCAs (10.3 percent) are employed in private households and 66,500 (7.4 percent) are self-employed, for a total of 158,700 workers (17.7 percent) who may provide services as independent providers.[114] Fewer HHAs are employed in this manner, with 3,600 (less than one percent) working for private households and 20,300 (about two percent) who are self-employed for a total of approximately 23,900 (2.2 percent) workers who may provide services as independent providers. Combining the data for HHAs and PCAs suggests that 182,600 of these workers (9.5 percent) may be either self-employed or employed in private households. The Department believes that these workers can reasonably be described as independent providers who provide direct care worker services to individuals or families.

However, it is likely that not all independent providers of home care are captured in the NEM. For example, in its comment on the proposed rule, the National Resource Center for Participant-Directed Services (NRCPDS) cited a study of 298 publicly funded participant-directed programs serving approximately 810,000 people.[115] The study found that California accounted for 59 percent of enrollments in participant-directed programs. The study did not provide information on the number of direct care workers, including independent providers, of publicly-funded home care employed by these program participants; however, this number is undoubtedly larger than the BLS estimate of independent providers of home care employed in private homes, which was not restricted to those whose services were purchased with public funds. As discussed in detail below, to the extent that data on direct care workers, other than that included in the OES or NEM was made available to the Department, we have revised the analysis of the number of direct care workers in an attempt to better reflect direct care workers providing services through consumer-directed programs. The Department assumes that all HHAs and PCAs classified in the NEM as self-employed or employed by households are independent providers directly employed by the family, meet the requirements for exemption, and are thus by assumption currently exempt from the FLSA's minimum wage and overtime compensation requirements.

Tasks, Wages, Hours

The Final Rule defines companionship services to include fellowship, protection, and care, defined as a limited amount of assistance with activities of daily living and instrumental activities of daily living.

- Fellowship means ''to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events.'' Fellowship services are typically not covered by public programs.
- Protection means ''being present with the person in their home or to accompany the person when outside of the home to monitor the person's safety and well-being.'' Some states reimburse specific types of consumers (i.e., those living with mental disabilities) for protection services.
- Care means to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

Since enactment of the companionship services exemption, the spectrum of tasks performed by workers for whom the exemption is claimed has expanded to include: Activities of daily living (ADLs), instrumental activities of daily living (IADLs), and paramedical

[114] BLS, 2010, projected to reflect 2011 employment.

[115] WHD–2011–0003–9474; ''Growth and Prevalence of Participant-Direction: Findings from the National Survey of Publicly-Funded Participant-Directed Services Programs, by Mark Sciegaj and Isaac Selkow, available at *http://web.bc.edu/libtools/details.php?entryid=340.*

(''medicalized'') tasks.[116] Paramedical tasks may include tasks such as changing of aseptic dressings, administration of non-injectable medications (e.g., blood pressure medication in tablet form);[117] and ostomy, catheter and bowel hygiene.

As mentioned above, the Department believes the services provided by these direct care workers can best be thought of as existing along a continuum; the Department found data in MEPS which supports this view of the tasks currently classified as companionship services. MEPS shows that of the estimated 6.3 million individuals receiving home care services in 2009, 92 percent (5.8 million) received care from agency-provided direct care workers. Of these consumers, 37 percent received care from HHAs, 9.7 percent from PCAs, and 3.8 percent from ''Companions'' (MEPS uses job titles rather than SOCs for the survey). In describing the services provided by these direct care workers, it was difficult to distinguish major differences between types of workers. For example:

- 100 percent of those receiving care from Companions received ''companionship services,'' about 53 percent of those receiving care from HHAs and PCAs also received such services from their HHA or PCA.
- 90 percent of those receiving care from PCAs received help with daily activities from their PCA; 71 percent receiving care from Companions also received help with daily activities from their Companion.
- 45 percent of those receiving care from HHAs received medical treatment from their HHA, 20 percent receiving care from Companions also received medical treatment from their Companion.
- 22 percent of those receiving care from a Companion received services such as homemaking from their Companion; 7 percent of those receiving care from a PCA also received such services from their PCA.

Therefore, the Department believes those employed under the job titles of HHA, PCA, and Companion (hereafter described as direct care workers for consistency with the remainder of the document) are best considered as providing a mix of services along a continuum ranging from more medicalized care at one end of the spectrum, to the opposite end that might consist primarily of providing fellowship and protection.

While HHAs and PCAs overlap in the type of services they provide, it is primarily HHAs who are employed by Medicare-certified agencies who may be asked to perform paramedical tasks. Those workers are required by Medicare to be trained and certified to perform these types of tasks.

Generally speaking, a home health aide or agency is authorized to provide a specific number of hours of service to consumers depending on their needs in the case of public funding, or agrees to provide a specific number of hours of service in the case of private pay. Agencies work to schedule direct care workers to cover the number of hours needed for the portfolio of cases they have, often taking into account continuity of service to each recipient, total number of hours each worker is scheduled per week, frequency of weekend services needed, and the distance between the direct care worker's home residence and the consumer's residence.

In the home care industry, agencies may offer to provide services seven days a week and 24 hours a day. One survey indicated private pay agencies provide 24-hour or live-in care to 10 percent of their consumers.[118] This type of schedule is frequently staffed using 12-hour shifts, 24-hour shifts, or by having the direct care worker live in the consumer's home. These cases are of particular concern with respect to overtime. A 12-hour case is a consumer who requires services to be provided by a direct care worker for a 12-hour block of time; a 24-hour case is a consumer who requires a direct care worker to be present to provide services around the clock. The key scheduling concerns that agencies contend exist with these cases are that:

- It is difficult to redistribute overtime hours to workers with fewer hours because workers are scheduled to work in lengthy shifts (up to 24 hours);
- Direct care workers are typically paid an hourly rate, and the employer would be required to pay an hourly overtime premium when applicable; however, Medicaid and other payers often reimburse agencies for these cases on a flat rate that does not account for overtime premiums or other costs;
- 24-hour shifts usually include a five- to eight-hour period to allow the worker to sleep while on site; however, the aide is not necessarily off-duty because s/he would be expected to assist the consumer if an urgent need arose. If the agency is required to count sleep hours toward the total number of hours worked per week then it may become costly to provide 24-hour care.
- Because of the intimate nature of providing such services in the consumer's home, consumers prefer having a single or a small number of direct care workers. This limits the ability of agencies to avoid paying overtime premiums by having more staff work fewer hours. In addition, having too many direct care workers can reduce continuity of care for the consumer; on the other hand, having too few direct care workers may also result in reduced continuity of care if one of those direct care workers becomes unavailable.

Private pay agencies have developed a two-tier pricing structure to make 24-hour private pay care cost competitive with nursing home care. Consumers may choose between paying for service on an hourly basis or pay a single flat rate for 24-hour care. According to the IHSGI survey, direct care workers are paid on average $9.87 per hour or $133 for 24 hours under the flat rate. The Department estimates that agencies charge consumers about $18.30 per hour for hourly service, and about $250 under the 24-hour flat rate.[119] According to the MetLife Market Survey of Long-Term Care Costs, the average private room nursing home rate in 2011 was about $240 per day.[120] Although it is reasonable to assume that consumers are willing to pay a premium to be able to stay in their homes, these results indicate that private pay agencies face constraints concerning how much they can increase their rates without having consumers choose to switch to a nursing home.[121] This affects a small minority of

[116] Seavey and Marquand, 2011, pg. 7. WHD–2011–0003–3514, *http://phinational.org/sites/phinational.org/files/clearinghouse/caringin america-20111212.pdf.*

[117] Administration of an injectable medication is a medical task generally performed by workers with additional training in medical tasks, such as Certified Nurse Assistants (CNAs).

[118] See, for example, IHS Global Insight (IHSGI). 2012. Economic Impact of Eliminating the FLSA Exemption for Companionship Services. WHD–2011–0003–8952. However, this analysis is based on a survey administered by IHSGI on behalf of the International Franchise Association in response to the NPRM; the survey was received by those private pay franchisees belonging to the 9 franchise chains that facilitated the survey, and response was voluntary. Therefore it is impossible to determine whether the responses are representative of the industry as a whole, or the degree of response bias. The survey represents the work patterns for at least one group of agencies in this industry; it simply cannot be determined how representative the responses are for the entire industry.

[119] The Department multiplied the reported pay rates by the ratio of revenues to wages from Home Care Pulse, 2011. We were able to confirm that the hourly rates were approximately the right magnitude from the MetLife Market Survey of Long-Term Care Costs (MetLife Mature Market Institute. October 2011).

[120] MetLife, 2011.

[121] Conversely, this does raise the question as to what percent of consumers need 24-hour care to remain in their homes. With the two-tier pricing structure, there is a discontinuity in the demand curve: for 13 hours of care or less, it is cheaper to

Continued

consumers. Based on the IHSGI survey, less than 10 percent of consumers cared for by survey respondents receive 24-hour home care. Indeed, 65 percent require less than 40 hours of care per week.

To add to the complexity of concerns about the size of potential overtime premiums when the consumer needs 24-hour care 7 days a week, industry publications and comments on the NPRM appear to use the terms ''24-hour'' and ''live-in'' synonymously. However, these terms have precise and separate meanings under the FLSA, and very different implications for overtime compensation. Under the general FLSA requirements:

- Employees on duty for periods of 24 hours or more may have bona fide scheduled sleeping periods of not more than 8 hours excluded from hours worked (with certain additional criteria concerning conditions, including that the employee must be able to get at least 5 hours of sleep). Thus, an employee on a shift of 24 hours or more might be eligible to be paid for 16 to 19 of the 24 hours, although additional uninterrupted meal time can reduce that. Since overtime is not incurred until after 40 hours of work in the workweek are accrued, a worker scheduled for 24-hour shifts (with sleep time) might start accruing the overtime compensation premium on their third shift in a week, or sooner if unable to get the minimum amount of sleep.
- To be considered ''live-in,'' an employee must reside on the employer's premises permanently or for extended periods of time. The Department has allowed an employee who lives at the place of employment at least 5 consecutive days per week to be considered as residing on the employer's premises for extended periods of time. Live-in workers need only be paid for compensable hours worked. The Department's long-standing existing regulations recognize that an employee who resides on his or her employer's premises is not working all the time he or she is on the premises. Ordinarily, live-in workers may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when they may leave the premises for their own purposes. Live-in domestic service workers must be paid at least minimum wage for all hours worked, but are not required to be paid for overtime when more than 40 hours of work are performed per week (unless employed by a third party employer). Thus, determining the potential impact of the revised rule on ''24-hour live-in'' care depends very much on whether the worker is ''24-hour'' or ''live-in.''

Similarly, the Department received comments on the application of overtime provisions to direct care workers who are essentially roommates of persons with disabilities. These direct care workers live with the consumer, assist the consumer in the morning and evening, but otherwise are free during the day to go to their own job or school. Thus, these direct care workers are likely ''live-in'' as described above, and are not entitled to overtime compensation under this Final Rule unless employed by a third party employer.

Some agencies take a proactive approach to scheduling these cases in order to manage the total number of hours on duty required from each worker. For example, an agency may split a 24-hour, seven days per week case between two direct care workers by having one aide provide services Sunday through half of the Wednesday shift (three 24-hour shifts and one 12-hour shift) when the second aide would take over and work through Saturday.[122] This reduces the total number of hours each aide must work, limits the work to one weekend day, and avoids overwhelming the consumer with too many different care providers.[123]

The direct care workers themselves report working an average of 31 to 34 hours per week and available data suggest that very few work overtime.[124] Based on an analysis of the 2007 National Home Health Aide Survey (NHHAS) and the 2009 Annual Social and Economic Supplement (ASEC) of the Current Population Survey, PHI reports that 92 percent of HHAs and 88 percent of PCAs work 40 hours or less per week for an average of 31 hours and 34 hours per week, respectively. By extension, only 8 percent of HHAs and 12 percent of PCAs reported working more than 40 hours per week.

However, this information may not fully capture the total number of hours worked by these individuals because some direct care workers work for multiple employers, many direct care workers work part-time jobs, and some employers do not compensate workers for travel time between consumers (because they are not reimbursed for this time). Furthermore, there is very limited information on hours worked by independent providers or those workers employed as live-in, on-call, or night shift workers. The Department assumes that in general independent providers directly employed by individuals, families, or households work similar hours as direct care workers employed by agencies.

The wages for these workers vary widely by occupation and geographic location. Based on detailed wage data from the BLS Occupational Employment Statistics Survey, the hourly wages of HHAs and PCAs range from about $7.55 to $19.84 (less than 10 percent earn below $7.55 and less than 10 percent earn more than $19.84) with the median wage for HHAs being approximately $9.94 and for PCAs $9.67 per hour.[125] As discussed above, wages for PCAs tend to be slightly lower on average than those for HHAs. The Department assumes that in general independent providers directly employed by families receive similar hourly wages as direct care workers employed by agencies. In approximately 90 percent of states (46 states), average hourly wages for PCAs were below 200 percent of the federal poverty level wage ($11.25) for individuals in one-person households working full-time.[126] Current research suggests that these workers find it difficult to support their households on these wages; approximately 50 percent of PCAs have to rely on public benefits (e.g., Medicaid, food and nutrition assistance, cash welfare, or assistance with housing, energy or transportation) and 37 percent of direct care workers employed by agencies in HHCS lack health insurance.[127]

F. Costs and Transfers

This section describes the costs and transfers associated with the Final Rule

use the hourly rate; for more than 13 hours of care it is cheaper to opt for 24-hour care under the flat rate.

[122] Elsas, M. & Powell, A. 2011. Interview of Michael Elsas, President, and Adria Powell, Executive Vice President of Cooperative Health Care Associates by Calvin Franz and Lauren Jankovic of ERG. April, 2011.

[123] Elsas, M. & Powell, A. 2011. Some agencies have experimented with breaking a 24-hour case into two 12-hour cases that are staffed by four direct care workers; this reduces total number of hours worked and eliminates the need for the 8-hour rest period but also increases the number of direct care workers that the consumer must become comfortable with.

[124] Seavey and Marquand, 2011, pgs. 61–64. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf*; HHS, 2011, p. 26.

[125] BLS, OES, 2011.

[126] Hourly federal poverty level calculated assuming full-time (40 hours per week) and full-year (52 weeks per year) employment. 2011 federal poverty levels provided by the U.S. Census Bureau. Available at: *http://www.census.gov/hhes/www/poverty/data/threshld/index.html*.

[127] Seavey and Marquand, 2011, pgs. 55–58. WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf*

and the Department's approach to estimating their magnitude. The Department estimates the first-year regulatory familiarization and hiring costs of the rule will vary between $18.6 and $20.6 million. In following years, costs are projected to increase from around $4 million in Year 2, to about $5 million in Year 10 as new firms enter the market and new individuals, families and households hire direct care workers.

Transfers result from the wage increases to comply with minimum wage and overtime compensation requirements. Total estimated transfers depend in part on the response of employers to the regulatory changes; in other words, will employers respond by paying overtime to current workers, changing scheduling practices to avoid paying overtime, hiring additional workers, or some combination of these approaches. Based on the methods described below, the Department estimates that first-year transfers from the rule will range from $103.7 to $281.3 million. In Years 2 through 10, total transfers using OT Scenario 1 are projected to increase from $322.3 million to $626.5 million while total transfers using OT Scenario 3 are projected to increase from $118.8 million to $230.9 million.

Regulatory Familiarization

When a new rule is promulgated, all the establishments affected by the rule will need to invest time to read and understand the components of the new rule; this is commonly referred to as regulatory familiarization. Each establishment will spend resources to familiarize itself with the requirements of the rule and ensure it is in compliance.

Each home care establishment will require about two hours of an HR staff person's time to read and review the new regulation, update employee handbooks and make any needed changes to the payroll systems. Based on our analysis of the industry and occupational data, the Department judges that each employer in HHCS and SEPD likely employs workers who will be affected by the Final Rule, and will therefore need to review the Final Rule. There are about 89,400 establishments in HHCS and SEPD; [128] assuming a mid-level HR loaded wage of $38.44 per hour over two hours equals about $6.9 million for regulatory familiarization in the first year following promulgation of the rule.[129]

The Department received comments from industry groups such as NPDA and the U.S. Chamber of Commerce, arguing that the unit time estimates for regulatory familiarization are too small. However, the commenters provided no data to form a more appropriate estimate. After further consideration, the Department maintains its original estimate of two hours per establishment for regulatory familiarization. This rulemaking is a revision to an FLSA regulation that applies to a component of the home care industry workforce. The Department believes that most, if not all, affected firms are already covered by the FLSA, and employ other workers who are not exempt from its overtime and minimum wage provisions. For example, the BLS NEM data report that Home Health Care Services (6216) in 2010 includes over 200 occupations including nursing aides, therapists, and health practitioners that are not exempt from overtime and minimum wage provisions.[130] Therefore the Department believes that firms are already familiar with the relevant provisions of the FLSA and merely have to apply those provisions to one additional group of workers. The Final Rule is limited in scope and length, limiting the time required for familiarization. Furthermore, we believe that most firms will make use of guidance and educational materials from the Department, industry trade groups, franchisers and other organizations to help them review the regulations more efficiently. Finally, the Department believes that most, if not all, affected firms already use payroll systems with the capability of handling overtime calculations, and already employ workers for whom overtime might have to be calculated. Based on interviews with payroll and human resources professionals, the Department estimates that, in general, the vast majority of employers use payroll systems to distribute wage statements to their employees.[131] Thus, it is once again a matter of extending activities they already perform for one group of their employees to another group of employees. Therefore, the additional time necessary to perform the types of tasks listed in this section should be relatively minimal.

For independent providers, the employer is considered to be the individual, family, or household that hires them. Therefore, families who directly employ these direct care workers will also have to review the regulatory revisions. Some commenters, including the Chamber of Commerce, stated that this estimate was too low because of the length of the preamble. Because the employer-employee relationship is less complex than for an agency that employs multiple workers caring for multiple consumers, the Department expects the burden of regulatory familiarization will be smaller. In addition, the regulatory text is quite short and the preamble discussion is intended simply as an aide to employers regarding a variety of FLSA issues. We believe that most individuals, families, and households will rely on guidance and educational materials from the Department and advocacy organizations. The Department therefore assumes that each individual, family, or household who directly hires a direct care worker will spend one hour on regulatory familiarization. The Department uses the national average hourly wage of $29.60 (loaded) to represent the opportunity cost of reviewing the regulatory revisions.[132]

The Department has found no data to support an estimate of the number of individuals, families, and households that directly hire independent providers. The Department assumes each independent provider is hired by a single individual, family, or household, and therefore, because it estimates there are 182,600 independent providers nationally, 182,600 individuals, families, and households will incur one hour of time at an opportunity cost of $29.60 per hour for a total of about $5.4 million for regulatory familiarization in the first year following promulgation of the rule.

[128] This includes the 58 counties in California to account for costs to the IHSS program at the county level to become familiar with the requirements. For the purposes of the analysis (and to capture potential transfers), the Department is assuming that the IHSS could be considered the employer and therefore become responsible for ensuring payment of minimum wage and overtime to the workers (in particular, the 50,000 workers who regularly report more than 40 hours of worker per week). In practice, this determination would need to be made on a case by case basis based on the employment relationship between consumer, direct care worker, and IHSS.

[129] BLS, 2011, National Compensation Survey (Occupation 13–1078), Median Hourly Wage.

[130] BLS National Employment Matrix, Home Health Care Services (62–1600) 2010. Available at: *http://www.bls.gov/emp/ep_table_109.htm.*

[131] Lucy Key Price, 2010. Interview with Lucy Key Price of L.K. Price Associates, Calvin Franz and Lauren Jankovic, both of ERG. Polly Wright, 2010. Interview with Polly Wright of HR Consultants, Inc., Calvin Franz and Lauren Jankovic, both of ERG. Jennifer Wise, 2010. Interview with Jennifer Wise of Wise Consulting, Calvin Franz and Lauren Jankovic, both of ERG.

[132] BLS, 2011, National Compensation Survey, Hourly mean wage for full-time Civilian Worker is $22.77; the Department estimates the fully loaded wage at the hourly wage × 1.3. Available at *http://www.bls.gov/eci/.*

Wages and Overtime [133]

Many direct care workers are already protected by minimum wage and overtime provisions at the state level and will not drive additional costs related to the Final Rule. Fifteen states require minimum wage for all hours worked for most direct care workers and guarantee some type of overtime compensation for some direct care workers who would otherwise be excluded under the FLSA.[134] Six states and the District of Columbia require minimum wage for all hours worked but do not guarantee overtime to most direct care workers.[135] Twenty-nine states do not require minimum wage or overtime. Table 6 summarizes the wages for HHA and PCA occupations based on state level minimum wage and overtime coverage.

TABLE 6—SUMMARY OF WAGES BY STATE MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR HHAS AND PCAS

Area name	Employment	Minimum 10th percentile wage	Hourly wages weighted average median wage	Maximum 90th percentile wage
All States:				
Total	1,745,290			
PCA	820,630	$7.55	$9.67	$19.84
HHA	924,660	7.60	9.94	18.23
States with Minimum Wage and Overtime Requirements:				
Total	765,220			
PCA	343,280		10.35	
HHA	421,940		10.32	
States with Minimum Wage but not Overtime Requirements:				
Total	240,630			
PCA	82,250		10.15	
HHA	158,380		9.97	
States without Minimum Wage or Overtime Requirements:				
Total	739,440			
PCA	395,100		8.98	
HHA	344,340		9.47	

Source: BLS OES, 2011.

In order to estimate the number of workers from the table that will be directly affected by the minimum wage and overtime components of the Final Rule, the Department made three primary calculations: (1) Removed from the data set those workers not currently employed in private homes (those providing services in facilities); (2) added employees of tax exempt organizations in states with overtime requirements to the set of workers without state-level overtime requirements (as they are sometimes exempt from the state overtime laws); and (3) identified the number of workers currently receiving less than the federal minimum wage ($7.25 per hour).

The data presented in Table 6 do not differentiate the workers who provide services in the homes of consumers (engaged in domestic service employment) and those who provide services primarily in facility settings (not engaged in domestic service employment). To identify agency-employed HHAs and PCAs likely to be providing services in facilities and exclude them from the estimation of costs, the Department examined the BLS NEM of industries for each occupation and identified 32 industries that employ HHAs and PCAs. Based on the description of the industry employing the HHA or PCA, the Department made a judgment of whether the actual services were being provided in a facility or in a private home. This is then used to estimate the number of workers likely to be providing services in the home and the percent of that occupation providing services in the home. Table 7 summarizes the data as well as the determination of whether the industry would be home- or facility-based. This percentage, approximately 50 percent of HHAs and 76 percent of PCAs, is used in the detailed calculations described below. By definition, the Department assumes that 100 percent of the HHAs and PCAs working as independent providers are working in private homes.

TABLE 7—SUMMARY OF INDUSTRIES EMPLOYING HHAS AND PCAS IN 2010 AND LIKELIHOOD OF THE AIDE WORKING IN A HOME OR FACILITY

Industry	HHA		PCA	
	Percent of agency employment	Home or facility	Percent of agency employment	Home or facility
Total, All workers[a]	*100.0*		*100.0*	
Home	*50*		*76*	

[133] These costs to employers are also transfer payments that will benefit employees. See Benefits, below.

[134] Colorado, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, Pennsylvania, Washington, and Wisconsin. NELP, 2012, WHD–2011–0003–9452.

[135] Arizona, California, Nebraska, North Dakota, Ohio, and South Dakota. NELP, 2012, WHD–2011–0003–9452.

TABLE 7—SUMMARY OF INDUSTRIES EMPLOYING HHAS AND PCAS IN 2010 AND LIKELIHOOD OF THE AIDE WORKING IN A HOME OR FACILITY—Continued

Industry	HHA		PCA	
	Percent of agency employment	Home or facility	Percent of agency employment	Home or facility
Facility	*50*		*24*	
By Industry				
Accounting, tax preparation, bookkeeping, and payroll	0.0	Facility	0.3	Facility.
Activities related to real estate	NA	NA	0.0	Facility.
Child day care services	0.1	Facility	0.1	Facility.
Civic and social organizations	NA	NA	0.1	Facility.
Community food and housing, and emergency and other relief services	0.0	Facility	0.3	Facility.
Educational services, public and private	0.1	Facility	0.1	Facility.
Employment services	3.1	Facility	3.1	Facility.
Government, excluding education and hospitals	2.9	Facility	2.3	Facility.
Grantmaking and giving services	NA	NA	0.4	Facility.
HHCS	35.5	Home	33.1	Home.
Hospitals, public and private	0.9	Facility	0.5	Facility.
Lessors of real estate	NA	NA	0.1	Facility.
Management of companies and enterprises	0.0	Facility	0.5	Facility.
Management, scientific, and technical consulting	NA	NA	0.1	Facility.
Nursing and community care facilities	19.1	Facility	2.8	Facility.
Offices of all other health practitioners	0.1	Facility	0.1	Facility.
Offices of mental health practitioners (except physicians)	0.0	Facility	0.1	Facility.
Offices of physical, occupational, and speech therapists, and audiologists	0.1	Facility	0.1	Facility.
Offices of physicians	0.1	Facility	0.3	Facility.
Other ambulatory health care services	0.0	Home	0.0	Home.
Other financial investment activities	NA	NA	0.1	Facility.
Other investment pools and funds	NA	NA	0.0	Facility.
Other miscellaneous	0.0	Facility	0.0	Facility.
Other personal services	NA	NA	0.3	Home.
Other residential care facilities	1.9	Facility	0.6	Facility.
Outpatient mental health and substance abuse centers	0.3	Facility	0.3	Facility.
Residential mental health and substance abuse facilities	2.2	Facility	0.3	Facility.
Residential mental retardation facilities	17.3	Facility	3.5	Facility.
SEPD	14.3	Home	42.5	Home.
Social advocacy organizations	0.0	Facility	1.2	Facility.
Unpaid family workers	NA	NA	0.3	Home.
Vocational rehabilitation	1.8	Facility	6.4	Facility.

Source: BLS 2010 NEM; note that the percent of the occupation employed in the home versus a facility is calculated based on the actual sum of the number appearing in the table. Values are rounded to the nearest 10th of a percent and columns may not sum to totals due to rounding.

[a] This excludes self-employed workers and those employed in private households because they are considered independent providers and will be added to the population of affected workers separately.

It is important to note that the determination of whether the industry is home- or facility-based is an estimate; some industries that appear to provide services primarily in a nursing facility, for example, may employ a few direct care workers who provide services in the private homes of consumers to assist with transitioning of the consumers from the facility back to their homes. Some industries that appear to provide services primarily in the private home, HHCS for example, may also employ direct care workers who work primarily in facilities.

Next, the workers in the states with minimum wage and overtime compensation are, in general, already receiving at least the minimum wage and some form of overtime premium for hours worked beyond 40 hours. These workers do not need to be included when calculating the costs and transfers associated with additional wages resulting from the application of the federal minimum wage or payment of an overtime premium. The exception is for workers employed by public agencies, non-profit organizations, and other tax exempt entities who are exempt from many of the applicable state laws (such as the employees of the Illinois Department of Human Services' Home Services Program). To account for these workers, the Department used the 2007 Economic Census to estimate the proportion of workers in those states who are employed in establishments exempt from Federal income tax. The proportion varies by state but is 42 percent on average. The proportion in each relevant state was multiplied by the number of HHA and PCA workers in each state to estimate the number of workers likely to be employed by an employer not covered by the state level laws related to minimum wage and overtime.[136] These workers, about 302,500, were added to the total number of workers without overtime coverage in order to estimate the costs of providing overtime compensation to workers under the Final Rule. States vary widely in terms of exemptions from minimum wage and overtime rules and not all states have these types of exemptions; as a result, this approach results in an overestimate of the number of workers who will receive additional overtime wages as a result of the rule. The Department judges that this is the best

[136] The Department used a proportion of 100 percent for workers in New York to account for the fact that New York law establishes an overtime premium of one and one-half the FLSA minimum wage (rather than the workers' regular rate) for workers employed by a third party employer in a private. This produces an overestimate of the number of workers who will receive additional overtime compensation as a result of the rule.

available method to estimate these additional workers given available data.

For the NPRM, the Department analyzed the 2009 BLS OES data on HHA and PCA wages by percentile to identify those workers receiving less than the federal minimum wage (usually those in the 10th and 25th percentiles in states without minimum wage coverage). For example, in North Dakota, the 10th percentile wage was $7.20 in 2009, roughly equal to the federal minimum wage of $7.25; the Department therefore assumed 10 percent of HHAs and PCAs in North Dakota would be impacted by the extension of the FLSA's minimum wage provision. When newer data became available, the Department updated this analysis using 2011 BLS OES data on HHA and PCA wages. Using the 2011 data, the Department found no states in which workers in the 10th or 25th percentile received less than the Federal minimum wage, and therefore now assumes that a negligible number of workers will be affected by the minimum wage provision.

Due to lack of data, the Department selected the assumptions it would use to analyze independent providers directly employed by individuals, families, and households. The Department assumes that independent providers: (1) Generally will not be entitled to overtime wage premiums, and (2) earn less than the current federal minimum wage in the same proportion as agency-employed direct care workers. This rulemaking does not eliminate the companionship services exemption for direct care workers directly hired by individuals, families, and households. Therefore, since independent providers by definition do not work for a third party, we assume they will be directly hired by the individual, family, or household and will not be entitled to overtime compensation when they work more than 40 hours per week (provided, of course, that the direct care worker performs companionship services as defined in § 552.6 or is a live-in domestic service worker). The Department was unable to find data on the average number of hours worked per week by independent providers, but assumes that independent providers provide home care to multiple consumers and it is unlikely that an independent provider will work more than 40 hours per week for any single family. This assumption is based on available data which suggests that the majority of consumers receive less than 40 hours per week of services.

By assuming that the proportion of independent providers earning less than the federal minimum wage is identical to that for agency-employed direct care workers, the Department implicitly assumes independent providers work in similar patterns as agency-employed direct care workers. That is, independent providers are distributed across states in the same proportion as agency-employed direct care workers, and are as likely to earn less than minimum wage as those employed by agencies.

Finally, the Department must account for those who work in Illinois' Department of Human Services (DHS) and in California's IHSS program. These workers were excluded from the estimate of potentially affected workers in the NPRM because review of state law suggested that they were already eligible for minimum wage and overtime. Comments submitted by Illinois and California clarified the employment arrangement, their status with respect to minimum wage and overtime, and the number of workers affected.[137] [138]

For the NPRM, the Department erroneously determined that all direct care workers in Illinois are currently eligible for overtime and removed all such workers from the analysis to estimate transfer payments. In its comment on the NPRM, the Illinois DHS clarified that 30,000 direct care workers are jointly employed by the state and the consumer and, although they receive employment benefits such as subsidized health insurance, are not eligible for overtime pay under state statute. Based on this comment, the Department returned 30,000 workers to the OES data for Illinois, and assumes these workers will incur overtime hours at the same rate as other agency-employed workers.

California's IHSS workers share some attributes with independent providers but are considered employees of the county level public authority for some purposes. Under the IHSS program, county level public authorities provide home care services to qualifying residents. The services are paid for by a mix of federal, state and county funding. The county authority screens and refers direct care workers to consumers with the selection of the direct care worker as well as scheduling and supervision determined by the consumer. The county authority also acts as the employer of record for direct care workers. In addition, in California's system the county authority is responsible for collective bargaining with the union representing direct care workers to determine wage rates and benefits.[139]

There are approximately 380,000 direct care workers employed through IHSS caring for about 440,000 consumers. All IHSS direct care workers' pay exceeds the minimum wage, while about 50,000 direct care workers routinely work more than 40 hours per week.[140] In *Bonnette* v. *California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983), the Ninth Circuit held that IHSS direct care workers were employees of the state and counties. For purposes of this analysis, the Department initially assumed that direct care workers for IHSS were considered employees of the county authority and were included in OES data. However, review of OES found a total of 105,000 PCAs and HHAs in California, including those that work in facilities. The Department concluded that the 380,000 direct care workers for IHSS were not included in the OES for California, and therefore added those workers to the pool of workers without overtime coverage. Furthermore, the comment concerning California's IHSS program indicates that 50,000 of the 380,000 IHSS direct care workers (13.2 percent) routinely work overtime, which is a somewhat higher proportion than the national average of 12 percent. Therefore the Department included 50,000 IHSS workers in projections of overtime compensation rather than apply the standard percentage used for other affected workers.[141] [142]

Table 8 summarizes the number of workers estimated to be directly impacted by the minimum wage and overtime provisions of this Final Rule. As explained in more detail above, to estimate the total number of workers potentially affected by the overtime provisions of this rule, the Department:

- Used OES data to identify agency employed workers in occupations that may provide companionship services under the current definition (i.e., 1,745,300 PCAs and HHAs). The OES is based on a nationally representative sample of private employers as well as state and local governments, and is a better measure of agency employment than the NEM.

[137] CSAC, CWDA, CAPA, and CICA, WHD–2011–0003–9420; State of Illinois DHS, Comments, WHD–2011–0003–7904.

[138] The Department received no other data suggesting that affected workers were not accurately represented in the OES or NEM, or appropriately considered in the Preliminary Regulatory Impact Analysis. Therefore, the Department had no basis for additional review of other states.

[139] CSAC, CWDA, CAPA, and CICA. WHD–2011–0003–9420.

[140] CSAC, CWDA, CAPA, and CICA. WHD–2011–0003–9420.

[141] Ibid.

[142] For the purposes of regulatory familiarization, we assumed that the 58 counties in California would incur familiarization costs.

• Estimated the percentage of agency-employed workers who are employed in homes rather than facilities from the NEM and applied those percentages to the workers identified in the OES to estimate 1,086,600 agency-employed PCAs and HHAs work in homes. Because the NEM is based on the Current Population Survey, it permits us to identify the industry in which the worker is employed.

• Subtracted 472,100 direct care workers from states that already require overtime pay using state-level OES data leaving 614,500 workers in states that do not currently require overtime coverage.

• Added 302,500 direct care workers back into the OES. These workers are employed in states that require overtime pay, but are not eligible for overtime for various reasons: They work for tax-exempt organizations; they work for the IL DHS; or they work in the state of New York.[143] This results in an estimated 917,000 agency-employed direct care workers who are not currently eligible for overtime pay.

• To this the Department added 380,000 IHSS workers not currently eligible for overtime to estimate a total of 1,297,000 direct care workers are without overtime coverage.

• Due to a lack of data concerning the prevalence of use of the companionship exemption, the Department assumes that all 1,297,000 direct care workers in states without overtime protection are currently paid as exempt companions, and are thus potentially eligible for overtime pay after the rule is promulgated. This assumption clearly leads to an overestimate of the magnitude of transfer payments resulting from the rule; this overestimate may be significant.

• Finally, the Department identified those PCAs and HHAs in the NEM who reported themselves as self-employed or employed by private households; this results in an estimated 182,600 independent providers.

Since the data suggest that none of the agency-employed PCAs earn less than minimum wage, the Department also assumes that none of the 158,700 PCA independent providers earn less than minimum wage. Similarly, because no agency-employed HHAs earn less than minimum wage, the Department assumes that none of the 24,000 HHA independent providers earn less than minimum wage.

TABLE 8—SUMMARY OF WORKERS THAT ARE DIRECTLY IMPACTED BY FINAL RULE

Affected workers	Number of workers	Source
Agency-employed PCA and HHA	1,745,290	2011 OES; State-level occupational employment and wages for SOC 39–9021 and 31–1011 (see Table 6).
PCA	820,630	
HHA	924,660	
Agency-employees working in the home:		
Percent PCA and HHA in homes:		2010 NEM for SOC 39–9021 and 31–1011 (see Table 7).
PCA	76.2%	
HHA	49.9%	
Number of PCA and HHA in homes:		Total Workers multiplied by percent working in homes; 2011 OES and 2010 NEM.
PCA	625,323	
HHA	461,236	
Total	1,086,559	
Workers without OT Coverage:		
Number of PCA and HHA in States without OT Coverage	614,508	Sum of employees working in homes in selected states; 2011 OES.
Number of PCA and HHA in public agencies and nonprofits in states with OT but who are ineligible; and NY, and IL DHS.	302,531	Total workers in states with OT laws multiplied by proportion of workers in state employed by tax-exempt organizations, plus workers in NY, and the 30,000 workers in the IL DHS Home Services Program; plus workers of CA IHSS; 2011 OES and 2007 Economic Census.
Total number of PCAs and HHAs not currently entitled to OT coverage.	[a] 917,039	
Number of California IHSS workers	[b] 380,000	
Total workers without OT coverage	1,297,039	
Workers below Minimum Wage	0	Number of workers with wage below $7.25; 2011 OES.
Family-employed Independent Providers	182,604	Projections for 2011 based on the 2010 NEM for SOC 39–9021 and 31–1011.
PCA	158,651	
HHA	23,953	
Independent Providers below MW	0	Number of workers paid below minimum wage; 2011 OES.

[a] Of the 917,039 total direct care workers not currently covered by overtime laws; 531,924 are PCAs and 385,115 HHAs. Estimated from state-level OES data with adjustments for tax-exempt employers, employees of IL DHS, and workers in NY state.

[b] Based on public comment, the Department assumes 50,000 of the 380,000 IHSS direct care workers (13.2 percent) work overtime; for the 917,039 agency-employed workers estimated from the OES, the Department assumes 12 percent work overtime based on an analysis of NHHAS data.

[143] Because conflicting information was available concerning overtime provisions for direct care workers in New York state, the Department included all New York direct care workers in the analysis to be conservative.

Minimum Wage

In the NPRM, the Department estimated the number of workers earning less than the minimum wage based on 2009 data. Using the 2009 BLS data on the wages of HHAs and PCAs by percentile, the Department estimated that approximately 14,200 HHAs and 30,700 PCAs in 13 states earned less than the federal minimum wage of $7.25. However, for this Final Rule the Department reviewed the 2011 BLS data, which suggests that no HHAs or PCAs are currently earning less than the minimum wage.[144] [145] Therefore the Department estimates no increase in wages will result from application of the minimum wage provision of the FLSA to direct care workers employed by agencies. With no evidence to the contrary, we maintain our working assumption that wages for independent providers track those of agency-employed direct care workers, and therefore the same result is obtained for independent providers.

The Department will not attempt to estimate impacts of future increases in the minimum wage. Since Congress extended FLSA protections to domestic workers in 1974, it has acted four times to increase the Federal minimum wage. Congress passed amendments to the FLSA increasing the minimum wage in 1977 (Pub. L 95–151), 1989 (Pub. L 101–157), 1996 (Pub. L 104–188) and 2007 (Pub. L 110–28). In each case, the minimum wage was gradually increased over a series of steps. Given that the minimum wage has reached the maximum rate contained in the most recent amendments (Pub. L 110–28), any estimate of the cost of this rule accounting for increases in the minimum wage would be purely speculative.

Overtime

Limited data exist on the amount of overtime worked by this population. A PHI analysis of the 2007 NHHAS and U.S. Census Bureau's Current Population Survey, ASEC on direct care workers found 8 to 12 percent of HHAs and PCAs may work overtime. Among HHAs, 8 percent worked more than 40 hours per week, and 2 percent worked more than 50 hours per week; 12 percent of PCAs appeared to work more than 40 hours per week; however, PHI believes this may be an overestimate based on the 2010 ASEC supplement which suggests approximately 42 percent of direct care workers in HHCS work full-time year round.[146]

A significant overtime compensation issue in this industry is associated with 24-hour care. Attending staff may be entitled to pay up to 16 of every 24 hours or even more (if the staff is not provided a bona fide sleep period). The City of New York and New York State Association of Counties filed an amicus brief with the U.S. Supreme Court in *Long Island Care at Home, Inc.* v. *Coke* on this issue.[147] The brief asserted that changing the FLSA companionship services exemption would significantly increase the cost to the City and State for providing home health services and included an estimate of the increased costs. The additional costs for direct care workers in New York City attending consumers requiring 24-hour care is by far the largest component of these costs, exceeding the Department's estimate of nationwide overtime for all workers in all states not currently covered by overtime.

Unfortunately, the brief does not adequately describe how it arrived at the cost estimates, nor does it provide estimates of the number of consumers requiring 24-hour care or the workers caring for them. The numbers presented in the brief suggest over 33.6 million hours of annual overtime are worked just to care for consumers requiring 24-hour care plus an additional 14.6 million hours of overtime hours are worked to care for other consumers.[148] This comprises 45.7 percent of the total amount of overtime the Department estimated for the 35 states and Washington, DC that do not currently require overtime compensation (73.5 million hours).[149] Furthermore, this sample, from the Current Population Survey ASEC, should reflect all hours worked, including that of direct care workers providing services to consumers requiring 24-hour care. In addition, the need to provide a consumer with 24-hour care does not necessarily result in 72 hours of overtime per week. Maintaining continuity of care does not require a single direct care worker in attendance for the entire week; service can be provided with adequate continuity of care by two to four workers.[150] Therefore, because the brief does not explain the basis for the numbers, nor were the estimates in the brief clarified or explained in comments on the NPRM, the Department has not relied upon those estimates.

In addition, although industry commenters (IFA, NAHC, NPDA, PCA) stated that direct care workers work considerably more overtime than the impact analysis suggested, it was impossible to derive a reliable estimate of patterns of overtime from the provided data. While responses characterized the percent of direct care workers who might work more than 40 hours per week, or consumers who receive ''live-in'' or 24-hour service, not enough information was presented that would permit estimation of the number of direct care workers who have such schedules or their typical hours worked.[151] Furthermore, much of their claim that overtime hours were underestimated was based on the prevalence of ''24-hour care'' and ''live-in care.'' Although commenters used these terms synonymously, these terms are not identical and have very significant implications for how hours worked are calculated, and it was highly problematic to interpret reported survey results in a meaningful way (see discussion of public comments on overtime scenarios for further explanation of this issue). Finally, the reported data were gathered in two industry surveys, as described above, that suffered from flawed sampling approaches and cannot be considered representative of the industry as a whole. Thus, the Department also could not estimate overtime hours based on industry data. Therefore, the Department has generally relied upon nation-wide data from BLS and the nationally representative NHHAS in developing the overtime analysis.

BLS data show there are about 614,500 total direct care workers in private homes in states without state-mandated overtime coverage, plus 302,500 workers employed in New York or by tax-exempt organizations in states

[144] BLS, OES, by state, 2000–2010. Available at: *http://stats/bls/gov/oes/.*

[145] Because the Department finds no evidence of HHAs and PCAs currently earning less than the FLSA minimum wage, estimates of costs and transfers from this point forward will not include mention of the minimum wage.

[146] Seavey and Marquand, 2011, pgs. 61–64. WHD–2011–0003–3514. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[147] 551 U.S. 158 (2007). Brief of Amici Curiae City of New York and New York State Association of Counties in Support of Petitioners.

[148] The incremental cost of requiring overtime compensation under this regulation is the difference between the current hourly rate paid for direct care workers, and the rate that would be paid if this regulation is promulgated (i.e., the overtime differential) applied to hours worked in excess of 40 hours per week. If straight time pay is currently about $10 per hour, the incremental cost will be $5 per hour. New York City projects the rule will cost $168 million per year for care of patients requiring 24-hour care; $168 million divided by $5 suggests that roughly 33.6 million overtime hours per year are worked in New York City alone to care for these consumers.

[149] See discussion later in this section for the methodology used to estimate the 73.5 million hours.

[150] Elsas & Powell, 2011.

[151] IHSS Global Insight 2012,. WHD–2011–0003–8952.

with overtime requirements who are not entitled to overtime compensation (including the 30,000 workers in the Illinois Department of Human Services Home Services Program) and 380,000 workers in the California IHSS program who are not entitled to overtime. In total, the Department estimates that there are 1.30 million agency-employed workers without overtime compensation protection who will be entitled to it as a result of the Final Rule (*See* Table 8).

For the NPRM, the Department calculated that 10 percent of affected direct care workers are employed 45 hours per week (5 hours of overtime), and an additional 2 percent are employed 52.5 hours per week (12.5 hours of overtime) based on the PHI analysis of NHHAS and ASEC data on overtime worked in this industry. As a result of public comment on these overtime estimates, the Department reviewed hours worked by direct care workers as reported in the 2007 NHHAS. When calculating overtime directly instead of using estimates based on the summary provided by PHI, the Department found that those direct care workers who work more than 40 hours, but no more than 50 hours per week, average 6.4 hours of overtime; those who work more than 50 hours per week average 21.0 hours of overtime per week. The Department calculates overtime hours worked assuming that 10 percent of these 917,000 direct care workers (excluding California's IHSS workers) are employed 46.4 hours per week (6.4 hours of overtime), and an additional 2 percent are employed 61.0 hours per week (21.0 hours of overtime). The joint comment from potentially affected groups in California [152] stated that 50,000 IHSS workers work more than 40 hours per week, but did not indicate how many additional hours they worked. Therefore, the Department assigned the same overtime work pattern to them: 83.3 percent of these workers (10 out of every 12) work 46.4 hours per week, and 16.7 percent (2 out of every 12) work 61 hours per week. In total, 73.5 million hours of overtime are worked per year. Using the weighted median HHA wage of $9.84 and the weighted median PCA wage of $9.54 per hour, these workers would earn an overtime premium of $4.92 and $4.77 per hour, respectively. Under these assumptions the additional cost of overtime compensation would be approximately $355.3 million per year, absent changes to employment practices that could reduce or even eliminate overtime for these employees.

Industry Adjustments to Overtime Requirement

It is reasonable to anticipate that agencies will evaluate and potentially change operating and staffing policies in response to overtime. Commenters universally agreed, with many home care agencies suggesting that they would limit employees' hours rather than pay overtime. *See e.g.,* IFA, NPDA, Martin Hayes, Henri Chazaud, and Melina Cowan. Currently, agencies have little incentive to manage overtime because hours worked in excess of 40 per week are paid at the same rate as hours less than 40 per week. Because overtime hours will now cost agencies more, they will have an incentive to manage those hours so as to reduce costs.

The Department identified at least three possible agency responses to overtime compensation requirements. First, the agency might manage existing staff to reduce overtime hours while maintaining the same caseload and staffing levels. For example, two direct care employees—one previously scheduled to work 50 hours per week and another previously scheduled to work 30 hours per week—may be rescheduled so that they both work 40 hours every week, thus leaving caseload and number of employees unchanged while eliminating the need for overtime compensation. Henri Chazaud notes that ''work schedules will be based on reduction and elimination of overtime.'' This sentiment is echoed by Martin Hayes who states that ''[i]f our agency is required to pay overtime for these caregivers—their hours will be reduced. Our agency will not pay overtime because our clients cannot afford it and it would cost us more than we make to foot the bill our self.'' However, there is little evidence on which to predict how agencies might reorganize staff time to support the same caseload. It seems doubtful that many agencies can support their caseload without paying at least some overtime compensation, but it is unclear how much overtime could be reduced. In addition, the time spent reorganizing staffing plans is not costless. In this scenario agencies will also incur opportunity costs for managerial time even if management pay is unchanged. In addition, employees will experience adjustment costs as they adapt to new work schedules.

Second, as suggested in the City of New York's amicus brief, agencies might choose to hire new employees to avoid having current staff exceed 40 work hours per week.[153] After the Court of Appeals for the Second Circuit concluded in *Coke* that direct care workers were entitled to overtime compensation, the experience of New York City indicates this might be a common response in some regions. Such an approach will require increased staffing to cover the existing caseload. The New York City experience suggests it became common for staff who worked more than 40 hours per week at a single agency to continue to work more than 40 hours per week, but for multiple agencies.[154] For example, a direct care worker might work 25 hours per week for each of two different agencies, and not be entitled to overtime compensation despite working 50 hours per week. Once again, agencies will incur additional managerial costs as they hire and manage additional staff. Employees who begin to work for more than one agency will also incur opportunity costs as they coordinate their schedules with multiple agencies. Finally, agencies might increase staffing by hiring workers who are new to the industry; depending on the tightness of the labor market, this might necessitate increasing hourly wages to attract new workers.

The third scenario comprises a mix of the first and second approaches. Neither of those approaches is costless to agencies. Under the FLSA, agencies will be required to pay their employees an additional 50 percent premium for each hour worked in excess of 40 per week. Conversely, managing workers to reduce or avoid working employees overtime hours will require additional time spent managing schedules. If agencies must hire additional workers to absorb the potential overtime hours, managerial time will be spent screening candidates and processing and training new hires. In addition to balancing overtime and managerial costs, agencies will have to consider potential impacts on consumer satisfaction; scheduling multiple workers for each consumer to avoid paying overtime might affect the agency's ability to retain existing consumers or attract new consumers. Therefore, the Department expects that agencies will weigh the cost of hiring additional workers with the cost of paying overtime to existing workers to determine the optimal mix of overtime and new hires appropriate to their circumstances. Agency caseload, consumer preferences, current staffing patterns, the cost of hiring new workers, and managerial preferences for staffing mix will affect the final decision.

[152] CSAC, CWDA, CAPA, and CICA. WHD–2011–0003–9420, p. 2.

[153] Brief of Amici Curiae City of New York. 2007.

[154] Elsas & Powell, 2011.

Because the potential magnitude of managerial time to handle more complex scheduling is unknown, the Department requested comments on this cost to agencies. Unfortunately, no estimates of this time were provided. The Department will discuss the cost of hiring new workers in detail below.

One factor that may help determine how many employees currently exceeding 40 hours of work per week would receive overtime compensation rather than have their hours reduced below 40 per week is the potential for existing workers to absorb additional hours without exceeding 40 hours per week. Available data suggest many employees are working significantly less than 40 hours per week and at least some of those workers are interested in working additional hours. As has been mentioned, studies show that direct care workers work, on average, approximately 34 hours per week, and many work part-time.[155] Seavey and Marquand, citing the 2010 CPS ASEC found that about 45.4 percent of workers report working part-time, and asked those part-time workers why they did not work full-time; 22 percent indicated they could only find part-time work and 18 percent stated they worked part-time due to business conditions. Thus, potentially 40 percent of part-time direct care workers might be interested in increasing their hours worked if more hours were available.

This suggests that of 917,000 agency-employed HHAs and PCAs not currently entitled to overtime protections, approximately 416,300 (45.4 percent) are part-time, and 166,500 (40 percent of part-time workers) might be interested in increasing their hours worked.[156] Employees in this industry currently average about 35 hours worked per week, and those who do not typically work overtime average about 28 hours per week.[157] If each of the 166,500 agency employed part-timers who might like to work additional hours increased their average hours worked by approximately seven hours per week, they could absorb the estimated 57.4 million hours of overtime currently worked per year by agency employed workers and non-family IHSS workers without exceeding 40 hours per week themselves.[158] Not all employers will be able to redistribute hours to interested part-time workers in this way, and it may be difficult for agencies to adjust worker schedules to come close to, but not exceed, 40 hours due to the nature of the work; the types of services they provide do not necessarily fit into one-hour increments.

However, those employers who can adjust schedules and redistribute hours can be expected to decrease overtime costs significantly.

Hiring Costs

When agencies reduce the number of overtime hours worked, they must hire new workers or reallocate hours to under-employed workers to cover the hours that would have been overtime prior to the rule. The Department estimates cost per hire based on Seavey (2004), who concludes that $3,000 (inflated to 2011 dollars) is a conservative estimate of the direct cost of replacing a worker who quits (a turnover). About 75 percent of this cost is attributable to hiring the replacement worker (about $2,230), while the remainder is attributable to the costs of separation and vacancy.[159] The additional hiring costs agencies incur will depend on their allocation of the remaining overtime hours over new hires and current part-time workers.

As described in more detail below, the Department considers three scenarios for the reduction in overtime hours. OT Scenario 1 involves agencies paying for 60 percent of current overtime hours and allocating the remainder between current part-time employees and new hires. In OT Scenario 2, we assume agencies will pay for 40 percent of current overtime hours and allocate the remainder between current part-time employees and new hires. Under OT Scenario 3, agencies pay for 10 percent of current overtime and allocate 90 percent to part-timers and new hires. Based on a review of relevant literature, the Department believes that, at the upper bound, employers will adjust so that 60 percent of the current overtime worked is paid at time and one-half the employee's regular rate of pay and that the remaining 40 percent of current overtime worked will be worked by new hires and current part-time workers. However, based on employer comments and the industry surveys, the Department believes that the actual response will most likely be OT Scenario 2.

Within each of the three overtime scenarios, the Department considers a range of potential allocations of the remaining overtime hours to new hires: 30 percent, 20 percent, and 10 percent. The Department chose 30 percent as the maximum hours allocated to new hires since hiring is costly, and converting less than 40 percent of the current part-time workers to full-time workers would be sufficient to cover the total estimated overtime hours. We expect most agencies would hire a smaller percent of new workers as it would result in unnecessary hiring costs if reallocation of hours to part-timers is feasible.

Table 9 lists the estimates of hiring costs in each of the overtime scenarios and the inputs used to calculate these estimates. In OT Scenario 1, agencies reallocate hours to the specified combinations of new and current part-time workers to cover the 40 percent of overtime hours they wish to avoid. This corresponds to converting from 43,700 to 56,200 part-time workers to full-time, hiring between 1,200 and 3,700 full-time workers, and incurring additional hiring costs of $2.8 to $8.4 million. In OT Scenario 2, agencies convert from 65,500 to 84,300 part-time workers to full-time, hire between 1,900 and 5,600 full-time workers, and incur additional hiring costs of $4.2 to $12.5 million.[160]

[155] Seavey and Marquand, 2011, p. 62–63. WHD–2011–0003–3514. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf. HHS, 2011. p.26.*

[156] The analysis of the availability of part-time workers to absorb additional work hours does not include IHSS workers because they differ from agency workers. In particular, many IHSS workers provide services to only one client, often a family member, and therefore seem unlikely to be interested in adding additional work hours to their schedule by adding an additional client.

[157] This hours estimate, 28 hours, was estimated by the Department based on the 2007 NHHAS data.

[158] Note: The total number of overtime hours available to the 166,500 agency employed part-time workers (57.4 million per year) differs from the total number of overtime hours worked by all workers without overtime coverage (73.5 million per year) used elsewhere in the analysis. The total number of overtime hours available to agency employed part-time workers is based on the number of overtime hours worked by agency employed workers plus the subset of IHSS workers who both work overtime and are not likely to be employed by a family member.

[159] Seavey, D. 2004. The Cost of Frontline Turnover in Long-Term Care. Washington, DC: IFAS/AAHSa. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/TOCostReport.pdf.* The Department attributes 75 percent of the cost to hiring replacement workers based on the compilation of findings reported by Seavey.

[160] Hiring costs are identical under OT Scenario 1 with 30 percent of reallocated overtime hours used for new hires and OT Scenario 2 with 20 percent of reallocated overtime hours used for new hires because both result in 12 percent of overtime hours going to new hires. Under OT Scenario 1, 60 percent of current overtime hours are paid to current employees and 40 percent are reallocated to new hires and current part-timers; 30 percent of the reallocated hours are used for new hires, resulting in 12 percent of overtime hours going to new hires (i.e., 40 percent of hours reallocated multiplied by the 30 percent of reallocated hours going to new hires). Under OT Scenario 2, 40 percent of current overtime hours are paid to current employees and 60 percent are reallocated to new hires and current part-timers; 20 percent of the reallocated hours are used for new hires, resulting in 12 percent of overtime hours going to new hires (i.e., 60 percent of hours reallocated multiplied by the 20 percent of reallocated hours going to new hires). This only occurs in Year 1.

OT Scenario 3 involves converting 98,300 to 126,400 part-time workers to full-time, hiring 2,800 to 8,400 new full-time workers, and incurring additional hiring costs of $6.3 to $18.8 million. These are direct costs incurred by agencies, not a transfer of income from agencies or payers to employees (like overtime compensation).

TABLE 9—YEAR 1 IMPACT ON HIRING COSTS

	New hires [a]	Part-time workers to full-time	Additional hiring costs ($ mil.)
OT Scenario 1 (60 Percent of Overtime Paid)			
Hiring full-time workers to cover:			
30% of remaining OT hours	3,746	43,699	8.4
20% of remaining OT hours	2,497	49,941	5.6
10% of remaining OT hours	1,249	56,184	2.8
OT Scenario 2 (40 Percent of Overtime Paid)			
Hiring full-time workers to cover:			
30% of remaining OT hours	5,618	65,548	12.5
20% of remaining OT hours	3,746	74,912	8.4
10% of remaining OT hours	1,873	84,276	4.2
OT Scenario 3 (10 Percent of Overtime Paid)			
Hiring full-time workers to cover:			
30% of remaining OT hours	8,428	98,322	18.8
20% of remaining OT hours	5,618	112,368	12.5
10% of remaining OT hours	2,809	126,414	6.3

[a] The number of new hires is the number of full-time (35 hours per week) workers needed to cover the specified proportion of the total estimated 1.1 million overtime hours per week currently available to part-time workers (i.e., overtime hours worked by agency-employed workers and non-family IHSS workers). The number of part-time workers converted to full-time is calculated as the number of workers whose hours are increased from 28 to 35 per week needed to cover the specified proportion of current overtime hours per week. The hiring costs are based on an estimated cost of $2,230 per hire.

Travel Time

The FLSA requires that employees who, in the normal course of work, travel to more than one worksite during the workday be paid for travel time between each worksite. If the direct care worker travels to the first consumer directly from home, and returns directly home from the final consumer, travel time for the first trip and last trip generally are not considered to be compensable hours worked. It is clear that at least some direct care workers travel between consumers for the same employer and are thus entitled to be paid for that time. However, the Department has been unable to find evidence concerning how many workers routinely travel as part of the job, the number of hours spent on travel, or what percentage of that travel time currently is compensated.

New York City's amicus brief does suggest, however, that projected travel time pay would be about 19.2 percent of the size of overtime costs.[161] As discussed in the summary of public comments, the Department received no comments providing additional data or alternative methods to revise this calculation; an alternative method using data on travel time in the NHHAS suffered from too many limitations to produce a suitable estimate. With no other data available, the 19.2 percent figure seems reasonable to estimate potential travel time pay. A number of qualifications apply to the use of this ratio. First, there is anecdotal evidence that agencies that operate in the city make little effort to minimize travel on the part of their workers; since travel is ''free'' to the agency, there is little incentive to manage travel time. Second, because there is no explanation of how either overtime or travel time estimates were generated, a closer examination of the data might change either or both estimates.[162] Third, it is unclear how work and travel patterns in New York City apply to the rest of the country. For example, anecdotal evidence suggests that direct care workers in rural areas might have to travel further between consumers, but their typical caseload patterns and total travel time are unknown. A survey of 261 direct care workers in Maine found workers traveled between 0 and 438 miles per week for an average unreimbursed mileage of 45 miles per week. One survey participant's comment was compelling: ''I had to give up my other clients because the price of gas and low wages I wasn't making ends meet.'' [163] However, it is not possible to estimate whether travel would involve longer or shorter periods of time than travel in New York City, which presumably often involves travel by public transportation or by car in heavily congested road conditions.

The Department expects few independent providers will be affected by the travel time provision. Although the FLSA requires that employees who travel to more than one worksite during the workday for one employer be paid for travel time between each worksite, in the case of independent providers, any travel between work sites most likely represents travel from one employer to another, not travel between sites for the same employer. Therefore the Department anticipates that few independent providers will be entitled to travel time pay, and included no independent providers in the cost model (because they would be traveling between separate employers and thus the time is not considered work time).

[161] Brief of Amici Curiae City of New York. 2007.

[162] Thus, it is plausible that a modification in the assumptions used to generate one estimate might also affect the second estimate. The ratio of travel time to overtime might remain relatively stable even if the absolute values of the estimates change.

[163] Ashley, A., Butler, S., Fishwick, N. (2010). Home Care Aide's Voices from the Field: Job Experiences of Personal Support Specialists. The Maine Home Care Worker Retention Study. *Home Healthcare Nurse,* 28(7), 399–405. Available at: *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2946202/.*

Subject to the qualifications described above, applying New York City's 19.2 percent figure to the total overtime cost with no adjustments to direct care worker schedules and pay for 100 percent of current overtime hours, the Department estimates that the requirement to pay travel time under the FLSA might add approximately $104.3 million per year to employer costs (7 percent annualization rate).[164] In estimating travel time pay, the Department assumes that agencies will make no scheduling adjustments to overtime hours (thereby paying 100 percent of overtime costs) and that travel time pay will maintain a constant proportion to overtime hours.

Industry groups suggest that a significant portion of agencies already pay for overtime, including agencies that voluntarily pay for travel and overtime in states that do not require overtime compensation. The IHS Global Insight comment reports that 50 percent of its survey respondents pay travel time, including 39 percent of those in states that do not require it. Because this survey is not a random sample it is unknown how representative the results are of the industry in general. However, given the uncertainty concerning the travel estimate, the Department did not adjust it downwards to reflect these comments. Furthermore, because the Department's estimate of travel time pay assumes agencies pay 100 percent of overtime costs, the travel time pay figures presented in this analysis overestimate travel time pay costs resulting from the Final Rule.

Industry Adjustments Response to Travel Time Requirement

As a result of this provision, agencies should have significant incentive to reduce travel between consumers for their employees, and therefore reduce costs. It is difficult, however, to predict the potential magnitude of the cost reduction. It might be difficult to reduce travel due to consumer preferences for specific direct care workers, or the geographical dispersion of consumers (especially in rural areas).

Therefore, although the Department anticipates travel will be reduced as a result of the Final Rule, it cannot predict the magnitude of this reduction. First, there may be some minimum level of necessary travel that is irreducible. Second, although agencies have incentive to more carefully manage costs associated with employee travel, they might be able to do so in such a way that agencies avoid increased costs, but results in little reduction in travel by their employees. For example, employees currently working overtime may have their hours reduced and obtain a second job in order to work more hours. This would likely increase the uncompensated travel time of such workers.

Live-in Domestic Service Employees

The Final Rule limits the application of the overtime exemption contained in § 13(b)(21) of the Act to the individual, family or household employing the live-in domestic worker. Third party employers would no longer be entitled to claim the exemption. In addition, the rule requires employers of live-in domestic workers to maintain an accurate record of hours worked, rather than simply keeping a copy of the agreement made by the employer and employee covering hours of work. The cost to employers of the recordkeeping requirement, discussed more fully in the Paperwork Reduction Act (PRA) section of this preamble, is estimated to be $29.7 million (which reflects the amount for the entire information collection–approximately $8.95 million of which stems from this Final Rule). These figures reflect year 1 only. Following year 1, the regulatory familiarization burden associated with this Final Rule will drop substantially. The Department utilized a 1979 study of Domestic Service Employees which incorporated 1974 data on the number of live-in domestic service workers and assumed for purposes of the PRA that a similar percentage of the current domestic service worker population is employed in live-in domestic service work today. The Department has been unable, however, to identify current data to estimate the number of live-in domestic service workers employed by third party agencies, but based on the 1979 data, we do not expect the impact of the change concerning third party employment to be substantial. Although the Department has estimated the number of live-in domestic service workers for purposes of the PRA, we have not included the 1979 data in the economic analysis because the data does not provide information to estimate the number of hours worked by live-in domestic service workers per week (and whether the hours exceed 40), or information to estimate the percentage of live-in domestic service workers employed by third party entities. The Department also received no relevant comments providing such information.

G. Total Transfers

Due to the continuum of different responses to the regulation, the Department analyzed three possible scenarios with respect to overtime. As previously discussed, in view of the comments received, the Department believes that paying for 100 percent or 0 percent of overtime are highly unlikely scenarios. Therefore, in the Final Rule the Department assumes 60 percent of current overtime will be paid in OT Scenario 1, 40 percent of current overtime will be paid in OT Scenario 2, and 10 percent will be paid in OT Scenario 3. Based on the combination of two industry surveys, empirical research, and employer comments, the Department believes that OT Scenario 2 reflects the most likely impacts of the Final Rule. Scenario 1 assumes the agency pays employees the overtime premium for over half of overtime hours worked. Conversely, the employer might change scheduling practices to avoid the majority of overtime costs to the extent practicable and hire additional workers as necessary to work the extra hours. In addition, it is assumed that additional staff can be hired at the current going wage rate under all three of these scenarios. As described above, additional managerial costs to agencies might occur as a result of changes in staffing; the Department has no basis for estimating these costs, but believes they are relatively small. Therefore, they are not included in the three scenarios.

The three scenarios in rank order from highest to lowest amount of overtime that will be paid by employers are:

- *OT Scenario 1:* The Department assumes agencies pay 60 percent of the overtime currently worked. Agencies use a combination of hiring additional direct care workers and increasing hours of current part-time workers to cover the remaining 40 percent of current overtime hours.
- *OT Scenario 2:* The Department assumes agencies make a partial adjustment to staffing; overtime compensation is reduced, but not eliminated, by hiring some additional staff or increasing hours to part-time workers. OT Scenario 2 assumes employers will pay the direct care workers for 40 percent of the overtime currently worked and hire additional direct care workers or increase hours for part-time workers to cover the remaining hours.
- *OT Scenario 3:* The Department assumes agencies ban overtime to the

[164] It is unknown whether travel hours will be paid at straight time or overtime rates; this will vary according to the circumstances of the individual worker. If we assume all travel hours are overtime hours, and are paid at approximately $14.50 per hour, then the $68.1 million in incremental travel time pay in Year 1 suggests about 4.7 million hours per year are spent in travel. If we assume all travel hours are straight time hours, and are paid at approximately $9.67 per hour, then the $68.1 million in incremental travel time pay suggests about 7.0 million hours per year are spent in travel.

extent possible and increase staffing to ensure few employees work more than 40 hours per week. The Department assumes that because of rigidities in staff and consumer preferences and schedules it will not be possible to reduce overtime to zero. Furthermore, some agencies already pay overtime voluntarily. Thus, the Department believes 10 percent of the overtime currently worked is a reasonable expectation for the level of overtime achieved under this scenario.

Table 10 presents an overview of the total estimated transfers of this rule where the scenarios represent a range of potential outcomes; actual transfers will depend on the response of employers to the Final Rule.

TABLE 10—SUMMARY OF YEAR 1 TRANSFERS

Transfer components	Total transfers ($ mil.)	Comments
Travel Time Compensation	$68.1	
Overtime Scenarios:		
OT 1 [a]	213.2	60% of $355.3 million.
OT 2 [b]	142.1	40% of $355.3 million.
OT 3 [c]	35.5	10% of $355.3 million.
Total Transfers by Scenario		Employers of workers not currently entitled to overtime protections:
Travel + OT Scenario 1	281.3	Allocate all but 60 percent of overtime to non-overtime workers.
Travel + OT Scenario 2	210.2	Allocate all but 40 percent of overtime to non-overtime workers.
Travel + OT Scenario 3	103.7	Allocate all but 10 percent of overtime to non-overtime workers.

[a] The Department estimates that 50,000 IHSS workers currently work overtime and about 110,000 (12% of 917,000) non-IHSS workers currently work overtime. Therefore, of the total estimated transfer, about 31 percent (e.g., $66.6 million in Year 1) is attributable to IHSS direct care workers.
[b] Of the total, about 31 percent (e.g., $44.4 million in Year 1) is attributable to IHSS direct care workers.
[c] Of the total, about 31 percent (e.g., $11.1 million in Year 1) is attributable to IHSS direct care workers.

The Department examined three scenarios representing varying agencies' potential responses to the overtime compensation requirement. There is little hard evidence concerning which scenario is most likely to occur based upon employer comments.[165] However, agencies have reasonable alternatives to paying the overtime premium: Spreading existing overtime hours to other workers, either new employees or current employees who want more hours. The Department expects that OT Scenario 1 is the least likely to occur; there is no reason to believe agencies will pay workers for significant amounts of overtime if they can avoid it. OT Scenario 1 represents an upper estimate that projected transfer effects will probably not exceed. OT Scenario 3 represents a lower estimate below which projected transfers are unlikely to fall. Based on the combination of two industry surveys, empirical research, and employer comments, the Department believes that OT Scenario 2 reflects the most likely impacts of the Final Rule and thus, believes that OT Scenario 2 best represents the true transfer effects resulting from the overtime requirement.

There are multiple channels through which hours can be spread to additional workers without significantly increasing non-overtime wages. For example, the Department examined scheduling patterns for consumers who require 24-hour care 7 days per week. With 2 direct care workers overtime might range from 18 to 46 hours per week depending on scheduling (assuming an average of 6.25 hours of sleep and 1.5 hours for mealtime for each 24 hour shift). By adding one more direct care worker, overtime can be reduced to perhaps 15 hours or less per week with similar assumptions concerning sleep and meal time.

The extent to which current employees work more than 40 hours per week provides little evidence of a potential labor shortage in this industry; because most agencies are not required to comply with overtime compensation requirements for these workers, they have had little incentive to manage workers in a way to avoid overtime. Furthermore, the existence of a significant pool of part-time workers who would prefer to work more hours suggests that a general labor shortage does not exist (although there might be some localized shortages).

Projected Future Costs and Transfer Effects Due to Industry Growth

As documented above in this analysis, the demand for direct care workers has grown significantly over the past decade and is projected to continue growing rapidly. One researcher has projected at least a 200 percent increase in demand for direct care workers over the next 40 years.[166] Therefore, the Department examined how the provisions in the Final Rule might impact a rapidly growing industry.

To project regulatory familiarization costs, the Department first estimated both the number of agencies and the number of independent providers likely to enter the market. The Department used U.S. Census' Business Dynamics Statistics to estimate an average annual firm ''birth'' rate of 8.6 percent of existing firms.[167] With 89,400 affected agencies in the baseline, this projects to 7,700 new agencies per year that will incur incremental regulatory familiarization costs.

The projected number of families expected to hire independent providers was calculated using U.S. Census population projections by age. Census projected that the number of individuals age 65 and older will increase from 40.3 million in 2010 to 56.0 million in 2020 (39 percent), while those age 85 and older will increase from 5.5 million to 6.7 million (22 percent) over the same time period.[168] The Department selected

[165] National-level quantitative analyses have produced results consistent with the Department's qualitative analysis for this labor market:

Barkume, Anthony. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs, *Industrial and Labor Relations Review,* 64(1): 128–142.

Trejo, Stephen. (1991). The Effects of Overtime Pay Regulation on Worker Compensation, *American Economic Review,* 81(4): 719–40.

Trejo, Stephen. (2003). Does the Statutory Overtime Premium Discourage Long Workweeks? *Industrial and Labor Relations Review,* 56(3): 530–551.

[166] HHS, 2001. pgs. 4, 5, and 7.

[167] U.S. Census Bureau, Center for Economic Studies. Business Dynamics Statistics: Firm Age by Firm Size. Available at: *http://www.census.gov/ces/dataproducts/bds/data_firm.html.* Accessed April 10, 2013.

[168] U.S. Census Bureau, Population Division. Table 1: Intercensal Estimates of the Resident

Continued

the weighted midpoint of these two age groups to estimate the growth rate of the population most likely requiring assistance. This growth rate over 10 years (37 percent) was applied to the number of independent home care providers in the baseline year (182,600) to estimate that 250,000 independent providers would be supplying services to 250,000 families by 2021, an average of 6,744 new workers per year from 2012 to 2021.[169]

However, this estimate does not account for turnover among individuals, families, and households hiring independent home care providers; the Department accounted for this by assuming that 50 percent of the previous year's independent home care providers would gain a new consumer, and that consumer or consumer's family would require regulatory familiarization. Thus, on average, regulatory familiarization costs among families hiring independent providers each year was calculated at 50 percent of the previous year's providers plus 6,744.

Consistent with the baseline estimate, new agencies projected to incur regulatory familiarization costs are assumed to require two incremental hours at a rate $38.44 per hour. Families hiring independent providers are assumed to require one hour of regulatory familiarization at a rate of $29.60. Table 11 summarizes the estimation of projected regulatory familiarization costs. The analytic baseline for projecting the costs of this rule is 2011 due to data availability, and therefore the projected first and second year costs of the rule appear to be in the past. This approach is necessary because the projections rely on and are later compared to year-specific estimates from other sources (e.g., projected home health expenditures). For Table 11, 2011 data should be interpreted as the pre-rule baseline, with 2012 representing projected costs for Year 1 following promulgation of the rule, 2013 representing Year 2, and so on. When comparing numbers projected by other agencies (e.g., BLS Occupational Outlook, CMS Office of the Actuary), the actual year label is appropriate.

TABLE 11—PROJECTED REGULATORY FAMILIARIZATION COSTS

Year	Agencies requiring regulatory familiarization		Families requiring regulatory familiarization				Costs ($ mil.)
	Number	Costs ($ mil.)	Total IPs	New IPs	Turnover	Costs ($ mil.)	
2011	89,446	6.88	182,604	.....	.....	5.41	12.28
2012	7,718	0.59	189,348	6,744	94,794	2.80	3.39
2013	7,718	0.59	196,092	6,744	98,046	2.90	3.50
2014	7,718	0.59	202,836	6,744	101,418	3.00	3.60
2015	7,718	0.59	209,581	6,744	104,790	3.10	3.70
2016	7,718	0.59	216,325	6,744	108,162	3.20	3.80
2017	7,718	0.59	223,069	6,744	111,534	3.30	3.89
2018	7,718	0.59	229,813	6,744	114,906	3.40	3.99
2019	7,718	0.59	236,557	6,744	118,279	3.50	4.09
2020	7,718	0.59	243,301	6,744	121,651	3.60	4.19
2021	7,718	0.59	250,045	6,744	125,023	3.70	4.29

Projected hiring costs under the three overtime scenarios are based on the projected growth in overtime hours. Projections of employment growth and projections of future overtime hours worked and overtime compensation are explained and quantified below. Only those new hires and their associated hiring costs that can be considered to be caused by this rule are considered (*see* Table 12). That is, the vast majority of new employees represented by job growth occur regardless of the rule and therefore the costs of hiring those workers are not attributable to the rule. It is only when an agency has to hire an additional worker as a result of the rule (i.e., a worker the agency would not have otherwise hired in the absence of the rule) that regulatory costs are attributed to this Final Rule.

The number of new hires attributable to the rule is a small fraction of the projected growth in employment in this industry. First, since we assume future overtime work patterns resemble current patterns, only 12 percent of each year's new employees are expected to work overtime. Second, because on average they work 8.8 hours of overtime per week, total overtime hours per 100 new hires is analogous to 2.6 full-time equivalent (FTE) positions. Third, the Department expects agencies will pay the overtime premium for some of those hours (10 to 60 percent): Thus, of the potential 2.6 FTE overtime hours, only 1.0 to 2.3 FTE overtime hours are necessary to cover reallocated overtime. Finally, the Department believes most (70 to 90 percent) of those 1.0 to 2.3 FTE overtime hours are likely to be reallocated to current part-time workers, and only 10 percent to 30 percent of those hours are allocated to new hires. Thus, the projected number of new hires that can be attributed to the rule is a very small percentage of the total number of new workers the industry is expected to hire over the next 10 years.

Table 12 shows the estimated number of new hires attributable to this rule and their associated costs. The Department projects that the average number of new hires caused by this rule ranges from 228 to 1,542, depending on the overtime and hiring scenario. Using a 7 percent real rate, the average annualized costs associated with hiring these workers range from $0.6 to $1.8 million in OT Scenario 1, $0.9 to $2.7 million in OT Scenario 2 and from $1.3 to $4.0 million in OT Scenario 3.

Population by Sex and Age for the United State: April 1, 2000 to July 1, 2010. Available at: *http://www.census.gov/popest/data/intercensal/national/nat2010.html.* Accessed April 10, 2013; U.S. Census Bureau. 2012. National Population Projections. Table 2: Projections of the Population by Selected Age Groups and Sex for the United States: 2015 to 2060. Available at: *http://www.census.gov/population/projections/data/national/2012/summarytables.html.* Accessed April 10, 2013.

[169] These do not include families that are using the services of IHSS direct care workers.

TABLE 12—PROJECTED HIRING COSTS [a]

Hiring full-time workers to cover:	Year 1 ($ mil.)	Future years ($ mil.) [b]		Average annualized value ($ mil.)		Number of hires	
		Year 2	Year 10	3% Real rate	7% Real rate	Year 1	Average [c]
OT Scenario 1.							
30% of remaining OT hours	8.4	$0.8	$0.8	$1.6	$1.8	3,746	685
20% of remaining OT hours	5.6	0.5	0.5	1.1	1.2	2,497	457
10% of remaining OT hours	2.8	0.3	0.3	0.5	0.6	1,249	228
OT Scenario 2.							
30% of remaining OT hours	12.5	1.2	1.2	2.5	2.7	5,618	1,028
20% of remaining OT hours	8.4	0.8	0.8	1.6	1.8	3,746	685
10% of remaining OT hours	4.2	0.4	0.4	0.8	0.9	1,873	343
OT Scenario 3.							
30% of remaining OT hours	18.8	1.7	1.7	3.7	4.0	8,428	1,542
20% of remaining OT hours	12.5	1.2	1.2	2.5	2.7	5,618	1,028
10% of remaining OT hours	6.3	0.6	0.6	1.2	1.3	2,809	514

[a] Projected number of hires and hiring costs are based on the projected growth in the number of overtime hours in Table 16.
[b] These costs represent a range over the nine-year span. Costs are lowest in Year 2 and highest in Year 10 so these two values are reported.
[c] Simple average over 10 years.

To estimate the number of incremental direct care workers who might earn overtime compensation or travel time compensation under the revisions, the Department utilized BLS Occupational Outlook employment projections for 2020.[170] The Department interpolated employment data for 2012 through 2019, and extrapolated the time series through 2021 using a constant rate of growth assumption. Wage data were directly extrapolated through 2021 using the time trend from 2000 through 2011. Based on these time series:

- Home Health Aide employment will increase by an average of 8.7 percent per year;[171] their median nominal wage will increase by an average of 2.72 percent per year while median real wage will increase by an average of 1.53 percent per year.[172]
- Personal Care Aide employment will increase by an average of 8.0 percent per year; their median nominal wage will increase by an average of 3.88 percent per year, and the median real wage will increase by an average of 2.70 percent per year.

Table 13 summarizes the projections of HHA and PCA employment and wages developed for this analysis.

TABLE 13—PROJECTED EMPLOYMENT AND HOURLY WAGE, HHAS AND PCAS, 2011–2021 [a]

Year	Home health aides			Personal care aides		
	Total employment (mil.)	Median wage		Total employment (mil.)	Median wage	
		Nominal	Inflation-adjusted [b]		Nominal	Inflation-adjusted [b]
2011	0.92	$9.91	$9.91	0.82	$9.49	$9.49
2012	1.01	10.16	10.05	0.89	10.34	10.23
2013	1.10	10.47	10.23	0.96	10.73	10.50
2014	1.19	10.78	10.42	1.04	11.13	10.75
2015	1.28	11.09	10.59	1.11	11.52	11.01
2016	1.37	11.40	10.76	1.18	11.91	11.25
2017	1.46	11.71	10.93	1.25	12.30	11.49
2018	1.55	12.03	11.09	1.32	12.69	11.72
2019	1.64	12.34	11.24	1.40	13.08	11.94
2020	1.72	12.65	11.39	1.47	13.48	12.16
2021	1.81	12.96	11.54	1.54	13.87	12.37

[a] Derived from BLS Occupational Outlook.
[b] Estimates based on 10 year average change in PPI for Home Health Services.

The Department did not project future (Year 2 and beyond) transfer effects associated with minimum wage provisions of the FLSA being extended to these occupations. BLS Occupational Employment Statistics on HHA and PCA wages for 2010 indicate that few, if any, workers are currently paid below minimum wage. BLS found no state in which the tenth percentile wage was below $7.25 per hour.[173] As previously discussed, Congress passed amendments to the FLSA increasing the Federal minimum wage only four times since it extended FLSA protections to

[170] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010–11 Edition,* Home Health Aides and Personal and Home Care Aides. Available at: *http://www.bls.gov/oco/ocos326.htm.* Accessed September 20, 2011.

[171] Total hours worked and overtime hours worked will increase at the same rate in this model.

[172] The Department adjusted nominal wages for inflation using the average increase in the PPI for Home Health Services over the last 10 years (1.2 percent).

[173] BLS Occupational Employment Statistics, 2010 state estimates. Available at: *http://stats.bls.gov/oes/.*

domestic workers in 1974. Given that the minimum wage has reached the maximum rate contained in the most recent amendments, any estimate of the cost of this rule accounting for increases in the minimum wage would be purely speculative.

Projected Cost Impacts

This section draws on the estimates of costs to determine the anticipated impact of this Final Rule in terms of total cost across all industries as well as estimated cost per firm and per employee.

Table 14 presents the impact of regulatory direct costs on existing agencies and individuals, families, and households in the first year. First year regulatory familiarization costs total $12.3 million; when annualized at a 7 percent discount rate over 10 years, total annualized costs are $4.9 million per year. Cost per agency is $77, while families employing independent providers will incur costs of $30 per individual, family, or household. Hiring costs annualized at a 7 percent real discount rate over 10 years range from $0.6 to $1.8 million in OT Scenario 1, from $0.9 million to $2.7 million in OT Scenario 2, and from $1.3 million to $4.0 million in OT Scenario 3. These correspond to Year 1 costs per establishment of $31 to $94 in OT Scenario 1, $47 to $140 in OT Scenario 2, and $70 to $211 in OT Scenario 3.

TABLE 14—IMPACT OF REGULATORY DIRECT COSTS

Component	Total projected compliance costs ($mil.) [b]				Year 1 cost per establishment component [a]
	Year 1	Future years		Annualized at 7%	
		Year 2	Year 10		
Regulatory familiarization costs					
Home Healthcare Agencies	$6.9	$0.6	$0.6	$1.4	$77
Families Employing IPs	5.4	2.8	3.6	3.5	30
Hiring Costs					
OT Scenario 1:					
30% of OT hours	$8.4	$0.8	$0.8	$1.8	$94
20% of OT hours	5.6	0.5	0.5	1.2	62
10% of OT hours	2.8	0.3	0.3	0.6	31
OT Scenario 2:					
30% of OT hours	12.5	1.2	1.2	2.7	140
20% of OT hours	8.4	0.8	0.8	1.8	94
10% of OT hours	4.2	0.4	0.4	0.9	47
OT Scenario 3:					
30% of OT hours	18.8	1.7	1.7	4.0	211
20% of OT hours	12.5	1.2	1.2	2.7	140
10% of OT hours	6.3	0.6	0.6	1.3	70

[a] Regulatory familiarization applies to 89,446 establishments; independent provider regulatory familiarization will impact 182,604 entities.
[b] Excludes paperwork burden, estimated in Section V.

Market Impacts

There are almost no data, such as price elasticities of supply or demand, that can directly be used to model the market for companionship services. Furthermore, because approximately 75 percent of expenditures on home care services are reimbursed by public payers, the effect of the rule depends on how the public payers respond to the increase in the cost of providing home care services. However, despite these limitations, the Department used available data combined with best professional judgment concerning appropriate parameter values, to project deadweight loss and disemployment effects of the Final Rule. The selection of specific values and the rationale for those decisions are explained in further detail below.

In this section, the Department first presents estimated transfer effects for each provision of the rule, along with qualitative discussion of potential market adjustments and impacts of that provision. The Department then presents the projected deadweight loss and disemployment effects of the Final Rule using a market model framework.

The Department estimates:

- Projected travel time pay represents a transfer of $68.1 million per year from agencies to employees (Table 10, although this might decline as agencies will now have incentive to more closely manage travel time). If these payments are spread equally over all agencies in this industry, they represent about a 0.15 percent increase in wages to employees. It is more likely that these payments will be distributed less uniformly; employees of some agencies might receive significant travel transfer effects, while others receive less.
- Transfer effects associated with overtime are most difficult to project. In Scenario 2 the $142.1 million in additional wages compose about 0.31 percent of annual wages if overtime is spread over all workers, or about 0.16 percent of average industry annual revenues if spread over all establishments. Again, it is likely that overtime compensation will be distributed less uniformly in a way that is difficult to predict.

However, changes in wages are not the only determinant of how the market might tend to respond to the Final Rule; the demand for home care services, and therefore the demand for workers in this industry, also affects the market response. Conceptually, the demand for companionship services has two distinct components: Consumers covered by public payers, and out-of-pocket payers. Multiple sources estimate that the percent of home care expenditures accounted for by Medicare and Medicaid range from about 75 percent to 90 percent.[174] [175] [176] [177] [178] The

[174] Seavey and Marquand, 2011, pgs 22, 23. WHD–2011–0003–3514. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[175] Congressional Research Service. Memorandum dated February 21, 2012, titled ''Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair

remaining expenditures are accounted for by out-of-pocket payers, private insurance, and a mix of other governmental sources.

Currently, Medicare will cover, without a copayment requirement, all—or almost all—of the allowed payment for home health care services for consumers eligible for Medicare payments. Thus, the demand for services by these consumers is likely to be highly inelastic, and the purchase of these services is dependent primarily on need and eligibility rather than price.[179] The increase in the payment rate resulting from an increase in costs may vary depending on the type of cost increase. Because an increase in the minimum wage is an unavoidable cost of providing these services, it seems reasonable to assume that it will eventually be reflected in payment rates. The impact of overtime and travel on reimbursement rates is more uncertain.

Several commenters stated that Medicare/Medicaid only pay for services and not travel or overtime. For example, Daniel Berland of the National Association of State Directors of Disabilities Services observed that ''Medicaid doesn't pay for time that is spent not working directly for the consumer.'' The CRS observed that ''payments by Medicare or Medicaid to an agency to provide home health aide services or Medicaid personal care services are not the same as the wage that that the agency pays to the worker'' and stated that over time the payments under both Medicare and Medicaid could be adjusted to reflect additional costs to agencies providing these services.[180]

Consumers who pay all, or a significant share, of costs out-of-pocket might have a significantly different price elasticity of demand for home care services. Little information is known about this market segment, including the percent of home care consumers actually pay out-of-pocket, as opposed to having private insurance to cover costs. Because public payers account for about 75 percent of total payments for home care services, it is likely that the private pay market segment is significantly smaller than the public pay market. To the extent that these consumers are not covered by private insurance and pay out-of-pocket, they are likely to have a more elastic demand for services; if the prices for home care services increase, these consumers are more likely to search for lower cost alternatives. However, the size of such an effect is difficult to predict on the basis of extant information.

The Department expects the impact of this Final Rule on the market for home care services to be relatively small because incremental transfers are projected to be small relative to industry wages and revenues, and because the market for these services is dominated by government payers. However, to the extent that some transfers are not reimbursed by government payers, and that agencies might therefore increase the price to consumers, they might result in some consumers seeking alternatives to the organized market for home care services.

Deadweight Loss

Deadweight loss from a regulation results from a wedge driven between the price consumers pay for a product or service, and the price received by the suppliers of those services. In this case, the transfer of income from agency owners to agency employees through overtime provisions reduces agencies' willingness to provide home care services. Because consumers and their families must now pay more to receive the same hours of service, they may reduce the number of hours of services they purchase; it is this potential reduction in services that causes the allocative inefficiency (deadweight loss) of the rule.

To estimate deadweight loss, the Department must estimate the reduction in services agencies are willing to provide at the current market price, the resulting increase in market price paid by consumers and families, and their reduced purchases of home care services. To do this, the Department uses: (1) The current market wage and hours of home care services; (2) the estimated income transfers resulting from the rule; and (3) the price elasticity of demand for and supply of home care services.

PCA criticized the deadweight loss analysis in the NPRM because it used an incorrect price elasticity of demand for direct care workers.[181] Upon further investigation, the Department determined that the comment was accurate, although the commenter's suggested alternative value was also flawed. Issues associated with the estimation of the price elasticity of demand and deadweight loss are discussed in detail in the Summary of Public Comments on the Preliminary Regulatory Impact Analysis Section.

In addition, the Department accepts the commenter's point that the market for direct care workers contains a private pay sector and a public-funds-reimbursed sector that might differ substantially in terms of consumer response to price changes. Therefore, the Department now evaluates deadweight loss projections by explicitly modeling the two distinct market sectors; the larger public pay market segment (75 percent of the market) is characterized by a highly inelastic price elasticity of demand (–0.17), while the smaller private pay segment (25 percent of the market) has more elastic demand (–1.0).

The Department has estimated approximately 385,000 HHAs and 532,000 PCAs currently work without overtime protection. An additional 50,000 of 380,000 IHSS direct care workers routinely work more than 40 hours per week but do not receive overtime compensation. These direct care workers are potentially affected by the overtime provisions of the Final Rule. The median hourly wage in these states is $9.91 for HHAs and $9.49 for PCAs. The Department used the number of employees affected by overtime provisions in its calculation of deadweight loss because: (1) The populations of affected workers in states without minimum wage and overtime provisions are largely overlapping (i.e., states without minimum wage protection also do not have overtime protection) because the same worker might be paid less than the minimum wage and also be working overtime, including both counts creates a double-counting problem; (2) minimum wage impacts of the Final Rule are estimated to be zero; and (3) spreading transfers over a smaller worker population results in a more conservative estimate of deadweight loss (that is, the Department is more likely to overestimate, than underestimate, deadweight loss).

Labor Standards Act: Impact on Medicare and Medicaid,'' p. 4. WHD–2011–0003–5683.

[176] U.S. Census Bureau: Health Care and Social Assistance, Estimated Year-to-Year Change in Revenue for Employer Firms by Source, Table 8.10. Available at: *http://www.census.gov/services/sas_data.html.*

[177] Home Health Care Services Payment System. The Medicare Payment Advisory Commission (MedPAC). October 2010. Available at: *http://www.medpac.gov/documents/MedPAC_Payment_Basics_08_HHA.pdf.*

[178] ERG analysis of MEPS data. Agency for Healthcare Research and Quality (AHRQ). Medical Expenditures Panel Survey. 2009. Available at: *http://meps.ahrq.gov/mepsweb/data_stats/download_data_files.jsp.* Accessed March, 2012.

[179] Home Health Care Services Payment System. The Medicare Payment Advisory Commission (MedPAC). October 2010. Available at: *http://www.medpac.gov/documents/MedPAC_Payment_Basics_08_HHA.pdf.* Medicare, for example, does not require copayment for eligible patients.

[180] Congressional Research Service. Memorandum dated February 21, 2012, titled ''Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair Labor Standards Act: Impact on Medicare and Medicaid.'' WHD–2011–0003–5683.

[181] William Dombi, WHD–2011–0003–9595.

The Department included 30 percent of California IHSS direct care workers in the deadweight loss analysis. Comments from the California State Association of Counties, et al., indicate that perhaps 70 percent of IHSS direct care workers are family members. This suggests they are different from other agency-employed direct care workers. For example, IHSS workers may not consider direct care to be their vocation (outside of caring for their family members), and thus might be more likely to quit than care for a non-family member after their family member no longer needs care.[182] Therefore, the Department believes most IHSS direct care workers are likely to respond to market forces in different ways than agency-employed direct care workers, and should not be included in the deadweight loss analysis. The Department assumed that those IHSS workers who exceed 40 hours of work per week are evenly distributed among family and nonfamily direct care workers, and therefore also included 30 percent of overtime premiums for IHSS workers in the deadweight loss analysis.

The Department estimated a range of income transfers depending on the assumptions made concerning business response to the regulation. The Department assumes a split of overtime costs between agencies, who pay at least some limited amount of overtime, and direct care workers, whose hours of work are reduced by that agency (although the direct care workers might seek additional hours to work at other agencies). Combining the $142.1 million estimated overtime compensation costs under OT Scenario 2 (expected by the Department to be the most probable of the three scenarios), with the amounts due based upon the travel time compensation provisions, the Department estimated the deadweight loss of the rule based on first year transfer costs of $210.2 million; this excludes 70 percent of overtime payments to IHSS workers. Thus, the rule might cost $159 per potentially affected worker, or approximately $0.09 per hour assuming workers average 35 hours per week, about 0.89 percent of the current hourly wage for HHAs and 0.92 percent for PCAs.

There are no econometric estimates of the price elasticity of demand or supply for home care services. The Department reviewed econometric literature to identify alternatives to use as proxies for a direct estimate of the price elasticity of demand for home care services. For the price elasticity of demand for home care services that are largely reimbursed by third party payers (e.g., public payers, private insurance), the Department chose the price elasticity of demand for ''health care services'' to use as a proxy for this analysis. The primary consideration in selecting this value is that the demand for home care should be largely inelastic due to the high degree of reimbursement; this characteristic is similar to the demand for health care services. A literature review shows that the price elasticity of demand for health care services is generally in the −0.10 to −0.20 range. As discussed earlier in the analysis, the Department will use a value of −0.17 in the deadweight loss model.

The price elasticity of demand for private pay care is expected to be more elastic because this type of demand is often for long-term chronic care, and is typically not reimbursed by third party payers. Therefore the Department selected the price elasticity of demand for nursing home care to use as a proxy: nursing home care appears to be a close substitute for long-term private pay home care because consumers frequently must choose between living at home with assistance, or entering a nursing home or assisted living facility if that assistance is unavailable or too expensive. Literature shows price elasticities of demand for nursing care in the −0.7 to about −4.0 range. For the reasons previously discussed, the Department will use a value of −1.0 in the deadweight loss model.[183]

For the purpose of estimating deadweight loss, the Department will assume that the private pay sector composes perhaps 25 percent of the home care services market; the private pay market segment will be assumed to employ 25 percent of direct care workers and incur 25 percent of transfers in the form of overtime and travel time compensation. This judgment is based primarily on the percentage of home care services paid by public payers. Although private pay industry commenters on the NPRM asserted the private pay market is large, they provided little data to document this assertion. The only portion of the private pay market that could be documented (e.g., private pay franchisees) was a fraction of the number of agencies claimed to operate in the private pay market.

In addition, the Department could find no corroboration to support the claim of a large private pay segment in other databases. The Department examined alternative data sources such as the nationally-representative MEPS database, which captures the use of long-term non-medical care (e.g., companionship and homemaker services) in addition to short-term acute medical home care. The MEPS data offered little support for the existence of a large private pay market for home care services. Private pay appears to be more frequently used with independent providers, whereas payment for agency services was dominated by Medicare and Medicaid with a relatively small percentage of consumers paying out-of-pocket for agency care.

The price elasticity of supply for hourly labor has been estimated at 0.1 (a 1 percent increase in wages will cause a 0.1 percent increase in hours supplied). However, among women, that price elasticity of supply is estimated to be about 0.14; because hours worked in this labor market are primarily supplied by women, the Department selected a value of 0.14 to use as the price elasticity of supply of home care services in this analysis.

Based on these price elasticities of supply and demand, the estimated cost per direct care worker hour, and baseline employment and wages, the Department projects that for:

- HHAs, hourly wage will increase by $0.03 to $9.94, and employment will decrease by about 332 (less than 0.1 percent of affected HHAs), or about 604,900 hours of home care services annually; deadweight loss will be $26,400 annually (less than 0.0001 percent of industry revenues).
- PCAs, hourly wage will increase by $0.03 to $9.52, and employment will decrease by 479 (less than 0.1 percent of affected PCAs), or about 872,500 hours of home care services annually; deadweight loss will be $38,100 annually (less than 0.0001 percent of industry revenues).

In addition, transfers to direct care workers will be borne by the consumers and their families in the form of higher prices, and by agencies and their owners in the form of reduced profit. The determination of who pays these transfers is a function of the relative price elasticities of supply and demand; the weighted average results for the two market sectors shows that about 38 percent of transfers will be borne by consumers, their families, and public payers, with the remainder borne by agencies (about 62 percent). For:

- HHAs, about $26.1 million is estimated to be paid by consumers, their families, and public payers; while $42.8 million is estimated to be paid by agencies and their owners in the form of reduced income.

[182] CSAC, CWDA, CAPA, and CICA, WHD–2011–0003–9420.

[183] Rechovsky, J. (1998). The Roles of Medicaid and Economic Factors in the Demand for Nursing Home Care, *Health Services Research,* 33(4 Pt 1): 787–813.

• PCAs, consumers, their families, and public payers are estimated to pay about $36.1 million, and $59.1 million is estimated to be paid by agencies and their owners in the form of reduced income.

Table 15 summarizes both the values of the parameters used in the deadweight loss analysis and the results of the analysis.

TABLE 15—SUMMARY OF DEADWEIGHT LOSS ESTIMATION

	Medicare/Medicaid reimbursed			Private pay			Total		
	HHA	PCA	Total	HHA	PCA	Total	HHA	PCA	Total
Values Used in Deadweight Loss Analysis									
Price Elasticity of Demand	−0.17	−0.17	.....	−1.00	−1.00	.....	N/A	N/A	.....
Price Elasticity of Supply	0.14	0.14	.....	0.14	0.14	.....	N/A	N/A	.....
Baseline Hourly Wage	$9.91	$9.49	.....	$9.91	$9.49	.....	$9.91	$9.49	.....
Baseline Employment [a]	336,709	465,052	801,761	96,278	132,976	229,254	432,987	598,028	1,031,015
Compliance Costs ($ mil.) [b]	.....	.....	$128.1	.....	.....	$36.1	.....	$164.3	
Compliance Costs per Hour [c]	.....	.....	$0.0878	.....	.....	$0.0866	.....	.....	$0.0875
Results of Deadweight Loss Analysis									
Post-Rule Hourly Wage	$9.95	$9.53	.....	$9.92	$9.50	.....	$9.94	$9.52	.....
Change in Hourly Wage	$0.040	$0.040	.....	$0.011	$0.011	.....	$0.033	$0.033	.....
Post-Rule Total Employment	336,480	464,722	801,202	96,174	132,827	229,001	432,654	597,549	1,030,203
Change in Employment	−229	−330	−559	−103	−149	−252	−332	−479	−812
Deadweight Loss	$18,300	$26,394	$44,694	$8,145	$11,748	$19,893	$26,445	$38,142	$64,587
% Paid by Purchasers [d]	45.2%	45.2%	45.2%	12.3%	12.3%	12.3%	37.9%	37.9%	37.9%
Amount Paid by Purchasers ($ mil.)	$24.3	$33.5	$57.8	$1.9	$2.6	$4.4	$26.1	$36.1	$62.3
% Paid by Employers [e]	54.8%	54.8%	54.8%	87.7%	87.7%	87.7%	62.1%	62.1%	62.1%
Amount Paid by Employers ($ mil.)	$29.5	$40.7	$70.2	$13.3	$18.4	$31.7	$42.8	$59.1	$101.9

[a] Agency employment in states without minimum wage and/or overtime laws and tax-exempt employers plus independent providers in states without minimum wage laws.
[b] Estimated sum of transfers and costs from overtime Scenario 2, travel, minimum wage, and regulatory familiarization costs. Values do not include independent providers.
[c] Assumes each direct care worker works 35 hours per week 52 weeks per year.
[d] Costs and transfers paid by purchasers in the form of higher prices; includes direct purchase of home care services and services purchased through public payers.
[e] Costs and transfers paid by employers in the form of lower profits.

Impact to Medicare and Medicaid Budgets

In 2012, HHS outlays for Medicare programs totaled $591 billion, and an estimated $34.1 billion went to home health programs.[184] In 2009, HHS and state outlays in support of Medicaid totaled $374 billion and approximately $50 billion went to home health services.[185] [186] In 2009, Medicare and Medicaid accounted for nearly 75 percent of home care services revenue; thus, the impact of the Final Rule on home care will depend on how Medicare and Medicaid respond to increased labor costs.

Although increased compensation to workers under this Final Rule associated with travel and overtime hours are considered transfer effects from a societal perspective, the Department expects agencies will try to pass these transfers through to Medicare and Medicaid to the extent they are able. As described in the comment summary, several commenters expressed concern that public funding does not pay for travel and overtime; however, CRS notes that federal regulations do not explicitly regulate direct care worker wage or benefit levels with respect to service reimbursements. Agencies already pay workers only a portion of the reimbursement as wages, and the remainder presumably covers other costs of doing business. The CRS report also notes that although initially the costs may be passed through to consumers, over time Medicare and Medicaid reimbursements may be adjusted to reflect the added costs to agencies.[187]

Under the three overtime scenarios examined, average first year transfer payments range from $103.7 to $281.3 million depending on how home care agencies respond to overtime requirements. Assuming transfer payments are incurred proportionately to the percentage of baseline home care costs, then services funded by public payers might account for approximately 75 percent of these overtime and travel payments, about $77.7 million to $211.0 million in the first year. These payments compose 0.13 to 0.35 percent of total HHS and state outlays for home care services ($60.4 billion in 2011).[188]

Projected Future Transfer Effects Due to Industry Growth

This section projects transfer effects and other impacts over 10 years. The Department used several key assumptions to develop these projections. First, the Department assumed that the number of home care workers directly employed in the homes and employed in states without current overtime premium requirements will remain a constant percentage of total employment in those occupations between 2012 and 2021 (about 41.6 percent of HHAs and 64.8 percent of PCAs).[189] We also assume that IHSS

[184] Center for Medicare and Medicaid Studies, Office of the Actuary. National Health Expenditure Accounts 2011–2021. Available at: *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/Proj2011PDF.pdf.*

[185] Detailed Medicaid data by type of home healthcare is not yet available for 2012.

[186] Kaiser Commission on Medicaid and the Uninsured. 2012 Medicaid Home and Community-Based Services Programs: 2009 Data Update.

Note, not all of the HCBS goes to personal care services; a more detailed breakdown of this spending is not available. For additional data, see Kaiser Family Foundation, State Health Facts: *http://statehealthfacts.org/comparetable.jsp?ind=242&cat=4.*

[187] Congressional Research Service. Memorandum dated February 21, 2012, titled ''Extending Federal Minimum Wage and Overtime Protections to Home Care Workers under the Fair Labor Standards Act: Impact on Medicare and Medicaid.'' WHD–2011–0003–5683.

[188] Center for Medicare and Medicaid Studies, Office of the Actuary. National Health Expenditures by type of service and source of funds, CY 1960–2011. Available at: *http:www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html.*

[189] These percentages are derived by dividing the number of workers without overtime coverage

Continued

employment grows at the same rate as HHA and PCA employment, and that 70 percent of IHSS workers care for family members.

Second, the Department also maintained the assumptions that 12 percent of HHAs and PCAs exceed 40 hours worked per week and that 10 percent of these direct care workers work 6.4 hours of overtime per week while 2 percent work 21.0 hours of overtime per week. We assume IHSS workers exceeding 40 hours per week remain a constant percent of total IHSS workers. These overtime assumptions are identical to those used to estimate costs and transfers for the Year 1 baseline analysis.

Third, consistent with the baseline analysis, we project three overtime scenarios. In these scenarios, employers adjust schedules as follows:

- OT Scenario 1: Employers adjust the hours worked and pay workers an overtime premium for 60 percent of the overtime hours worked prior to the rule.
- OT Scenario 2: Employers adjust the hours worked and pay workers an overtime premium for 40 percent of the overtime hours worked prior to the rule.
- OT Scenario 3: Employers adjust the hours worked and limit overtime hours to 10 percent of the overtime hours worked prior to the rule.

Finally, we continue to estimate travel time pay as 19.2 percent of overtime evaluated at 100 percent of baseline overtime hours worked.

The Department excluded potential transfer effects associated with the minimum wage provision from the projections because the number of workers earning less than the minimum wage has declined steadily, to the point of being at or near zero, as nominal wages have increased: thus, the Department estimates that the minimum wage provisions of this Final Rule will have negligible impact if the federal minimum wage stays at its current level. As previously discussed, based on the infrequency with which Congress historically has enacted updates to the minimum wage, the Department did not assume any minimum wage increase in the analysis. Although the Department expects that the parameters used in this analysis will not remain constant through 2021, it has insufficient information on which to base estimates of how these key variables might change over time. Therefore, maintaining the assumptions used in the Year 1 analysis provide the best basis for projecting future costs and transfer effects.

Based on the data and assumptions described in this section, and the employment and wage projections in Table 13, Table 16 presents the Department's projections through 2021 of overtime and travel time compensation attributable to the revisions to the companionship regulations in this Final Rule.

TABLE 16—PROJECTED HHA AND PCA OVERTIME HOURS, OVERTIME COMPENSATION AND TRAVEL TIME COMPENSATION ATTRIBUTABLE TO FINAL RULE, 2012–2021 [a]

	Overtime hours worked (millions)			Overtime and travel time compensation (millions)			
Year	Scenario 1	Scenario 2	Scenario 3	Scenario 1	Scenario 2	Scenario 3	Travel
				Nominal Dollars			
2012	48.1	32.1	8.0	$247.0	$164.6	$41.2	$78.9
2013	52.1	34.8	8.7	276.9	184.6	46.1	88.5
2014	56.2	37.4	9.4	308.3	205.5	51.4	98.5
2015	60.2	40.1	10.0	341.1	227.4	56.8	109.0
2016	64.2	42.8	10.7	375.3	250.2	62.6	120.0
2017	68.2	45.5	11.4	411.0	274.0	68.5	131.4
2018	72.2	48.2	12.0	448.1	298.7	74.7	143.2
2019	76.3	50.8	12.7	486.6	324.4	81.1	155.5
2020	80.3	53.5	13.4	526.6	351.0	87.8	168.3
2021	84.3	56.2	14.0	568.0	378.6	94.7	181.5
				Inflation-Adjusted Dollars [b]			
2012	48.1	32.1	8.0	$244.2	$162.8	$40.7	$78.1
2013	52.1	34.8	8.7	270.7	180.5	45.1	86.5
2014	56.2	37.4	9.4	297.9	198.6	49.7	95.2
2015	60.2	40.1	10.0	325.8	217.2	54.3	104.1
2016	64.2	42.8	10.7	354.4	236.3	59.1	113.3
2017	68.2	45.5	11.4	383.6	255.8	63.9	122.6
2018	72.2	48.2	12.0	413.5	275.6	68.9	132.2
2019	76.3	50.8	12.7	443.9	295.9	74.0	141.9
2020	80.3	53.5	13.4	474.8	316.5	79.1	151.8
2021	84.3	56.2	14.0	506.2	337.5	84.4	161.8

[a] Calculations based on employment and wage data in Table 13 and specified assumptions.
[b] Inflation estimates based on 10-year average change in PPI for Home Health Services.

The Department projects that paid overtime hours will increase from 48.1 million to 84.3 million between 2012 and 2021 with a consequent increase in overtime compensation from $247.0 million to $568.0 million (OT Scenario 1). This corresponds to a $244.2 to $506.2 million increase in inflation-adjusted overtime compensation. In OT Scenario 2, overtime compensation is projected to increase from $162.8 million to $337.5 million in inflation-adjusted dollars. Assuming employers only cover 10 percent of overtime, and the other 90 percent of overtime hours

(917,039 total; 385,115 HHAs plus 531,924 PCAs) by the total employment (1.75 million; 924,660 HHAs plus 820,630 PCAs). Specifically, for HHAs, the source of the percentage is 385,115/924,660 and for PCAs, it is 531,923/820,630 (see Table 8).

are eliminated through scheduling changes and/or hiring additional workers (OT Scenario 3), the projected increase ranges from $40.7 million to $84.4 million in inflation-adjusted dollars. Travel time compensation is projected to increase from $78.1 million to $161.8 million in inflation-adjusted dollars over that same period.

To place these projected future transfer effects resulting from the Final Rule in context, the Department compared nominal transfer effects to projected Medicare and Medicaid spending over the same period. The Centers for Medicare & Medicaid Services report that in 2012 Medicare expenditures totaled $590.8 billion, while Medicaid expenditures were $458.9 billion; $34.1 billion of Medicare and $29.7 billion of Medicaid expenditures were spent on the provision of home care services.[190] By 2021, annual Medicare and Medicaid expenditures are projected to total $1,964 billion of which annual home care expenditures under both programs might increase to $126 billion .

After adjusting projected overtime and travel transfer effects, the Department expects that these incremental transfers will compose 0.40 percent of projected Medicare and Medicaid Home Health Care expenditures under OT Scenario 1, 0.30 percent under Scenario 2, and 0.154 percent of those expenditures under OT Scenario 3. Table 17 summarizes the projected National Health Care budgets, incremental payments attributable to the Final Rule, and those payments as a percent of National Health Care expenditures from 2012 through 2021. Projected overtime and travel payments resulting from the rule account for a similar, but slightly larger, percentage of National Home Health Care (i.e., all U.S. public and private home health care spending) than they do for public spending programs on home care.

TABLE 17—PROJECTED OVERTIME AND TRAVEL TIME COMPENSATION AS PERCENT OF PROJECTED NATIONAL HOME HEALTH CARE EXPENDITURES

Year	Projected expenditures (billions) [a b]		Adjusted overtime & travel time compensation in nominal dollars (millions)			OT & Travel as % projected home health care		
	Total	Home health care	OT 1 + Travel	OT 2 + Travel	OT 3 + Travel	OT 1 + Travel	OT 2 + Travel	OT 3 + Travel
2012	$2,809	$77.5	$326.5	$244.2	$120.7	0.42	0.31	0.16
2013	2,915	81.9	366.0	273.7	135.3	0.45	0.33	0.17
2014	3,130	88.3	407.4	304.7	150.5	0.46	0.34	0.17
2015	3,308	94.5	450.7	337.0	166.5	0.48	0.36	0.18
2016	3,514	101.2	495.9	370.8	183.1	0.49	0.37	0.18
2017	3,723	108.4	543.0	406.0	200.5	0.50	0.37	0.19
2018	3,952	117.1	591.9	442.6	218.5	0.51	0.38	0.19
2019	4,207	126.6	642.8	480.6	237.3	0.51	0.38	0.19
2020	4,487	137.0	695.5	520.0	256.7	0.51	0.38	0.19
2021	4,781	148.3	750.2	560.8	276.9	0.51	0.38	0.19

[a] Centers for Medicare and Medicaid Studies, Office of the Actuary, National Health Expenditure Projections, 2011–2021. Available at: *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/Proj2011PDF.pdf*.

[b] "National Health Care" indicates all U.S. public and private health care spending, as tabulated by the CMS Office of the Actuary.

The Department also projected deadweight loss and employment impacts over 10 years. These projections are calculated maintaining the assumptions concerning the market shares and the price elasticities of supply and demand discussed in the first year deadweight loss analysis and projected overtime and travel time compensation presented in Table 16. The Department's calculated deadweight loss and employment impacts over 10 years are summarized in Table 18.

TABLE 18—PROJECTED DEADWEIGHT LOSS AND EMPLOYMENT IMPACTS

	Year 1 ($ mil.)	Other Years ($ mil.) [a]		Average Annualized Value ($ mil.)	
		Year 2	Year 10	3% Real Rate	7% Real Rate
Costs [h]					
Regulatory Familiarization:					
Agencies	$6.9	$0.6	$0.6	$1.3	$1.4
Families Hiring Self-Employed Workers	$5.4	$2.8	$3.6	$3.4	$3.5
Hiring Costs [b]:					
30% OT remaining in OT 1	$8.4	$0.8	$0.8	$1.6	$1.8

[190] The 2009 Medicaid home care expenditures of $50 billion cited earlier in the report is composed of three types of programs: Home Health, Personal Care Services, and HCBS 1915 waiver programs. These data are compiled retrospectively by the Kaiser Commission on Medicaid and the Uninsured, and the Department believes that spending in these three types of programs best characterizes Medicaid home health expenditures. CMS Office of the Actuary classifies home health care expenditures somewhat differently in its National Health Expenditures Projections; in 2009 the NHE value for home health care was about half the Kaiser value at $24.3 billion. The Department chose to use the official CMS projections for home health care for consistency in methodology with all other expenditure projections used in this section and presented in Table 17. The Department believes these projections underestimate future Medicaid home health expenditures; however, note that if larger projected values were used in the analysis, the impacts presented in Table 17 would be proportionately smaller.

TABLE 18—PROJECTED DEADWEIGHT LOSS AND EMPLOYMENT IMPACTS—Continued

	Year 1 ($ mil.)	Other Years ($ mil.) [a]		Average Annualized Value ($ mil.)	
		Year 2	Year 10	3% Real Rate	7% Real Rate
20% OT remaining in OT 2	$8.4	$0.8	$0.8	$1.6	$1.8
10% OT remaining in OT 3	$6.3	$0.6	$0.6	$1.2	$1.3
Total costs (30% of OT 1)	$20.6	$4.2	$5.0	$6.4	$6.7
Total costs (20% of OT 2)	$20.6	$4.2	$5.0	$6.4	$6.7
Total costs (10% of OT 3)	$18.6	$4.0	$4.8	$6.0	$6.2
Transfers					
Travel Wages	$68.1	$78.1	$151.8	$107.1	$104.3
Overtime Scenarios:					
OT 1 [c]	$213.2	$244.2	$474.8	$335.2	$326.3
OT 2 [d]	$142.1	$162.8	$316.5	$223.5	$217.5
OT 3 [e]	$35.5	$40.7	$79.1	$55.9	$54.4
Total Transfers by Scenario					
Travel + OT 1	$281.3	$322.3	$626.5	$442.3	$430.5
Travel + OT 2	$210.2	$240.9	$468.3	$330.6	$321.8
Travel + OT 3	$103.7	$118.8	$230.9	$163.0	$158.7
Deadweight Loss ($ millions)					
Travel + OT 1	$0.116	$0.132	$0.257	$0.182	$0.177
Travel + OT 2	$0.065	$0.074	$0.144	$0.101	$0.099
Travel + OT 3	$0.016	$0.018	$0.035	$0.025	$0.024
Total Cost of Regulations [f]					
RF + HC + DWL (OT 1)	$20.8	$4.3	$5.2	$6.6	$6.8
RF + HC + DWL (OT 2)	$20.7	$4.2	$5.1	$6.5	$6.8
RF + HC + DWL (OT 3)	$18.6	$4.0	$4.8	$6.0	$6.2
Disemployment (number of workers)					
Travel + OT 1	1,086	1,184	1,976	1,531	(g)
Travel + OT 2	812	885	1,477	1,144	(g)
Travel + OT 3	400	436	728	564	(g)
Benefits from Reduced Turnover [b f]					
OT 1	$40.3	$34.9	$30.9	$33.8	$34.1
OT 2	$30.2	$24.7	$20.7	$23.6	$23.9
OT 3	$14.9	$10.7	$7.7	$9.9	$10.1
Net Benefits [f]					
OT 1	$19.6	$30.6	$25.7	$27.3	$27.3
OT 2	$9.4	$20.5	$15.5	$17.1	$17.1
OT 3	−$3.7	$6.7	$2.9	$3.9	$3.9

[a] These costs represent a range over the nine-year span. Costs are lowest in Year 2 and highest in Year 10 so these two values are reported.
[b] We use three scenarios under which agencies redistribute overtime hours to either current part-time workers or new hires to manage overtime costs: 40 percent of overtime hours are redistributed under OT Scenario 1, 60 percent under OT Scenario 2, and 90 percent under OT Scenario 3. Of this redistributed overtime, various percentages are redistributed to part-time workers and new hires: New hires constitute 30 percent of redistributed hours under OT Scenario 1 (12 percent of total overtime), 20 percent under OT Scenario 2 (12 percent of total), and 10 percent under OT Scenario 3 (9 percent of total).
[c] Of the total, about 31 percent (e.g., $66.6 million in Year 1) is attributable to IHSS direct care workers; 30 percent of IHSS costs (e.g., $20.0 million in Year 1) are included in the turnover and deadweight loss analyses.
[d] Of the total, about 31 percent (e.g., $44.4 million in Year 1) is attributable to IHSS direct care workers; 30 percent of IHSS costs (e.g., $13.3 million in Year 1) are included in the turnover and deadweight loss analyses.
[e] Of the total, about 31 percent (e.g., $11.1 million in Year 1) is attributable to IHSS direct care workers; 30 percent of IHSS costs (e.g., $3.3 million in Year 1) are included in the turnover and deadweight loss analyses.
[f] Results based on the combination of overtime scenario and hiring costs presented under Hiring Costs.
[g] Simple average over 10 years.
[h] Excludes paperwork burden, estimated in Section V.

Average annualized minimum wage, overtime premium, and travel time compensation range from $158.7 million to $430.5 million per year based on how employers adjust to the requirement to pay overtime wage premiums using a 7 percent discount rate. These transfers are projected to cause average annualized deadweight loss ranging

from $24,000 to $177,000 per year. These transfers are also projected to cause disemployment impacts ranging from 564 to 1,531 workers per year. In general, approximately 70 percent of deadweight loss and disemployment occurs in the publicly funded market and 30 percent in the private pay market.

Non-Monetized Projected Impacts

Two additional aspects of home care services might be affected by the rule. The rule might result in increased purchases of home care services through informal arrangements with independent providers and, although the hours of care received by consumers might be unaffected by the increased costs of care, additional caregivers may be required to provide the same number of hours of services. These additional aspects are discussed in turn below.

Independent Providers

An unknown number of consumers receive home care services through more informal arrangements with care provided by independent providers. Here, informal agreements are reached between the consumer (or consumer's family) and the direct care worker regarding hours of care and hourly pay rates. Services can be provided at lower cost than when provided through agencies because the independent provider does not incur administrative and overhead costs and may have more flexibility to negotiate on prices and scheduling.

The Final Rule will increase costs to home care agencies that offer services in states where they are not currently required to pay the minimum wage and/or overtime compensation and an unknown percentage of those costs might be reimbursed by public payers. If the costs are not fully reimbursed, home care agencies might increase the rates they charge consumers, have their profit margin squeezed, or both. If costs are passed through to consumers and their families, they will have incentive to look for lower cost alternatives, such as informal arrangements with independent providers. In addition, workers who desire to work more than 40 hours per week might have opportunities to provide services as independent providers rather than work for multiple agencies. Although the rule might increase incentives on both sides to use informal arrangements with independent providers, there is no information available to project potential changes to that market.

Continuity of Care

Continuity of care ''is commonly framed as being composed of provider continuity (a relationship between a consumer and provider over time), information continuity (availability and use of data from prior events during current consumer encounters) and management continuity (coherent delivery of care from different doctors).'' [191] In the home care scenario, concerns have been raised that continuity of care, specifically provider continuity, may suffer if employers opt not to pay overtime for direct care workers who, for example, work more than 40 hours per week for a single consumer and the employers instead schedule other direct care workers to provide home care services to that consumer in the same workweek. Some are concerned that a break in the continuity of care may result in a reduction in the quality of care.

The Department understands that home care involves more than the provision of impersonal services; when a direct care worker spends significant time with a consumer in the consumer's home, the personal relationship between direct care worker and consumer can be very important. Certain consumers may prefer to have the same direct care worker(s), rather than a sequence of different direct care workers. The extent to which home care agencies choose to spread employment (hire more direct care workers) rather than pay overtime may cause an increase in the number of direct care workers for a consumer; the consumer may be less satisfied with that care, and communication between direct care workers might suffer, affecting the quality of care for the consumer.[192] Alternatively, having additional direct care workers may improve continuity of care by minimizing disruption of care when the primary direct care worker is unavailable due to vacation or being sick.

Continuity of care may suffer from the provision of too few direct care workers. This may occur currently because, as discussed below, an agency can schedule direct care workers without regard for the number of hours worked each week, which may cause increased turnover rates. Although matching consumer and direct care worker in a long-term personal relationship is the ideal for many consumers, it may not be the norm. Low wages and long, irregular hours may contribute to the high turnover rate in the industry, resulting in low continuity of care. For instance, the turnover rate (those leaving and entering home care work) for workers in the home care industry has been estimated to range from 44 to 65 percent per year.[193] Other studies have found turnover rates to be much higher, up to 95 percent [194] and, in some cases, 100 percent annually.[195] Thus, many consumers already experience a sequence of different direct care workers, and it is not apparent that the Final Rule will necessarily exacerbate that experience.

Application of the FLSA's minimum wage and overtime compensation protections may reduce turnover rates. Frequent turnover is costly for employers in terms of recruitment costs and training of new direct care workers and also in terms of the likelihood of a reduction of quality care or not being able to provide care at all. The employee turnover rate in this industry is high because of low wages, poor or nonexistent benefits, and erratic and unpredictable hours. Job satisfaction, and the desire to remain in a given position, is highly correlated with wages, workload, and working conditions. Increased pay for the same amount of work and overtime compensation likely would aid in employee retention and attracting new hires. Those employers who choose not to pay overtime would need to spread the hours among their employees, resulting in more consistent work hours for many direct care workers. As one study found, for this low-income workforce, ''higher wages, more hours, and travel cost reimbursement are found to be significantly associated with reduced turnover.'' [196] Another report determined that ''increases in the federal or state minimum wage can make home care employment more

[191] Van Walraven, C., Oake, N., Jennings, A., et al. (2009). The Association Between Continuity of Care and Outcomes: A Systematic and Critical Review. *Journal of Evaluation in Clinical Practice,* 16(5): 947–956.

[192] Brief of Amici Curiae City of New York. 2007.

[193] Seavey and Marquand, 2011, p. 70. WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf.*

[194] Zontek, T., Isernhagen, J., Ogle, B. (2009). Psychosocial Factors Contributing to Occupational Injuries Among Direct Care Workers. *American Association of Occupational Health Nurses Journal,* 338–347.

[195] Ashley, A., Butler, S., Fishwick, N. (2010). Home Care Aide's Voices from the Field: Job Experiences of Personal Support Specialists. The Maine Home Care Worker Retention Study. *Home Healthcare Nurse,* 28(7), 399–405.

[196] Morris, L. (2009). Quits and Job Changes Among Home Care Workers in Maine: The Role of Wages, Hours and Benefits. *The Gerontologist,* 49(5), 635–650.

desirable.'' [197] This finding was echoed in comments submitted by Steven Edelstein of PHI and the Women's Employment Rights Clinic.

For the estimated 8 to 12 percent of direct care workers who work more than 40 hours per week, only a portion of that percentage likely provides services for the same consumer. Many who work overtime accrue long hours in the service of at least a few consumers, traveling between consumer homes during the workweek. For example, the 2011 Private Duty Homecare Benchmarking Study found that firms with annual revenue greater than $2 million attribute about 23 percent of weekly billable hours to live-in care (which presumably exceeds 120 hours of paid work per week per consumer), yet the average consumer only receives 25 hours of service per week.[198] Thus, if the average consumer receives 25 hours of care per week, yet a disproportionate number of service hours are accrued by the minority of patients receiving 24-hour care, then most consumers must be receiving substantially less than 25 hours of care per week and their direct care workers must be responsible for multiple consumers. Such consumers should probably not lose any continuity of care as a result of agencies spreading some overtime hours to other workers. It is also conceivable that, in a minority of cases, the direct care worker provides home care services around the clock for a stretch of a few days.

Analysis of the NHHAS shows that those direct care workers who typically work overtime work 49 hours per week on average, not including travel time between consumer homes. Provider continuity that results in overtime work has drawbacks. From the aide's perspective, the long work hours can be a burden. For instance, ''shifts beyond the traditional 8 hours have been associated with increased risk of errors, incidents, and accidents.'' [199]

Many regard having the same direct care worker for long hours as a cornerstone of ''continuity of care'' and having more direct care workers to cover the same number of direct care worker hours for a consumer as negatively impacting quality of care. As discussed above, however, the opposite may be true. Working extended hours may affect the quality of care that the aide is able to provide and even the aide's own health and well-being.

Furthermore, paying employees below minimum wages, not paying for all hours worked or overtime, and providing no training or benefits is not the only path to financial success for employers in the home care industry. Another business model, in which employees receive training, an overtime wage differential, and health care benefits, has been successful. Cooperative Home Care Associates (CHCA), based in New York, for example, has always paid workers overtime. Although overtime at CHCA is carefully managed, it can still be substantial (e.g., 30 percent or more of employees exceed 40 work hours per week); allowing, even expecting overtime, permits CHCA, however, to use a staffing plan that maintains continuity of care. These policies have driven CHCA's turnover rate far below the industry average, a major factor in its financial success.[200] In terms of employee coverage, CHCA cases requiring weekday and weekend coverage are assigned permanent direct care workers who work on alternate weekends. Also, cases requiring 24-hour coverage, seven days per week, are shared among four direct care workers, requiring only some overtime hours.[201]

Other agencies such as Community Care Systems, Inc., in Springfield, Illinois, have reduced overtime costs by distributing extra hours more evenly among workers through better tracking of work hours. Close monitoring of employee workloads and spreading of work hours also curbed overtime use for Illinois-based Addus HealthCare, one of the nation's largest home care employers. These employers pay overtime even in those states that do not require it, demonstrating that ''wage and hour protections are economically realistic for the industry, and can be achieved without excessive use of costly overtime hours.'' [202] These examples suggest that requiring overtime compensation in this industry does not inevitably cause disruption of employer-employee relationships and direct care worker-consumer relationships leading to higher turnover, discontinuity of consumer care, and increased use of independent providers.

Transfer Effects

Perhaps the most visible effect of the Final Rule is the transfer of income from businesses and their owners to workers, and potentially, from one group of workers to another group of workers. In economics, a transfer payment is broadly defined as a redistribution of income in the market system that does not affect total output.

Transfer Effects Associated With Travel Provisions

The Final Rule leads to an unambiguous transfer from employers to employees in those states that currently do not require compensation for travel time—approximately $68.1 million in Year 1.

Two factors could change the dynamics of this transfer scenario. First, increased wages for compensating travel time might be passed through to consumers in the form of higher prices for home care services. If those higher prices result in consumers finding alternatives to home care services (e.g., accessing independent providers for services), then the income transfer from travel compensation is partially mitigated because the provision of home care services is reduced, resulting in reduced revenues to agencies, and a deadweight loss to the economy. This reduction in demand by households will be less pronounced if the demand for home care services is inelastic (i.e., the hours of home care services purchased does not change significantly when price increases, as in the public pay market). However, the Department's deadweight loss analysis did not show significant reductions in the private pay market for which the price elasticity of demand is much larger than the market for publicly funded care.

Second, the Department expects that over time some of these costs may be reimbursed. To the extent that public payers increase reimbursement rates to cover these costs, the transfer is from the federal and state agencies to workers.

Transfer Effects Associated With Overtime Provisions

The transfer of income associated with the payment of the overtime differential is more ambiguous. Employers are likely to respond to overtime compensation requirements along a spectrum ranging from (1) reducing overtime work to the extent possible and spreading hours to other workers or hiring new workers to fill the available hours, to (2) maintaining current staffing patterns and paying overtime for all work hours exceeding

[197] Burbridge, L. (1993). The Labor Market for Home Care Workers: Demand, Supply, and Institutional Barriers. *The Gerontologist,* 33(1), 41–46.

[198] Home Care Pulse. 2011. 2011 Annual Private Duty Home Care Benchmarking Study. Highlights Edition, p. 24.

[199] Keller, S. (2009). Effects of extended work shifts and shift work on patient safety, productivity, and employee health. *American Association of Occupational Health Nurses Journal,* 57(12), 497–502.

[200] Elsas & Powell, 2011.

[201] NELP report, p. 26.

[202] NELP report, pgs 25–26.

40 per week. To the extent that employers choose to pay overtime, the income transfer is from businesses and their owners to workers. However, to the extent that employers eliminate overtime and spread the now available hours to other employees or new hires, the transfer is from worker to worker. Employees who used to exceed 40 hours of work per week will work fewer hours, transferring income to fellow workers who will absorb the extra hours. It is also possible that those employees working more than forty hours per week may distribute those hours among multiple employers.

Reduced Reliance on Public Assistance

An increase in wages might reduce direct care worker reliance on public assistance programs to meet the needs of their own households. Recent research finds that approximately 50 percent of personal care aides rely on public assistance.[203] Almost 90 percent of these workers are women.[204]

Assuming these workers are in a family consisting of themselves and two children, the average amount of public assistance for such families is about $10,300.[205] In addition, many minimum wage workers also receive food stamps. The federally-assisted Supplemental Nutrition Assistance Program (SNAP, previously referred to as the Food Stamp Program) provided aid to 44.7 million participants in an average month in 2011 with total annual expenditures of $71.8 billion, an average of $1,600 in food stamps expenditures per participant.[206] This would entail $4,800 per family for an assumed family of three. In total, the average direct care worker might receive $15,100 in public assistance and food stamps to provide for her/his family.

Increased wages should reduce demand for public assistance services resulting in a savings to these programs; however, the Department is unable to quantify the savings due to the lack of data on how the benefits of these programs vary with income. The savings associated with the minimum wage provisions under the Final Rule might be negligible since the Department estimates that no workers currently earn less than the minimum wage. To the extent that the employees' work requires significant travel time and overtime, or added hours of work due to employer schedule adjustments, they will also receive additional income (note that some workers may lose hours or pay as a result of employer schedule adjustments, which may actually increase their reliance on public assistance). The Department did not estimate this portion of the potential economic impact due to uncertainty about the number of workers who would receive compensation for travel time or additional hours of work.

H. Benefits

This section describes the expected benefits of the changes to the companionship services exemption made by this Final Rule. Potential benefits of this revision to the ''companionship services exemption'' flow from the transfer of regular and overtime wages to workers from their employers, and include: Reduced worker turnover and potentially reduced worker injury rates.

Reduction in Employee Turnover Rates

Researchers have found that lower wages are associated with higher turnover and lower quality of care, and that increases in wages for direct care workers result in decreased turnover rates.[207] Frequent turnover is costly for employers in terms of recruitment costs and training of new direct care workers and also in terms of the likelihood of a reduction in the quality of care or not being able to provide care at all. The employee turnover rate in this industry is high because of low wages, poor or nonexistent benefits, and erratic and unpredictable hours. Job satisfaction, and the desire to remain in a given position, is highly correlated with wages, workload, and working conditions. Increased pay for the same amount of work and overtime compensation likely would aid in employee retention.

Studies estimating the relationship between wage rate and turnover rate often express that relationship as an elasticity—the percentage change in turnover rate associated with a one percent change in the wage rate. Studies have found turnover rates in the home care industry that range from 44 to 95 percent per year, and even approach 100 percent per year.[208] Based on the study most relevant to our analysis, the Department judges that the elasticity of the turnover rate with respect to a change in the wage rate is −2.17.[209] However, the Department acknowledges that when many agencies are simultaneously increasing wages, the overall impact on turnover might be smaller. Therefore the Department also presents a sensitivity analysis using a smaller turnover elasticity of −0.844. For the purpose of estimating the impact of the rule on turnover costs, we assume the initial turnover rate is 50 percent. The Department estimates the value of the excess cost to the business of employee turnover as about $3,000 in 2011 dollars based on Seavey (2004). About 75 percent of this cost is attributable to hiring the replacement worker, while the remainder is attributable to the costs of separation and vacancy.[210]

The Department estimated the impact of applying the minimum wage and overtime provisions of the FLSA on turnover costs. The Department believes few, if any, direct care workers currently earn less than the minimum wage. Therefore, we project no decline in turnover rates as a result of the minimum wage requirement.

Table 19 also shows the estimated change in turnover costs due to travel reimbursement and overtime compensation in the three overtime scenarios. The Department estimates that the turnover rate will decrease by 1.3 percentage points due to an average increase in compensation of 1.21 percent in OT Scenario 1. This corresponds to a $40.3 million decrease in turnover costs in Year 1. In OT Scenario 2, the Department calculates that the turnover rate will decrease by 1.0 percentage point due to an average increase in the hourly wage of 0.91 percent, corresponding to a reduction in turnover costs of $30.2 million. When agencies pay only 10 percent of the current overtime hours (OT Scenario 3), the turnover rate will decrease by 0.5 percentage points due to an average increase in the hourly wage of 0.45 percent; this corresponds to a $14.9 million reduction in Year 1 turnover costs.

[203] Seavey and Marquand, 2011, p. 58. WHD–2011–0003–3514. Also available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/caringamerica-20111212.pdf.*

[204] Seavey and Marquand, 2011, p. 10. WHD–2011–0003–3514. *http://phinational.org/sites/phinational.org/files/clearinghouse/caringinamerica-20111212.pdf*

[205] TANF Eighth Annual Report to Congress.

[206] Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2011, U.S. Department of Agriculture, Food and Nutrition Service, November 2012. Available at: *http://www.fns.usda.gov/ora/MENU/Published/snap?FILES/Participation/2011Characteristics.pdf.*

[207] Powers, E., Powers, N. (2010). Causes of Caregiver Turnover and the Potential Effectiveness of Wage Subsidies for Solving the Long-Term Care Workforce 'Crisis.' *The B.E. Journal of Economic Analysis & Policy* 10(1): Article 5.

[208] PHI 2010a; Zontek, T., Isernhagen, J., Ogle, B., (2009); Ashley, A., Butler, S., Fishwick, N., (2010).

[209] The study most comparable used data from the San Francisco County home care workers (Howes, C. (2005). Living Wages and Retention of Homecare Workers in San Francisco. *Industrial Relations: A Journal of Economy and Society*. 44(1): 139–163).

[210] Seavey, D. 2004. The Cost of Frontline Turnover in Long-Term Care. Washington, DC: IFAS/AAHSa, p. 11. Available at: *http://phinational.org/sites/phinational.org/files/clearinghouse/TOCostReport.pdf.*

TABLE 19—YEAR 1 IMPACT ON TURNOVER COSTS

	Initial values	Resulting values
Application of the minimum wage provision		
Turnover Rate	50.0%	45.6%
Workers Impacted	0	
Annual Turnover Cost (in millions)	$0.0	$0.0
Change in Year 1 Turnover Cost (in millions) [a]		$0.0
Application of the overtime provision		
OT Scenario 1 [b]:		
Turnover Rate	50.0%	48.7%
Workers Impacted	1,031,015	
Annual Turnover Cost (in millions)	$1,534.6	$1,494.3
Change in Year 1 Turnover Cost (in millions) [c]		−$40.3
OT Scenario 2 [b]:		
Turnover Rate	50.0%	49.0%
Workers Impacted	1,031,015	
Annual Turnover Cost (in millions)	$1,534.6	$1,504.5
Change in Year 1 Turnover Cost (in millions) [d]		−$30.2
OT Scenario 3 [b]:		
Turnover Rate	50.0%	49.5%
Workers Impacted	1,031,015	
Annual Turnover Cost (in millions)	$1,534.6	$1,519.8
Change in Year 1 Turnover Cost (in millions) [e]		−$14.9

[a] Because no workers are currently believed to be paid less than minimum wage, no reduction in turnover costs is attributed to the minimum wage provision.
[b] This analysis is performed on the same basis as the deadweight loss analysis (e.g., the same pool of workers, and overtime and travel time compensation).
[c] The change in annual turnover cost is the reduction in turnovers (13,552) multiplied by the estimate of the cost per turnover.
[d] The change in annual turnover cost is the reduction in turnovers (10,129) multiplied by the estimate of the cost per turnover.
[e] The change in annual turnover cost is the reduction in turnovers (4,994) multiplied by the estimate of the cost per turnover.

The first column in Table 20 presents the estimated net impact on turnover in Year 1 due to travel and overtime in each of the overtime scenarios. For OT Scenario 1, combining the impacts on turnover costs due to the application of overtime regulations shown in Table 19 above yields an estimated reduction in turnover costs of $40.3 million. The Department estimates that OT Scenario 2 corresponds to a $30.2 million decrease in costs, while OT Scenario 3 corresponds to a $14.9 million decrease in costs.

Table 20 also summarizes the total impact on turnover costs for Years 1 and 10. Based on the Department's estimation of the growth in overtime hours, agencies will need to continue to hire workers to cover these additional hours in subsequent years. The annual turnover rate will remain at the lower rate, while the total number of employees is larger in each subsequent year due to the hiring of additional workers to cover some of the overtime hours; these additional workers would not have been hired in the absence of the overtime requirement. Thus, the absolute number of turnovers per year is increasing because the lower turnover rate is partly offset by the larger number of workers to whom it is applied. This reduces the annual savings attributable to the reduced turnover rate. Employers will continue to accrue cost savings due to reduced turnover, but those savings will be diminishing over time due to the increased employment. The Department calculates the net impact on annual turnover costs by subtracting the turnover cost associated with the initial 1.03 million positions and 50 percent turnover rate from the turnover costs based on the increased number of positions but decreased turnover rate as estimated in Year 1. The growth in the number of workers depends on agencies' allocation of the additional overtime hours among paying the overtime premium, hiring new workers, and distributing the hours over existing workers. Within the three overtime scenarios, the Department considers three proportions of the remaining overtime hours covered by new hires as discussed in the hiring costs section—30 percent, 20 percent, and 10 percent. Using a 7 percent real discount rate, the annualized decrease in turnover costs will range from $34.1 to $38.3 million per year in OT Scenario 1. In OT Scenario 2, the annualized decrease in turnover costs will range from $20.7 to $27.0 million each year. In OT Scenario 3, the annualized decrease in turnover costs will range from $0.6 to $10.1 million each year.

TABLE 20—SUMMARY OF IMPACT OF CHANGES TO FLSA ON TURNOVER COSTS

Hiring full-time workers to cover	Year 1 ($ mil.) [a]	Future years ($ mil.) [b]		Average annualized value ($ mil.)	
		Year 2	Year 10	3% Real rate	7% Real rate
OT Scenario 1					
30% of remaining OT hours	−$40.3	−$34.9	−$30.9	−$33.8	−$34.1
20% of remaining OT hours	−40.3	−36.7	−34.1	−36.0	−36.2

TABLE 20—SUMMARY OF IMPACT OF CHANGES TO FLSA ON TURNOVER COSTS—Continued

Hiring full-time workers to cover	Year 1 ($ mil.) [a]	Future years ($ mil.) [b]		Average annualized value ($ mil.)	
		Year 2	Year 10	3% Real rate	7% Real rate
10% of remaining OT hours	−40.3	−38.5	−37.2	−38.2	−38.3
OT Scenario 2					
30% of remaining OT hours	−30.2	−22.0	−15.9	−20.3	−20.7
20% of remaining OT hours	−30.2	−24.7	−20.7	−23.6	−23.9
10% of remaining OT hours	−30.2	−27.4	−25.4	−26.9	−27.0
OT Scenario 3					
30% of remaining OT hours	−14.9	−2.4	.7	0.0	−0.6
20% of remaining OT hours	−14.9	−6.6	−0.5	−5.0	−5.3
10% of remaining OT hours	−14.9	−10.7	−7.7	−9.9	−10.1

[a] Year 1 estimates are the sum of the impacts on turnover costs due to the application of the overtime provision.
[b] These costs represent a range over the nine-year span. Costs are lowest in Year 2 and highest in Year 10 so these two values are reported.

The Department also performed a sensitivity analysis by repeating the calculations using a turnover elasticity of −0.844.[211] With a 7 percent real discount rate, the annualized decrease in turnover costs ranges from $9.4 to $13.6 million per year in OT Scenario 1. In OT Scenario 2, average annualized turnover costs are decreased by $2.2 to $8.6 million. Under OT Scenario 3, average annualized turnover costs range from a $1.0 million decrease to an increase of $8.6 million per year.

The Department notes that the estimates above do not reflect possible offsetting effects related to employees who previously worked overtime and who, as a result of the rule, experience a reduction in their scheduled hours and thus in their compensation. To compensate for their lower earnings, these workers may accept a second job, although this would not affect the turnover rate in a meaningful way. However, if some agencies continue to pay overtime, while a worker's current employer does not, the employee with reduced hours may be more likely to leave, thus resulting in increased turnover in the short-run, although turnover may still decrease in the long run since the worker may be more likely to remain longer with the employer that pays overtime.

Reduction in Worker Injuries and Illnesses

Many studies have shown that extended work hours result in increased fatigue, decreased alertness, and decreased productivity, negatively affecting employee health and well-being. Long work hours in the health care field ''have adverse effects on patient outcomes and increase health care errors and patient injuries.'' [212] For example, nurses working more than 8 hours report more medication errors, falling asleep at work, a decrease in productivity, and impaired critical thinking abilities. The error rates double when nurses work 12.5 or more consecutive hours. A 2004 National Institute for Occupational Safety and Health report evaluated the literature and found studies ''examining 12-hour shifts combined with more than 40 hours of work per week reported increases in health complaints, deterioration in performance, or slower pace of work.'' [213] One study that analyzed 13 years' worth of data and nearly 100,000 job records notes that ''long working hours indirectly precipitate workplace accidents through a causal process, for instance, by inducing fatigue or stress in affected workers.'' [214] It is therefore telling that ''[d]irect care workers have the highest injury rate in the United States, primarily due to work-related musculoskeletal disorders.'' [215] The rate of days away from work (work days missed due to on-the-job injuries) for nursing aides, orderlies, and attendants was almost four times greater than the all-worker rate, 449 per 10,000 compared to 113 per 10,000 for all workers.[216] One of the results of the FLSA's overtime compensation requirement is that employers may hire more people to work fewer hours each. Doing so in those circumstances where excessive overtime hours are worked may therefore result in fewer injuries and illnesses incurred. On the other hand, a possible effect of this rule is that direct care employees currently working more than 40 hours per week for one employer will spread those hours over multiple employers, which may increase fatigue due to, for example, increased travel time as a result of working for multiple employers; these conflicting theoretical possibilities make the rule's likely impact on injuries and illnesses an empirical question.

The Department looked at total injury numbers and injury rates from the Survey of Occupational Injuries and Illnesses (SOII) of the Bureau of Labor Statistics. To the best of our knowledge, this is the only available database providing data simultaneously on the state and industry level for multiple years. The goal was to determine whether it was possible to perform a ''difference-in-differences'' analysis of injuries; this type of analysis can determine whether there is a statistically significant difference in injuries before and after minimum wage and overtime regulations were passed in some states.

Only four states had adopted direct care worker minimum wage and/or overtime provisions during the period

[211] Clabby II, Robert T. 2002. Report to the Joint Appropriations Committee on the Impact of Funding for Direct Staff Salary Increases in Adult Developmental Disabilities Community-Based Programs. Wyoming Department of Health, Cheyenne, WY.

[212] Keller, S. 2009. pg. 498. Available at: *http://www.healio.com/~/media/Journals/AAOHN/2009/12_December/Effects%20of%20Extended%20Work%20Shifts%20and%20Shift%20Work%20on%20Patient%20Safety%20Productivity%20and%20Employ%2059601/Effects%20of%20Extended%20Work%20Shifts%20and%20Shift%20Work%20on%20Patient%20Safety%20Productivity%20and%20Employ%2059601.ashx.*

[213] Caruso, C., Hitchcock, E., Dick, R., et al. (2004). Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries, and Health Behaviors. *National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services.* Available at: *http://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf.*

[214] Dembe, A., Erickson J., Delbos, R., et al. 2005.

[215] Zontek, Isernhagen, and Ogle, 2009.

[216] NELP report (p. 27, FN45).

for which industry-specific data are available (2003–2011): Arizona (minimum wage, January 2007), Maine (minimum wage and overtime, September 2007), Ohio (minimum wage, April 2007), and Colorado (minimum wage and overtime, January 2010). Of these, only Arizona and Maine had usable data (for a total of 6 observations), which was not sufficient to perform conclusive analysis.

Improved Quality of Care

As has been stated previously, one of the main benefits of this Final Rule is that the professionals who are entrusted to care for consumers in their homes will have the same protections in the labor market as almost all other employees. Guaranteed minimum wage and overtime compensation for home care jobs, comparable to similar occupations, will attract more workers to the home care industry. The increased availability of direct care workers will allow employers to meet the growing demand for home care services without requiring workers to perform services for excessive hours. Additionally, this may improve the quality of care since workers may be less fatigued and have more energy to devote to the consumers to whom they provide home care services. However, the Department understands that the continuity of care for some individuals may be affected, such as by having more care providers as a result of this rule. In addition, with the standard of pay raised, more highly trained and certified workers will seek out and remain in the HHA and PCA occupations, and a higher quality of service may be provided to the consumer. While a monetary value cannot be placed on increased professionalism and improved care, those expected benefits are noteworthy.

VII. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires agencies to evaluate the potential effects of their proposed and Final Rules on small businesses, small organizations and small governmental jurisdictions. *See* 5 U.S.C. 604.

The RFA requires agencies to prepare and make available for public comment a final regulatory flexibility analysis (FRFA) describing the impact of Final Rules on small entities. The RFA specifies the content of a FRFA. Each FRFA must contain:

- A succinct statement of the need for, and objectives of the Final Rule;
- A summary of the significant issues raised by the public comments in response to the NPRM, a summary of the agency assessment of the issues, and a statement of any changes made as a result of such comments;
- The agency's response to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration;
- A description of an estimate of the number of small entities to which the Final Rule will apply;
- A description of the projected reporting, recordkeeping and other compliance requirements of the Final Rule including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- Description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the Final Rule and why other alternatives were rejected.

1. Objectives of, and need for, the Final Rule

Section 13(a)(15) of the FLSA exempts from its minimum wage and overtime compensation provisions domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' Due to significant changes in the home care industry over the last 38 years, workers who today provide home care services to individuals are performing duties and working in circumstances that were not envisioned when the companionship services regulations were promulgated. Section 13(b)(21) provides an exemption from the Act's overtime compensation requirements for live-in domestic service workers. The current regulations allow an employer of a live-in service domestic worker to maintain a copy of the agreement of hours to be worked and to indicate that the employee's work time generally coincides with that agreement, instead of requiring the employer to maintain an accurate record of hours actually worked by the live-in domestic worker. The Department is concerned that not all hours worked are actually captured by such agreement and paid, which may result in a minimum wage violation. The current regulations do not provide a sufficient basis to determine whether the employee has in fact received at least the minimum wage for all hours worked.

The Department has re-examined the regulations and determined that the regulations, as currently written, have expanded the scope of the companionship services exemption beyond those employees whom Congress intended to exempt when it enacted § 13(a)(15) of the Act, and do not provide a sufficient basis for determining whether live-in workers subject to § 13(b)(21) of the Act have been paid at least the minimum wage for all hours worked. Therefore, this document revises the definitions of ''domestic service employment'' and ''companionship services,'' and requires employers of live-in domestic service workers to maintain accurate records of hours worked by such employees. In addition, the regulation limits the scope of duties a direct care worker may perform and still be considered to perform companionship services, and prohibits employees of third party employers from claiming either exemption.

There has been an increase in the employment of home health aides and personal care aides in the private homes of individuals in need of assistance with basic daily living or health maintenance activities. BLS's national occupational employment and wage estimates from the OES survey show that the number of workers in these jobs tripled during the decade between 1988 and 1998, and by 1998 there were 430,440 workers employed as home health aides and 255,960 workers employed as personal care aides. The combined occupations of personal care and home health aides continue to constitute a rapidly growing occupational group. BLS statistics demonstrate that between 1998 and 2009, this occupational group again more than doubled with home health aides increasing to 955,220 and personal care aides increasing to 630,740.[217]

The growth in demand, however, has not resulted in growth in earnings for workers providing home care services. The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry. Studies have shown that the low income of direct care workers continues to impede efforts to improve both jobs and care.[218]

[217] See 1998 and 2009 Occupational Employment and Wage Estimates, National Cross-Industry Estimates, Available at: *http://www.bls.gov/oes/oes_dl.htm*.

[218] *See* Brannon, Diane, et al. (2007). Job Perceptions and Intent to Leave Among Direct Care

Protecting domestic service workers under the Act is an important step in ensuring that the home care industry attracts and retains qualified workers that the sector will need in the future. Moreover, the workers that are employed by home care staffing agencies are not the workers that Congress envisioned when it enacted the companionship exemption (i.e., neighbors performing elder sitting) but are instead professional direct care workers entitled to FLSA protection based on the expanded nature of the duties many of them perform. In view of the dramatic changes in the home care sector in the 38 years since these regulations were first promulgated and the growing concern about the proper application of the FLSA minimum wage and overtime protections to domestic service employees, the Department believes it is appropriate to narrow the scope of the definition of ''companionship services'' and limit the companion and live-in exemptions to the individual, household, or family using the services to more accurately reflect Congressional intent.

2. Summary of Significant Issues Raised by Public Comments, Assessment of the Agency and Response

3. The Agency's Response to the Comment Filed by the Chief Counsel for Advocacy of the Small Business Administration

The Small Business Administration's Office of Advocacy (Advocacy) submitted a comment summarizing key issues raised by small business representatives during a roundtable and in subsequent conversations; the small business representatives focused on three key issues with the IRFA and also suggested several alternatives for consideration (the alternatives are addressed under number 5, below).[219]

Specifically, small businesses suggested that the Department re-evaluate the private pay sector of the companion services market, the incidence of overtime among these workers because it may be underestimated, and account for the costs of restricting hours and hiring additional workers to avoid the cost of overtime compensation.

The Department appreciates this feedback from small businesses and endeavored to refine the final economic analysis to include it. First, the Department analyzed available data on the private pay sector and incorporated this sector into the discussion of the market and the analysis of deadweight loss and disemployment resulting from the Final Rule. The available data did not support the assertion of the significant size of the private pay market, as discussed in the Executive Orders 12866 and 13563 analysis. As stated earlier in this final rule, limited data exists regarding the private pay sector and overtime utilization within that sector. However, based on the analysis, it is clear that this sector behaves differently than the publicly funded market and should be analyzed differently.

Second, the Department reviewed the references used to estimate the incidence of overtime among these workers in addition to any other available data on this issue and determined that, in the absence of new statistically reliable data sources, the two national surveys of direct care workers provide the best source of information on the amount of overtime worked. However, the estimated total number of overtime hours worked and the associated overtime compensation transfers have increased due to the addition approximately 80,000 workers who were previously unaccounted for (30,000 in Illinois, 50,000 in California). The estimated total number of overtime hours worked also increased because, after further evaluation of the data in the NHHAS, the Department determined that the estimated 12 percent of workers who work overtime average 8.8 hours of overtime per week instead of the 6.3 hours estimated in the proposed rule.

Third, the Department agrees with commenters that adjusting worker schedules and hiring additional workers in order to eliminate overtime hours is not costless. This cost has been incorporated into the analysis by adjusting the assumption on OT Scenario 3 to account for administrative costs and local rigidities in the availability of additional workers; specifically, the NPRM assumed that employers could adjust to absorb all of the overtime hours currently worked, and the final analysis assumes that employers could adjust to absorb all but 10 percent of overtime hours due to the costs associated with administration.

The U.S. Chamber of Commerce also submitted a comment expressing serious concerns with the impact of the rule on small entities, stating that the Department underestimated the costs of regulatory familiarization, especially to families, and inappropriately labeled some costs of the rule as transfers. The comment references data from the Chamber of Commerce's members, but does not provide any additional detail. Thus, as explained in some detail in the section describing the estimation of regulatory familiarization costs, the Department maintains its assumptions concerning regulatory familiarization. As stated previously, most third party employers are already covered by the FLSA and employ other workers who are not exempt, so they are familiar with the FLSA's minimum wage and overtime compensation requirements. Therefore, they simply need to apply the FLSA to an additional category of workers. The Department will provide guidance and educational materials that individuals and families who employ direct care workers can rely on to learn about the rule's requirements. With respect to the Chamber of Commerce's comment relating to whether transfers are costs, the Department describes the estimated transfers due to payment of travel time and overtime compensation as transfers in the economic analysis because those payments are not a loss to the larger economy; however, the transfers are treated as compliance costs to employers for the purpose of estimating the deadweight loss and disemployment effects of the Final Rule in recognition of the fact that it will impact the behavior of employers.

Advocacy also suggested that the Department clarify that registries are not third party employers. The employment relationship was not addressed by the proposed rule and the Department proposed no changes to its longstanding test of what constitutes an employment relationship under the FLSA. However, in response to Advocacy's suggestion, the Department has included in the preamble to this Final Rule a lengthy description of the employment relationship test and how it applies in various factual scenarios including registries. This discussion is found in the Joint Employment section of this preamble.

4. Description and Estimate of the Number of Small Entities To Which the Final Rule Will Apply

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used standards defined by SBA to classify entities as small for the purpose of this analysis. For the two industries that are the focus of this analysis, the SBA defines a small business as one that has average annual receipts of less than $14 million for HHCS and $10 million for SEPD.[220]

Workers: Evidence From the Better Jobs Better Care Demonstrations. *The Gerontologist,* 47(6): 820–829.

[219] Winslow Sargeant, WHD–2011–0003–7756.

[220] These thresholds were updated in 2012 from $13.5 and $7 million, respectively. See: *http://www.fns.usda.gov/ora/MENU/Published/snap/FILES/Participation/2011Characteristics.pdf.*

Based on the estimated average annual revenues per establishment in each employment size category derived from Statistics of U.S. Businesses (SUSB) data and attributed to the establishments in the HHCS and SEPD industries, it appears that no employers exceed the SBA size standards of $14 million in annual revenues for HHCS and $10 million in annual revenues for SEPD. Thus, for the purposes of this analysis, the entire HHCS and SEPD industries (89,400 establishments) are composed of small businesses.

Although in reality it is possible that there are some firms in the 100–499 and 500+ employee categories that earn revenues in excess of the SBA standard for their industry, we include all establishments in order to not underestimate the number of small firms affected by the rule. We also believe we have not mischaracterized this sector in any meaningful way: We believe these industries are primarily, if not completely, composed of small businesses by SBA standards.

In order to better understand the impact of the rule on businesses of different sizes, the Department analyzed small business impacts using establishment size as a proxy for firm size. The Department combined Quarterly Census of Employment and Wages data for the HHCS and SEPD industries and then used the SUSB, 2007, data set to distribute establishments and employees to the following size categories: 0–4, 5–9, 10–19, 20–99, 100–499, and 500+ employees.

Although basing this analysis on establishment size will bias results, the bias will tend to overestimate the number of small businesses affected by the rule and the impacts to those small businesses. First, the analysis overestimates the number of small entities; a firm composed of multiple establishments might earn aggregate revenues that exceed the threshold the SBA used to define ''small'' in these industries. Second, costs are in part a function of the number of firms in the industry due to the need for each firm to become familiar with the Final Rule. Our cost model thus assigns those familiarization costs to each establishment. Again, to the extent that firms own multiple establishments, compliance costs associated with regulatory familiarization will be smaller than estimated here. Third, compliance costs are also a function of the number of establishment employees. Because there are no data linking the use of the companionship services exemption to establishment size, there is no direct way to measure the impact of this rule's minimum wage and overtime requirements by size categories. The Department thus assumed compliance costs associated with meeting those requirements would be proportionate to the number of establishment employees. Therefore, these costs increase in proportion to establishment size (as measured by the number of employees), and smaller establishments are not unduly impacted relative to larger establishments. This proportionate approach may not capture the full impact of the regulatory requirements on smaller establishments given the lack of available data.

Table 21 presents the estimated number of establishments, employees, and revenue by establishment size. The table shows that the 500+ employee category employs 42 percent of workers, and accounts for 20 percent of establishments and 43 percent of revenue for the combined industries. Conversely, establishments with fewer than 20 employees account for only six percent of employment but more than 44 percent of establishments.

TABLE 21—AFFECTED ESTABLISHMENTS, WORKERS, AND REVENUE BY EMPLOYMENT SIZE [a]

Number of employees	Total employees (1,000)	Percent of total employment	Workers without MW	Workers without OT	Total establishments	Percent of establishments	Revenue ($ mil.)	Percent industry revenue	Average revenue per establishment ($1,000)
0–4	22	1.1	0	10,426	24,548	27.5	$1,954	2.2	$80
5–9	29	1.5	0	14,080	7,262	8.1	1,779	2.0	245
10–19	64	3.3	0	30,471	7,685	8.6	3,752	4.1	488
20–99	421	22.0	0	201,744	18,495	20.7	18,422	20.3	996
100–499	573	29.9	0	274,541	13,287	14.9	25,860	28.5	1,946
500 +	804	42.1	0	385,776	18,111	20.3	39,079	43.0	2,158
Total	1,912	100.0	0	917,039	89,388	100.0	90,846	100.0	1,016

[a] Data in this Table are distributed across categories using percentages from SUSB, 2007.

5. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements for Small Entities

The FLSA sets minimum wage, overtime compensation, and recordkeeping requirements for employment subject to its provisions. All non-exempt covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked. Workers performing domestic service but not meeting the definition of companionship services and live-in domestic service workers employed by third parties will need to be paid in accordance with the FLSA's minimum wage and overtime compensation provisions.

This Final Rule provides no differing compliance requirements and reporting requirements for small entities. The Department has strived to minimize respondent recordkeeping burden by requiring no order or specific form of records under the FLSA and its corresponding regulations. Moreover, employers would normally maintain the records under usual or customary business practices.

Every covered employer must keep certain records for each non-exempt worker. The regulations at 29 CFR part 516 require employers to maintain records for employees subject to the minimum wage and overtime compensation provisions of the FLSA. The recordkeeping requirements under 29 CFR part 516 are not new requirements; however, some additional employees will be included in the universe of covered employees under the Final Rule. As indicated in this analysis, the Final Rule expands minimum wage and overtime compensation coverage to approximately 1.30 million workers. This results in an increase in employer burden and is estimated in the Paperwork Reduction Act (PRA) section of this Final Rule. Note that the burdens reported for the PRA section of this Final Rule include the entire

information collection and not merely the additional burden estimated as a result of this Final Rule.

Cost to Small Entities

Table 22 presents the results of the first year, recurring years, and annualized cost and impact analyses as distributed by establishment size. The figures in the table include the costs of regulatory familiarization, hiring costs, complying with minimum wage requirements, travel time compensation, and overtime compensation, assuming employers respond by adjusting work schedules so that overtime hours are reduced to 60 percent of the current value (Scenario 1; in addition, we assume 30 percent of reallocated overtime hours are assigned to new hires). This scenario is the most costly of the three examined, and thus the results presented here show the anticipated upper bound.

TABLE 22—FIRST YEAR, RECURRING, AND ANNUALIZED COMPLIANCE COSTS BY EMPLOYMENT SIZE [a]

Number of employees	Cost ($1,000)	Percent of total cost	Cost per establishment	Cost per establishment as a percent of average revenue
First Year				
0–4	$4,423	1.9	$180	0.23
5–9	3,983	1.7	548	0.22
10–19	8,003	3.5	1,041	0.21
20–99	50,494	22.0	2,730	0.27
100–499	67,801	29.5	5,103	0.26
500 +	95,228	41.4	5,258	0.24
Total	229,933	100.0	2,572	0.25
Recurring Costs				
0–4	2,450	1.1	100	0.13
5–9	3,308	1.5	456	0.19
10–19	7,159	3.3	932	0.19
20–99	47,402	22.0	2,563	0.26
100–499	64,506	29.9	4,855	0.25
500 +	90,642	42.1	5,005	0.23
Total	215,468	100.0	2,410	0.24
Annualized Costs, at 7% Real Rate				
0–4	2,712	1.2	110	0.14
5–9	3,398	1.6	468	0.19
10–19	7,272	3.3	946	0.19
20–99	47,813	22.0	2,585	0.26
100–499	64,945	29.9	4,888	0.25
> 500	91,252	42.0	5,038	0.23
Total	217,393	100.0	2,432	0.24

[a] Totals in this Table exclude costs related to California's IHSS workers because these workers are not employed by private small establishments and therefore the employer will not incur costs associated with IHSS workers.

First year costs range from $180 for entities where the owner has fewer than five employees in addition to him- or herself (a 0–4 employee establishment), to $5,258 per establishment for entities with more than 500 employees (Table 22). Annual recurring costs are somewhat smaller, ranging from $100 per year per establishment in the 1 to 4 employee class, to $5,005 in the 500 employee or more size class. Over ten years, the rule is projected to cost establishments an annual average ranging from $110 for establishments with fewer than five employees to $5,038 for 500+ employee establishments per year when cost are annualized using a 7 percent real interest rate.

Total costs and cost per establishment are consistently proportionate to establishment size as measured by either revenues or employment regardless of cost type (first year, recurring, or annualized). For example, employers with more than 500 employees are projected to incur 41.4 percent of total first year costs, which is proportionate to their share of the industry employment and revenues (see Table 21 and Table 22). In addition, the ratio of compliance costs to average establishment revenue is relatively similar regardless of establishment size. For example, the table shows that average annualized compliance costs vary between 0.14 and 0.26 percent of average annual revenues for all establishments ranging from the 0 to 4 employee class to the 500+ employee class.

In summary, first year compliance costs do not exceed $2,730 for establishments with fewer than 100 employees, and do not exceed $5,258 for those with more than 100 employees; first-year compliance costs do not exceed 0.27 percent of establishment revenue for all establishment size classes; average annualized compliance costs do not exceed $2,585 for establishments with fewer than 100 employees, and do not exceed $5,038 for those with more than 100 employees; and average annualized compliance costs do not exceed 0.26 percent of establishment revenue regardless of establishments size.

Impacts to small businesses are unlikely to vary significantly over time. Existing firms incur regulatory familiarization costs once, and these costs do not impose a significant economic burden. It is possible, however, that the actual cost burdens to small entities may differ from the Department's estimates. The Department estimates that recurring costs such as overtime and travel time compensation (transfer payments in the EO 12866 analysis) are proportionate to firm size. These costs will increase if the firm grows, but in proportion to the firm's ability to bear them. As new firms enter the market, they will bear the same costs: One-time regulatory familiarization costs, and recurring payments for overtime and travel. Again, recurring costs will be proportionate to firm size. Therefore, based on these assumptions, if the revisions to the companionship services regulations are affordable for existing firms, they will be affordable to new market entrants as well.

There are limitations to this analysis. It is assumed that the distribution of employees by establishment size has not changed significantly since 2007 (although the number of employees has increased significantly). We also assume that the occupations of HHA and PCA are distributed by establishment size similarly to other occupations in the HHCS and SEPD industries. With the exponential growth in these industries, it is possible that the distribution of workers by employment size class has shifted. In addition, the cost analysis conducted in this report is unable to capture the difference in costs for urban versus rural home care agencies.

6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Other Alternatives Were Rejected

As previously discussed, the Department believes it has chosen the most effective option that updates and clarifies the rule. Based on the commenters' suggestions, among the options considered by the Department but not described in the NPRM, the least restrictive option was taking no regulatory action. A more restrictive option was to add to the provisions being finalized a limit on the personal care services that can be performed. NELP and the National Council on Aging among others suggested that the Department require an initial assessment be conducted to determine if a direct care worker is performing primarily fellowship and protection for the consumer. If it is found that the direct care worker is not engaged primarily in fellowship and protection, then the subsequent list of personal care services should not be considered at all and the worker should not be considered exempt. The National Council on Aging further expressed the view that toileting, bathing, driving, and tasks involving positioning and/or transfers be excluded from the list of permissible duties. ANCOR suggested that the list be made exclusive and include fewer tasks. The commenter added that the Department should consider providing an allowance for household work defined as no more than one hour in a seven day period. AFSCME expressed the view that those workers who regularly engage in mobility tasks should not be considered companions. The Department carefully considered such views in development of the Final Rule. The Department ultimately settled on a less restrictive list of permissible care services (assistance with ADLs and IADLs) than initially proposed as well as less restrictive than options suggested by some of these commenters. The Department views the resulting list as a compromise that allows for some delivery of care services by the exempt companion while at the same time recognizing and making an effort to address the health and safety concerns of direct care workers and consumers. Taking no regulatory action does not address the Department's concerns discussed above under Need for Regulation. The Department found the most restrictive option to be overly burdensome on business in general and specifically small business.

Pursuant to the RFA, the Department considered several other approaches to accomplish the objectives of the rule and minimize the economic impact on small entities including those suggested in comments on the NPRM as well as more traditional approaches.

In its comment, Advocacy noted that small businesses are most concerned with the cost of overtime compensation and less so the minimum wage provision. One suggested alternative was to maintain the exemption from overtime compensation for third party employers of live-in workers, consistent with the laws in at least three states (Michigan, Nevada, and Washington). The Department recognizes that this approach would represent incremental progress towards narrowing the exemption for this set of workers and result in a very small economic impact on the industry from the Final Rule.

However, the Department believes this approach is inconsistent with Congress's intent to provide FLSA protections to domestic service workers, while providing a narrow exemption for live-in domestic service workers. It is apparent from the legislative history that the 1974 amendments were intended to expand coverage to include more workers, and were not intended to roll back coverage for employees of third parties who already had FLSA protections as employees of covered enterprises. Moreover, this approach does not support the objectives of the rule or the purposes of the overtime requirements of the FLSA, one of which is to spread employment.

Another alternative suggested by Advocacy and the participants at the Small Business Roundtable hosted by Advocacy was to allow employers to exclude some nighttime hours from ''hours worked'' to reduce the potential burden of overtime compensation to workers providing care on higher hour cases (12- or 24-hour shifts). For example, Minnesota and North Dakota state laws exclude up to eight hours from the overnight hours (from 10:00 p.m. to 9:00 a.m.) from the ''hours worked'' for purposes of minimum wage and overtime calculations. This Final Rule does not include revisions to the longstanding regulations applicable to all FLSA-covered employers addressing when sleep time constitutes hours worked and when sleep time may be excluded from hours worked. Therefore, employers still have the opportunity to exclude bona fide sleep hours; however, there would be no basis under the FLSA for treating sleep time hours differently for domestic service workers than for other employees. The Department's existing regulations already provide for the exclusion of sleep time from compensable hours worked under certain conditions. As previously discussed in the Hours Worked section of this preamble, under the Department's existing regulations, an employee who is required to be on duty for less than 24 hours is working even though he or she is permitted to sleep or engage in other personal activities when not busy. *See* § 785.21. Where an employee is required to be on duty for 24 hours or more, the employer and employee may agree to exclude a bona fide meal period or a bona fide regularly scheduled sleeping period of not more than eight hours from the employee's hours worked under certain conditions. *See* § 785.22. The conditions for the exclusion of such a sleeping period from hours worked are (1) that adequate

sleeping facilities are furnished by the employer, and (2) that the employee's time spent sleeping is usually uninterrupted. When an employee must return to duty during a sleeping period, the length of the interruption must be counted as hours worked. If the interruptions are so frequent that the employee cannot get at least five hours of sleep during the scheduled sleeping period, the entire period must be counted as hours worked. *Id.; see also* Wage and Hour Opinion Letter, 1999 WL 1002352 (Jan. 7, 1999). Where no expressed or implied agreement exists between the employer and employee, the eight hours of sleeping time constitute compensable hours worked. This description of these longstanding rules in the Final Rule's preamble is provided to help to educate small business employers regarding their ability to exclude sleep time from hours worked. *See* § 785.22. However, because there would be no basis under the FLSA for treating sleep time hours differently for domestic service workers than for other employees, the commenters' suggestion was not adopted.

Another approach suggested by small business representatives at the Small Business Roundtable and in subsequent conversations between small businesses and Advocacy would be to calculate overtime compensation based on a different rate of pay than straight time; for example, under New York state law overtime hours are paid at one and a half times the minimum wage rather than the worker's regular rate of pay for some workers. Again, there is no legal basis in the FLSA for calculating overtime compensation at a rate other than one-and-one-half times the employee's regular rate of pay. Moreover, the Department does not believe that this supports the objective of the rule or the spread of employment under the Act. In terms of economic burden, this alternative could reduce the cost to employers of overtime by approximately 25 percent under OT Scenario 2; however, 15 states currently require payment of overtime at time and a half of regular pay with no evidence of significant economic burden. Quoting the Michigan Olmstead Coalition ''we have seen no evidence that access to or the quality of home care services are diminished by the extension of minimum wage and overtime protection to home care aides in this state almost six years ago.''

Another alternative discussed by commenters is to exclude travel time from hours worked in order to decrease the burden of overtime compensation. However, the comments provided little justification for a departure from the general FLSA principles applicable to all employers on the compensability of travel time set forth in 29 CFR 785.33–785.41. Excluding travel time that is ''all in the day's work'' from compensable hours worked, for example, would be inconsistent with the Portal-to-Portal Act amendment to the FLSA and inconsistent with how such travel time is treated for all other employees. §§ 785.38; 790.6. Furthermore, the analysis above suggests that the economic impacts of combined overtime and travel time pay are not significant, and travel time is merely a fraction of overtime cost. Thus, travel time adds a relatively small amount to the burden of this rulemaking.

The Department also considered several traditional alternatives suggested in the SBA guide ''How to Comply with the Regulatory Flexibility Act.'' [221] Those alternatives include:

• Compliance Assistance. The Department has made a variety of educational assistance materials related to this Final Rule available on its Web site, and WHD offices throughout the country are available to provide compliance assistance at no charge to employers. The Department intends to engage in robust outreach efforts and make every effort to work with employers to ensure compliance. As mentioned elsewhere in this preamble, the Department will work closely with stakeholders and the Department of Health and Human Services to provide additional guidance and technical assistance so that stakeholders, including employee and employer advocacy groups, as well as state agencies, understand their rights and responsibilities under the FLSA and this Final Rule.

• Differing compliance or reporting requirements that take into account the resources available to small entities. The FLSA sets a floor below which employers may not pay their employees. As shown above, nearly all employers affected by the rule meet the criteria for small entities and the costs to the smallest of these employers are not overly burdensome; for example, the annualized cost of the rule is estimated to be $110 for an employer with 0–4 employees and $5,038 for an employer with 500 or more employees. *See* Table 22. To establish differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA and appears to not be necessary given the small annualized cost of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore the Department declines to establish differing compliance or reporting requirements for small businesses.

• Clarification, consolidation, or simplification of compliance and reporting requirements for small entities. This rule simplifies and clarifies compliance requirements for employers of workers performing companionship services. The rule imposes no reporting requirements. The recordkeeping requirements imposed by this rule are necessary for the employer to determine their compliance with the rule as well as for the Department and domestic service employees to determine the employer's compliance with the law. The recordkeeping provisions apply generally to all businesses—large and small—covered by the FLSA; no rational basis exists for creating an exemption from compliance and recordkeeping requirements for small businesses in the HHCS and SEPD industries. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

• Use of performance rather than design standards. Under the Final Rule, the employer may achieve compliance through a variety of means. The employer may: hire additional workers and/or spread employment over the employer's existing workforce to ensure employees do not work more than 40 hours in a workweek, and/or pay employees time and one-half for time worked over 40 hours in a workweek. In addition, the FLSA recordkeeping provisions require no particular order or form of records to be maintained so employers may create and maintain records in the manner best fitting their situation. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

• An exemption from coverage of the rule, or any part thereof, for such small entities. The FLSA contains no authority to allow the Department to create an exemption for certain employers based on size of their workforce. Furthermore, creating an exemption from coverage of this rule for businesses with as many as 500 employees, those defined as small businesses under SBA's size standards, is inconsistent with Congressional intent in expanding FLSA coverage to workers providing domestic services in private households and its creation of a

[221] SBA, A Guide for Government Agencies: How to Comply with the Regulatory Familiarization Flexibility Act, Implementing the President's Small Business Agenda and Executive Order 13272. June 2010. pgs 47–58. Available at: *www.sba.gov/advo.*

narrow companionship services exemption.

The Department notes that while it is not appropriate to employ all of these traditional alternatives to lessen the impact of this Final Rule on small entities, the delayed effective date of this Final Rule creates a transition period during which all entities potentially impacted by this rule, including small entities, have the opportunity to review existing policies and practices and make necessary adjustments for compliance with this Final Rule. This transition period coupled with the Department's compliance assistance efforts lessens the impacts of complying with this Final Rule, relative to a regulatory alternative in which compliance is required immediately upon finalization.

VIII. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, requires agencies to prepare a written statement that identifies the: (1) Authorizing legislation; (2) cost-benefit analysis; (3) macro-economic effects; (4) summary of state, local, and tribal government input; and (5) identification of reasonable alternatives and selection, or explanation of non-selection, of the least costly, most cost-effective or least burdensome alternative; for rules for which a general notice of proposed rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million ($141 million in 2012 dollars, using the Gross Domestic Product deflator) or more in any one year.

Authorizing Legislation

This rule is issued pursuant to Sections 13(a)(15), 13(b)(21), and 11(c) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(15), 213(b)(21), 211(c). Section 13(a)(15) of the FLSA exempts from its minimum wage and overtime provisions domestic service employees employed ''to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).'' Section 13(b)(21) of the FLSA exempts from the overtime provision any employee employed ''in domestic service in a household and who resides in such household.'' The requirements to maintain the exemptions provided by these sections are contained in this Final Rule, 29 CFR part 552. Section 3(e) of the FLSA defines ''employee'' to include an individual employed by the government of a state or political subdivision of a state, or interstate governmental agency. Section 3(x) of the FLSA, also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency. Section 11(c) of the FLSA indicates that employers subject to minimum wage and/or overtime requirements must make, keep, and preserve records as the Administrator prescribes by regulation.

Cost-Benefit Analysis

For purposes of the Unfunded Mandates Reform Act of 1995, this rule includes a Federal mandate that might result in increased expenditures by the private sector or state, local, and tribal governments of more than $100 million in any one year. The primary impact on state, local, and tribal governments may be through increased Medicaid reimbursement rates. The magnitude of that impact will depend on two factors: (1) How home care agencies adjust scheduling to reduce or eliminate overtime hours; and (2) how states adjust Medicaid budgets in response to the rule.

On average, Medicaid expenditures are one of the most significant components of state budgets, second only to primary and secondary education as a source of expenditures from state general revenues. In fiscal year 2011, the National Association of State Budget Officers estimated that the state share of Medicaid expenditures accounted for 17.4 percent of state general revenues.[222] Although some direct care workers are employed, or jointly employed, by state or county agencies (e.g., California, Illinois), these state or county agencies primarily serve the states' Medicaid population. Impacts to these agencies and direct care workers are thus a subset of the impact of the rule on the state share of Medicaid expenditures; to analyze these impacts separately would constitute double-counting. Therefore the Department will focus this section on the potential impact of the rule on the state share of Medicaid expenditures.

The Department estimated a range of total transfers of overtime and travel wages based on three adjustment scenarios, depending upon the percentage of current overtime hours worked that employers continue to provide to employees (10 percent, 40 percent or 60 percent); the middle scenario (described in the Regulatory Impact Analysis as OT Scenario 2) results in payment of 40 percent of current overtime hours worked (average annualized value of $321.8 million per year). For the reasons discussed in the Regulatory Impact Analysis, the Department believes OT Scenario 2 represents the most likely impact of the Final Rule.

As described in the regulatory impact analysis (with respect to the Agency Model in Section VI.D), home health care expenditures accounted for by Medicare and Medicaid range from about 75 to 90 percent of total home health care expenditures. However, as previously described, not all Medicaid expenditures on home care services are included in the standard Medicaid accounting classification; in 2009 the sum of State Home Health, PCS, and HCBS 1915(c) waiver programs[223] ($50.0 billion) was about twice the size of the NHE line item for Medicaid home health care expenditures ($24.3 billion).[224]

To avoid underestimating the Medicaid share of home care expenditures, the Department added these additional sources of home care spending to the NHE values and calculated that as much as 55 percent of home care expenditures may be accounted for by Medicaid.[225] Thus, perhaps $175.3 million of the $321.8 million in additional average annualized transfers under OT Scenario 2 might be attributed to Medicaid programs. It is unlikely that the entire amount will be expenditures from state budgets because the federal government also contributes to Medicaid expenditures. The CMS Office of the

[222] Office of the Actuary, Centers for Medicare & Medicaid Services, U.S. Department of Health & Human Services. 2012 Actuarial Report on the Financial Outlook for Medicaid. Available at: *http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf.* Accessed April 17, 2013.

[223] Kaiser Commission on Medicaid and the Uninsured. 2012 Medicaid Home and Community-Based Services Programs: 2009 Data Update. *http://statehealthfacts.org/comparetable.jsp?ind=242&cat=4.*

[224] Centers for Medicare and Medicaid Studies, Office of the Actuary, National Health Expenditure Projections, 2011–2021. Available at: *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/Proj2011PDF.pdf.*

[225] In 2009, the NHE listed total home health care expenditures as $66.1 billion, $29.9 billion (45 percent) of which were accounted for by Medicare, $24.3 billion by Medicaid (37 percent), with the remainder attributed to a mix of other government programs, private insurance, and private out-of-pocket spending. The Department calculated its adjusted Medicaid percent of expenditures by adding $25.7 billion ($50.0 billion minus $24.3 billion) to both total and Medicaid expenditures, then dividing $50.0 billion by $91.8 billion ($66.1 billion plus $25.7 billion) to estimate that roughly 54.5 percent of home care expenditures may be attributable to Medicaid.

Actuary projects that the federal share of Medicaid expenditures will average 60.2 percent through 2020; thus, the state share of additional wages under this scenario may be about 39.8 percent of the $175.3 million, or $69.8 million in average annualized wages.[226] Based on data from the CMS, we calculated that in 2011 state Medicaid expenditures totaled $158.6 billion and the average annualized value of projected state Medicaid expenditures is $232.5 billion per year from 2011 through 2020 (after adjusting for inflation).[227] Thus, if state Medicaid programs reimburse agencies for the entire amount of additional wages expected under OT Scenario 2, it will increase state Medicaid budgets by approximately 0.03 percent per year over that time horizon. This estimate represents an average across states; some will experience impacts greater than 0.03 percent and other less than 0.03 percent depending on whether state-level laws already require overtime or travel time payments for direct care workers. Information about state-level requirements appears in Table 3.

Macro-Economic Effects

Agencies are expected to estimate the effect of a regulation on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if accurate estimates are reasonably feasible and the effect is relevant and material. 5 U.S.C. 1532(a)(4). However, OMB guidance on this requirement notes that such macro-economic effects tend to be measureable in nationwide econometric models only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of the Gross Domestic Product,[228] or in the range of $39 to $77 billion. A regulation with smaller aggregate effect, such as this one, is not likely to have a measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector.

This regulation is focused on two sub-industries (HHCS and SEPD) within the Health Care and Social Assistance industry (NAICS 62), which account for just over 10 percent of total employment in this industry.[229] The Department's RIA estimates that the total first-year impacts of the rule on employers of workers providing home health care services will be approximately $20.7 million, with additional transfers of approximately $210.2 million, depending on the approach employers choose to manage overtime hours. However, given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable impact on the economy.

The total first-year costs of $20.7 million comprise 0.04 percent of payroll in the two industries nationwide, and total first-year costs as a percent of revenues are 0.02 percent nationwide. The total first-year transfers of $210.2 million as a percent of HHCS and SEPD payrolls are 0.5 percent, and the total first-year transfers as a percent of revenues are about 0.2 percent.

Summary of State, Local, and Tribal Government Input

Several state employers commented on specific aspects of the proposed rule. These comments have been addressed above in the preamble and Paperwork Reduction Act sections of the Final Rule. During the public comment period, representatives of the state of Washington, Tennessee, Arkansas, California, Virginia, and Oregon submitted written comments to the agency for review. Additionally, organizations such as the National Association of Medicaid Directors and the California State Association of Counties submitted written comments for review. While such associations are not representatives of specific states, many of their members are representatives of state and local government.

Representatives of individual states expressed concern about cost (and income transfers). For example, the State of California Health and Human Services Agency referenced the state's budget issues and requested that the Department postpone acting on the requirement of overtime wages to be paid to home care workers who are employed by third parties, such as home care staffing agencies.[230] The State of Washington, Aging and Disability Services Administration, stated that the proposed rule's discussion concerning costs requires further research. *See* State of Washington.[231] The Arkansas Department of Human Services expressed the view that implementing these changes without also identifying additional funding sources is ''ill advised.'' *See* Arkansas Department of Human Services.[232] In the same general category of cost, some representatives of individual states expressed concern over the requirement to pay overtime compensation to direct care workers. The Department also held a listening session with state Medicaid directors or their representatives where the state participants reiterated these concerns.

The Department notes that there was little objection among commenters that individuals providing companionship services be paid the minimum wage. Indeed, many commenters indicated that such employees are already receiving at least the federal minimum wage for hours worked. Additionally, as noted in the Department's Final Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (April 23, 2004) (69 FR 22122), Congress amended the FLSA in 1985 following the *Garcia* decision to readjust how the FLSA would apply to public sector employers by allowing compensatory time off in lieu of cash overtime compensation. Pursuant to the definition section of the Unfunded Mandates Reform Act, the term ''direct costs'' shall be determined on the assumption that state, local, and tribal governments and the private sector will take all reasonable steps necessary to mitigate the costs resulting from a Federal mandate. *See* 2 U.S.C. 658; Public Law 104–4, (March 22, 1995). Further, nothing in the Final Rule requires that employers schedule employees for more than 40 hours per workweek. Employers can avoid the overtime premium payment (or in the case of the public sector, compensatory time off) merely by limiting the employee to 40 hours of work in a workweek. Limiting workers to 40 hours per week should affect very few consumers. The Department's analysis of overtime hours worked showed 88 percent of direct care workers do not

[226] Office of the Actuary, Centers for Medicare & Medicaid Services, United States Department of Health & Human Services. 2012 Actuarial Report on the Financial Outlook for Medicaid. Available at: *http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf.* Accessed April 17, 2013.

[227] Centers for Medicare and Medicaid Studies, Office of the Actuary, National Health Expenditure Projections, 2011–2021. Available at: *http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/Proj2011PDF.pdf.*

[228] Real Gross Domestic Product for the first quarter of 2012 was $15.454 trillion. Bureau of Economic Analysis, News Release: National Income and Product Accounts Gross Domestic Product, 1st quarter 2012 (second estimate); Corporate Profits, 1st quarter 2012 (preliminary estimate). Available at: *http://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm.*

[229] BLS Quarterly Census of Employment and Wages: 2011 Annual employment for NAICS 62 (18,368,506). Total annual employment in 2011 for NAICS 6216 (HHCS) and 62412 (SEPD) was 1,912,306. Available at: *http://www.bls.gov/cew/#databases.*

[230] WHD–2011–0003–9531.

[231] WHD–2011–0003–6166.

[232] WHD–2011–0003–9232.

typically work more than 40 hours per week, and consumers served by those workers should not be affected by the rule. Although consumers served by those direct care workers who exceed 40 hours per week are likely to be affected, not all such workers will have their hours adjusted (*e.g.,* agencies that voluntarily pay overtime compensation are less likely to adjust worker schedules, and other agencies may not completely eliminate overtime hours). Thus, only some subset of consumers cared for by direct care workers currently working overtime hours are likely to be affected by the rule.

Least Burdensome Option or Explanation Required

The Department's consideration of various options has been described throughout the preamble and the Regulatory Flexibility Analysis. The Department believes it has chosen the most effective option that updates and clarifies the rule and which, given the changes made in the Final Rule in response to comments received, minimizes the burden to the extent possible. Based on the commenters' suggestions, among the options considered by the Department but not described in the NPRM, the least restrictive option was taking no regulatory action. A more restrictive option was to add to the provisions being finalized a limit on the personal care services that can be performed. NELP and the National Council on Aging among others suggested that the Department require an initial assessment be conducted to determine if a direct care worker is performing primarily fellowship and protection for the consumer. If it is found that the direct care worker is not engaged primarily in fellowship and protection, then the subsequent list of personal care services should not be considered at all and the worker should not be considered exempt. The National Council on Aging further expressed the view that toileting, bathing, driving, and tasks involving positioning and/or transfers be excluded from the list of permissible duties. ANCOR suggested that the list be made exclusive and include fewer tasks. The commenter added that the Department should consider providing an allowance for household work defined as no more than one hour in a seven day period. AFSCME expressed the view that those workers who regularly engage in mobility tasks should not be considered companions. The Department carefully considered such views in development of the Final Rule. The Department ultimately settled on a broader set of permissible care services than initially proposed as well as less restrictive than options suggested by some of these commenters. The Department views the inclusion of assistance with activities of daily living and instrumental activities of daily living as a compromise that allows for some delivery of care services under the companionship services exemption while at the same time recognizing and making an effort to tailor the types of permissible duties to Congress' original intent and to address the health and safety concerns of direct care workers and consumers. Taking no regulatory action does not address the Department's concerns discussed above under Need for Regulation. The Department found the most restrictive option to be overly burdensome on business in general and specifically small business.

IX. Executive Order 13132 (Federalism)

The Final Rule does not have federalism implications as outlined in Executive Order 13132 regarding federalism. The Final Rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

This Final Rule was reviewed under the terms of Executive Order 13175 and determined not to have ''tribal implications.'' The Final Rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

XI. Effects on Families

The undersigned hereby certifies that this Final Rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

XII. Executive Order 13045, Protection of Children

Executive Order 13045, dated April 23, 1997 (62 FR 19885), applies to any rule that (1) is determined to be ''economically significant'' as defined in Executive Order 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This Final Rule is not subject to Executive Order 13045 because it has no environmental health or safety risks that may disproportionately affect children.

XIII. Environmental Impact Assessment

A review of this Final Rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq.; the regulations of the Council on Environmental Quality, 40 CFR 1500 et seq.; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the Final Rule will not have a significant impact on the quality of the human environment. As a result, there is no corresponding environmental assessment or an environmental impact statement.

XIV. Executive Order 13211, Energy Supply

This Final Rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

XV. Executive Order 12630, Constitutionally Protected Property Rights

This Final Rule is not subject to Executive Order 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

XVI. Executive Order 12988, Civil Justice Reform Analysis

This Final Rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the federal court system. The Final Rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 552

Companionship, Domestic service workers, Employment, Labor, Minimum wages, Overtime pay, Wages.

Laura A. Fortman,

Principal Deputy Administrator, Wage and Hour Division.

For the reasons discussed in the preamble, 29 CFR part 552 is amended as follows:

PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

■ 1. The authority citation for part 552 continues to read as follows:

Authority: 29 U.S.C. 213(a)(15), (b)(21), 88 stat. 62; Sec. 29(b) of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93–259, 88 Stat. 76).

■ 2. Revise § 552.3 to read as follows:

§ 552.3 Domestic service employment.

The term *domestic service employment* means services of a household nature performed by an employee in or about a private home (permanent or temporary). The term includes services performed by employees such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. This listing is illustrative and not exhaustive.

■ 3. Revise § 552.6 to read as follows:

§ 552.6 Companionship services.

(a) As used in section 13(a)(15) of the Act, the term *companionship services* means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. The provision of *fellowship* means to engage the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events. The provision of *protection* means to be present with the person in his or her home or to accompany the person when outside of the home to monitor the person's safety and well-being.

(b) The term *companionship services* also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed 20 percent of the total hours worked per person and per workweek. The provision of *care* means to assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (such as meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care).

(c) The term *companionship services* does not include domestic services performed primarily for the benefit of other members of the household.

(d) The term *companionship services* does not include the performance of medically related services provided for the person. The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants; the determination is not based on the actual training or occupational title of the individual performing the services.

■ 4. Amend § 552.101 by revising the first three sentences of paragraph (a) to read as follows:

§ 552.101 Domestic service employment.

(a) The definition of *domestic service employment* contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from ''the generally accepted meaning'' of the term. Accordingly, the term includes persons who are frequently referred to as ''private household workers.'' See. S. Rep. 93–690, p. 20. The domestic service must be performed in or about a private home whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. * * *

* * * * *

■ 5. Amend § 552.102 by revising paragraph (b) to read as follows:

§ 552.102 Live-in domestic service employees.

* * * * *

(b) If it is found by the parties that there is a significant deviation from the initial agreement, the parties should reach a new agreement that reflects the actual facts of the hours worked by the employee.

■ 6. Revise § 552.106 to read as follows:

§ 552.106 Companionship services.

The term ''companionship services'' is defined in § 552.6. Persons who provide care and protection for babies and young children who do not have illnesses, injuries, or disabilities are considered babysitters, not companions. The companion must perform the services with respect to the elderly person or person with an illness, injury, or disability and not generally to other persons. The ''casual'' limitation does not apply to companion services.

■ 7. Amend § 552.109 by revising paragraphs (a) and (c) to read as follows:

§ 552.109 Third party employment.

(a) Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption, if the employee meets all of the requirements of § 552.6.

* * * * *

(c) Third party employers of employees engaged in live-in domestic service employment within the meaning of § 552.102 may not avail themselves of the overtime exemption provided by section 13(b)(21) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption.

■ 8. Amend § 552.110 by revising paragraphs (b), (c), and (d) and adding new paragraph (e) to read as follows:

§ 552.110 Recordkeeping requirements.

* * * * *

(b) In the case of an employee who resides on the premises, the employer shall keep a copy of the agreement specified by § 552.102 and make, keep, and preserve a record showing the exact number of hours worked by the live-in domestic service employee. The provisions of § 516.2(c) of this chapter shall not apply to live-in domestic service employees.

(c) With the exception of live-in domestic service employees, where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may:

(1) Indicate by check marks, statement or other method that such hours were actually worked; and

(2) When more or less than the scheduled hours are worked, show the exact number of hours worked.

(d) The employer is required to maintain records of hours worked by each covered domestic service employee. However, the employer may require the domestic service employee to record the hours worked and submit such record to the employer.

(e) No records are required for casual babysitters.

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Part IV

Securities and Exchange Commission

17 CFR Parts 229 and 249

Pay Ratio Disclosure; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 249

[Release Nos. 33–9452; 34–70443; File No. S7–07–13]

RIN 3235–AL47

Pay Ratio Disclosure

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to Item 402 of Regulation S–K to implement Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 953(b) directs the Commission to amend Item 402 of Regulation S–K to require disclosure of the median of the annual total compensation of all employees of an issuer (excluding the chief executive officer), the annual total compensation of that issuer's chief executive officer and the ratio of the median of the annual total compensation of all employees to the annual total compensation of the chief executive officer. The proposed disclosure would be required in any annual report, proxy or information statement or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S–K. The proposed disclosure requirements would not apply to emerging growth companies, smaller reporting companies or foreign private issuers.

DATES: Comments should be received on or before December 2, 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 S7–07–13 on the subject line; or
- Use the Federal Rulemaking ePortal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–07–13. 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: Christina L. Padden, Attorney Fellow in the Office of Rulemaking, at (202) 551–3430, in the Division of Corporation Finance; 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Item 402 [1] of Regulation S–K [2] and a conforming amendment to Form 8–K [3] under the Securities Exchange Act of 1934 (the ''Exchange Act'').[4]

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[1] 17 CFR 229.303.

[2] 17 CFR 229.10 *et seq.*

[3] 17 CFR 249.220f.

[4] 15 U.S.C. 78a *et seq.*

I. Background

A. Section 953(b) of the Dodd-Frank Act

Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') [5] directs the Commission to amend section 229.402 of title 17, Code of Federal Regulations, to require each issuer, other than an emerging growth company, as that term is defined in Section 3(a) of the Securities Exchange Act of 1934, to disclose in any filing of the issuer described in section 229.10(a) of title 17, Code of Federal Regulations (or any successor thereto)— the median of the annual total compensation of all employees of the issuer, except the chief executive officer (or any equivalent position) of the issuer; the annual total compensation of the chief executive officer (or any equivalent position) of the issuer; and the ratio of the median of the total compensation of all employees of the issuer to the annual total compensation of the chief executive officer of the issuer. Section 953(b) also requires that the total compensation of an employee of an issuer shall be determined in accordance with section 229.402(c)(2)(x) of title 17, Code of Federal Regulations, as in effect on the day before the date of enactment of the Dodd-Frank Act.[6]

We are proposing amendments to implement Section 953(b). We refer to this disclosure of the median of the annual total compensation of all employees of the issuer, the annual total compensation of the chief executive officer of the issuer and the ratio of the two amounts as ''pay ratio'' disclosure.

Section 953(b) of the Dodd-Frank Act does not amend the Securities Act of 1933 (''Securities Act'') [7] or the Exchange Act. Instead, Section 953(b) directs the Commission to amend Item 402 of Regulation S–K (''Item 402'') to add the pay ratio disclosure requirements mandated by the Dodd-Frank Act. Although Section 953(b) defines some terms used in the provision, commenters have raised questions about the scope of the

[5] Public Law 111–203, 124 Stat. 1376 (2010), as amended by Public Law 112–106,126 Stat. 306 (2012).

[6] Public Law 111–203, sec. 953(b), 124 Stat. 1376, 1904 (2010), as amended by Public Law 112–106, sec. 102(a)(3), 126 Stat. 306, 309 (2012). Section 102(a)(3) of the Jumpstart Our Business Startups Act (the ''JOBS Act'') amended Section 953(b) of the Dodd-Frank Act to provide an exemption for registrants that are emerging growth companies as that term is defined in Section 3(a) of the Exchange Act.

[7] 15 U.S.C. 77a *et seq.*

statutory requirements and the need for additional interpretive guidance.[8]

B. Comments Received

In connection with rulemakings implementing the Dodd-Frank Act, we have sought comment from the public before the issuance of a proposing release. With respect to Section 953(b) of the Dodd-Frank Act, as of September 15, 2013, we have received approximately 22,860 comment letters and a petition with approximately 84,700 signatories.[9] We have considered these comments in proposing the rules described in this release.

Commenters were divided in their recommended approaches to Section 953(b) and the implementation issues it raises. Comments from industry groups, issuers, law firms and executive compensation professionals generally raised concerns about the complexity of the Section 953(b) requirements, the significant compliance costs that could be involved and the potential inability for many companies to verify the accuracy of their disclosure.[10] These commenters generally asserted that this type of disclosure would not be material to investors or useful to an investment or voting decision, and they disputed the potential benefits cited by commenters who supported the provision.[11] Comments from individual and institutional investors and some public policy organizations generally outlined what they expected to be the benefits of the mandated information and urged the Commission to implement the provision in a way that would preserve those benefits.[12] Notwithstanding these differing viewpoints, several commenters supported a flexible approach to implementation that would retain the potential benefits of the mandated disclosure, while avoiding the additional compliance costs that a less flexible approach could impose.[13]

We discuss the concerns and recommendations from the commenters in more detail throughout this release. We agree with commenters that, depending on how Section 953(b) is implemented, the cost of compliance with these new disclosure requirements could be, at least for some registrants, substantial. The rules we are proposing are intended to address commenters' concerns and are designed to lower the cost of compliance while remaining consistent with Section 953(b).

II. Discussion of the Proposed Amendments

A. Introduction

Section 953(b) imposes a new requirement on registrants to disclose the median of the annual total compensation of all employees (excluding the chief executive officer), the annual total compensation of the chief executive officer and the ratio of the median disclosed to the annual total compensation of the chief executive officer. Section 953(b)(2) specifies that, for purposes of Section 953(b), the total compensation of an employee of an issuer shall be determined in accordance with Item 402(c)(2)(x) of Regulation S–K. The Commission's rules for compensation disclosure have traditionally focused on the compensation of executive officers and directors.[14] Although registrants subject to Item 402 are required to provide extensive information about the compensation of the principal executive officer (''PEO'') and other named executive officers identified pursuant to Item 402(a), current disclosure rules generally do not require registrants to disclose detailed compensation information for other employees in their filings with the Commission.[15] Commenters have observed that, because of the complexity of the requirements of Item 402(c)(2)(x), registrants typically compile information required by Item 402(c) manually for the named executive officers, which they have stated takes significant time and resources.[16] We do not expect that many registrants, if any, currently disclose or track total compensation as determined pursuant to Item 402 for their workforce.[17]

[8] Comments submitted to the Commission in connection with Section 953(b) are discussed generally in Section I.B. and throughout this release as they relate to specific aspects of the proposals.

[9] Comments related to the executive compensation provisions of the Dodd-Frank Act, including Section 953(b), are available at *http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml.* In connection with Section 953(b), the Commission received approximately 260 unique comment letters and approximately 22,600 form letters (posted on the Web site as Letter Type A) as of September 15, 2013. The Commission also received a petition (posted on the Web site as Letter Type B) with approximately 84,700 signatories. In this release, references to comment letters identify the commenter by the name of the organization or individual submitting the letter. Letters by commenters who submitted multiple letters are identified by date.

[10] *See, e.g.,* letters from American Bar Association (''ABA''); Center on Executive Compensation dated September 10, 2010 (''COEC I''); Center on Executive Compensation dated November 11, 2011 (''COEC II''); Davis Polk & Wardwell LLP (''Davis Polk''); Business Roundtable *et al.,* (''Group of Trade Associations''); Society of Corporate Secretaries and Governance Professionals (''SCSGP''); Greta E. Cowart, Haynes & Boone LLP *et al.* (''Group of Exec. Comp. Lawyers''); Protective Life Corporation; Towers Watson; Brian Foley & Co.; and Pay Governance LLC. We discuss these costs in detail in Section IV of this release.

[11] *See, e.g.,* COEC I and letters from Brian Foley & Co.; Group of Trade Associations; Meridian Compensation Partners, LLC; National Association of Corporate Directors (''NACD''); and Retail Industry Leaders Association (''RILA'').

[12] *See, e.g.,* letters from AFL–CIO dated December 13, 2010 (''AFL–CIO I'') and AFL–CIO dated August 11, 2011 (''AFL–CIO II''); Americans for Financial Reform; Batirente *et al.* (''Group of International Investors''); J. Brown; K. Burgoyne; Calvert Investment Management; Community Action Commission; CtW Investment Group; Drucker Institute; Institute for Policy Studies; R. Landgraf; D. Miron; Social Investment Forum; S. Towns; Trillium Asset Management; UAW Retiree Medical Benefits Trust; and Walden Asset Management. *See* also Letter Type A. We discuss these benefits in detail in Section IV of this release.

[13] *See, e.g.,* AFL–CIO II and letters from ABA; American Benefits Council; COEC II; Protective Life Corporation; and Davis Polk.

[14] Initially, disclosure requirements for executive and director compensation were set forth in Schedule A to the Securities Act and Section 12(b) of the Exchange Act, which list the type of information to be included in Securities Act and Exchange Act registration statements. In 1938, the Commission promulgated its first executive and director compensation disclosure rules for proxy statements. *See* Amended Proxy Rules, Release No. 34–1823 (Aug. 11, 1938) [3 FR 1991].

From time to time thereafter, the Commission has amended its executive and director compensation disclosure requirements in light of changing trends in executive compensation and other issues, and, more recently, to comply with the mandates of the Dodd Frank Act. *See, e.g.,* Solicitation of Proxies Under the Act, Release No. 34–3347 (Dec. 18, 1942) [7 FR 10655]; Solicitation of Proxies, Release No. 34–4775 (Dec. 11, 1952) [17 FR 11431]; Uniform and Integrated Reporting Requirements: Management Remuneration, Release No. 33–6003 (Dec. 4, 1978) [43 FR 58181]; Disclosure of Executive Compensation, Release No. 33–6486 (Sept. 23, 1983) [48 FR 44467]; Executive Compensation Disclosure, Release No. 33–6962 (Oct. 16, 1992) [57 FR 48126]; Executive Compensation Disclosure; Securityholder Lists and Mailing Requests, Release No. 33–7032 (Nov. 22, 1993) [58 FR 63010]; Executive Compensation and Related Person Disclosure, Release No. 33–8732A (Aug. 29, 2006) [71 FR 53158] (''2006 Adopting Release''); Proxy Disclosure Enhancements, Release No. 33–9089A (Dec. 16, 2009) [74 FR 68334]; and Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release No. 33–9178 (Jan. 25, 2011)[76 FR 6010].

[15] Although the group of covered individuals for whom disclosure is required has changed over time, the rules generally have sought to require compensation disclosure for ''persons who, in fact, function as key, policy-making members of management.'' Uniform and Integrated Reporting Requirements: Management Remuneration, Release No. 33–5950 (July 28, 1978) [43 FR 34415], at 34416.

[16] *See* letter from Davis Polk. *See also* letter from R. Morrison.

[17] *See* letter from Protective Life (noting that ''very few employers routinely determine certain items of compensation for individual 'rank and file' employees, notably the values of stock and stock option awards and the aggregate change in the actuarial present value of defined benefit pension plan accruals. For most employers, determining these amounts will require, for the first time, calculations for all (or a large subset) of their employees''). *See also* COEC I (''No public company currently calculates each employee's total compensation as it calculates total pay on the Summary Compensation Table for the named

Continued

Registrants are required to present various elements of employee compensation, on an aggregate basis, in the relevant line items of their financial statements and related footnotes (such as accrued payroll and benefits amounts recorded in current liabilities on the balance sheet, or salary and bonus amounts included in selling and administrative expenses or cost of goods sold on the income statement).[18] These amounts are calculated and presented in accordance with the comprehensive set of accounting principles that the registrant uses to prepare its primary financial statements. For example, under United States generally accepted accounting principles (''U.S. GAAP''), there are several accounting standards that relate to compensation,[19] and these standards are distinct from the Commission's executive compensation disclosure rules. In addition, the Commission's executive compensation disclosure rules differ from tax accounting and reporting standards.[20] Therefore, Section 953(b) requires registrants to disclose specific information about non-executive employee compensation that is not currently required for disclosure, accounting or tax purposes.

Many commenters raised concerns about the significant compliance costs that could result from requiring the use of ''total compensation'' as defined in Item 402(c)(2)(x) to calculate employee pay and requiring registrants to identify the median instead of the average.[21] According to these commenters, the primary driver of the significant compliance costs is that many registrants, whether large multinationals or companies of modest revenue size and market capitalization, maintain multiple and complex payroll, benefits and pension systems (including systems maintained by third party administrators) that are not structured to easily accumulate and analyze all the types of data that would be required to calculate the annual total compensation for all employees in accordance with Item 402(c)(2)(x). Thus, in order to compile such disclosure, registrants would either need to integrate these data systems or consolidate the data manually, which, in both cases, would be, according to these commenters, highly costly and time consuming.[22]

The proposed rules to implement Section 953(b) are designed to comply with the statutory mandate and to address commenters' concerns regarding the potential costs of complying with the disclosure requirement. Where we have exercised discretion in implementing the statutory requirements, we are proposing alternatives that we believe will reduce costs and burdens, while preserving what we believe to be the potential benefits, as articulated by commenters, of the disclosure requirement mandated by the Dodd-Frank Act. We note, however, that neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision.[23] Commenters supporting Section 953(b) have emphasized that potential benefits could arise from adding pay ratio-type information to the total mix of executive compensation information.[24] We have considered the statutory mandate of Section 953(b) in the context of other executive compensation disclosure under Item 402, and, where practicable, we have sought to make the mandated disclosure of Section 953(b) work with the existing executive compensation disclosure regime.

executive officers, because disclosure of executive pay has a different purpose than internal accounting.''); and letter from R. Morrison (''Collecting, organizing, and analyzing this kind of data for all employees in order to develop a median comp figure would be extremely complex, time-consuming, and burdensome, assuming this is even possible.'').

[18] ''Total compensation'' as determined pursuant to Item 402 is not an amount that is reported or calculated in connection with a registrant's financial statements.

[19] *See, e.g.,* FASB ASC 710, *Compensation—General;* ASC 715, *Retirement Benefits Compensation;* ASC 960, *Defined Benefit Pension Plans;* ASC 962, *Defined Contribution Pension Plans;* ASC 965, *Health and Welfare Benefit Plans;* and ASC 718, *Compensation—Stock Compensation.*

[20] For example, registrants that are subject to the United States Internal Revenue Code [26 U.S.C. 1 *et seq.*] are required to report certain compensation information for each employee to the Internal Revenue Service, typically on Form W–2. The elements of compensation that are required to be calculated and reported on Form W–2 are not the same as those covered by Item 402 requirements, and the reported amounts relate to the relevant calendar year for tax purposes, rather than the registrant's fiscal year.

Additionally, the compensation required to be disclosed under Item 402 reflects the compensation that was awarded to, earned by or paid to the executive officer during the fiscal year in contrast to compensation reported on Form W–2, which reflects only compensation that was includible in income for income tax purposes during the calendar year regardless of when that compensation was earned. For example, under Item 402, the value of stock options, deferred salary and bonuses would be included in compensation in the period they were awarded or earned. In contrast, for purposes of Form W–2, income from stock options is generally included in income at the time of exercise, and income relating to deferred salary and bonuses is included only when those amounts are actually paid, which could be in a future year.

[21] *See, e.g.,* letters from Davis Polk (noting that compliance will be ''highly costly and burdensome, with tremendous uncertainty as to accuracy. Companies are justifiably concerned about the costs and burdens to accomplish the formidable data collection and calculation tasks for employees worldwide between the end of the year and the first required filing.''); Frederick W. Cook & Co., Inc. (stating, ''the calculation of median total pay for all employees other than the CEO is problematic, burdensome and perhaps impossible for many issuers'') and Protective Life Corporation (''It is difficult to overemphasize how burdensome this requirement could be for large employers. Calculating annual total compensation is much more complicated than simply adding up numbers that companies already have available. . . . Since many large companies use outside accounting, actuarial nd compensation and pension administration firms to perform these calculations, the costs of disclosure will increase accordingly.''). *See also* letters from ABA; COEC I; Group of Exec. Comp. Lawyers; Group of Trade Associations; Meridian Compensation Partners, LLC; NACD; and R. Morrison.

[22] *See, e.g.,* letter from Group of Trade Associations (''There is a widespread misconception that this information is readily available at the touch of a button.'') *See also* COEC II and letters from Group of Exec. Comp. Lawyers; Meridian Compensation Partners, LLC; and R. Morrison.

[23] The requirements imposed by Section 953(b) originated in the Senate. A provision identical to Section 953(b) was first included in S. 3049, the ''Corporate Executive Accountability Act of 2010,'' which was sponsored by Senator Menendez and introduced on February 26, 2010. In that bill, the provision accompanied a say-on-pay provision. A provision identical to Section 953(b) next appeared in S. 3217, the ''Restoring American Financial Stability Act of 2010'' sponsored by Senator Dodd and introduced on April 15, 2010, which served as the basis for the Senate's amendments to H.R. 4173. The legislative record includes only a few brief references to the pay ratio disclosure requirements, each opposing the provision. *See* 156 Con. Rec. S3121 (daily ed. May 5, 2010) (statement of Sen. Gregg) and 156 Cong. Rec. S4075 (daily ed. May 20, 2010) (statement of Sen. Shelby). The April 30, 2010 report issued by the Senate Committee on Banking, Housing and Urban Affairs does not mention the pay ratio requirements other than a short statement by the minority. *See* Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 3217 (''the Senate Report''), S. Rep. No. 111–176, at 245.

The requirements of Section 953(b) were not discussed during the conference committee's deliberations on the legislation. Similarly, the Joint Explanatory Statement of the Committee of Conference does not mention the pay ratio requirements in its summary of Title IX, Subtitle E. *See* Conference Report on H.R. 4173, H. Rep. No. 111–517, at 872.

[24] *See, e.g.,* letters from Americans for Financial Reform (''Existing requirements mandate disclosure of top executive compensation only, encouraging companies to focus unduly on peer to peer comparisons when setting CEO pay. . . . Disclosure of CEO-to-worker pay ratios will encourage Boards of Directors to also consider vertical pay equity within firms.''); Calvert Investment Management (''The disclosure required by Section 953(b) will help investors understand how issuers are distributing compensation dollars throughout the firm in ways that may help improve employee morale and productivity.''); CtW Investment Group (''The new disclosure offers an insight into compensation within the entire organization, and provides a different way for boards and shareholders to evaluate the relative worth of a CEO.''); and UAW Retiree Medical Benefits Trust (''[W]e view Section 953(b) as an essential tool that will increase corporate board accountability to investors . . . a comparison between CEO and employee pay may help shareholders identify the board's strengths and weaknesses, and may provide insight into [the board's] relationship with the CEO.'').

In light of the significant potential costs articulated by commenters,[25] we believe that it is appropriate for the proposed rules to allow registrants flexibility in developing the disclosure required by the statute. The proposal seeks to implement Section 953(b) without imposing additional prescriptive requirements that are not mandated by the Dodd-Frank Act and reflects our consideration of the relative costs and benefits of this approach as opposed to a more prescriptive one. For example, registrants would be able to choose from several options in order to provide the disclosure. Registrants may choose to identify the median using their full employee population or by using statistical sampling or another reasonable method. In doing so, the proposed requirements would allow registrants to choose a statistical method to identify the median that is appropriate to the size and structure of their own businesses and the way in which they compensate employees, rather than prescribing a particular methodology or specific computation parameters. Registrants may calculate the annual total compensation for each employee included in the calculation (whether the entire population or a statistical sample) and the PEO using Item 402(c)(2)(x) and to identify the median using this method. As an alternative, registrants may identify the median employee based on any consistently applied compensation measure and then calculate the annual total compensation for that median employee in accordance with Item 402(c)(2)(x). The proposed requirements also would permit registrants to use reasonable estimates in calculating the annual total compensation for employees other than the PEO, including when disclosing the annual total compensation of the median employee identified using a consistently applied compensation measure. We believe that this flexible approach is consistent with Section 953(b) and could ease commenters' concerns about the potential burdens of complying with the disclosure requirement. We do not believe that a one-size-fits-all approach would be prudent, given the wide range of registrants and the disparate burdens on registrants based on factors such as their type of business and the complexity of their payroll systems. We seek comment on whether the proposed rules address sufficiently the practical difficulties of data collection and whether there are other alternative approaches consistent with Section 953(b) that could provide the potential benefits of pay ratio information at a lower cost. We also seek comment on whether the flexible approach proposed in this release appropriately implements Section 953(b).

The details of the proposal are set forth in the sections below. First, we interpret the scope of Section 953(b) with respect to the filings and the registrants that are subject to the proposed requirements. Next, we set forth the proposed new pay ratio disclosure requirement in Item 402, to be designated paragraph (u), and provide details on a variety of technical and interpretive issues, including:

- The employees that are to be included in the identification of the median;
- identifying the median;
- determining ''total compensation;''
- disclosure of the methodology, assumptions and estimates used;
- the meaning of ''annual'' in the context of ''annual total compensation;''
- various timing matters that arise in connection with the proposed requirements; and
- the status of the disclosure as ''filed'' rather than ''furnished.''

Finally, we address transition matters, including the proposed compliance date for registrants that would be subject to the rules, and proposed transition provisions for new registrants.

B. Scope of Section 953(b) of the Dodd-Frank Act

1. Filings Subject to the Proposed Disclosure Requirements

In accordance with Section 953(b) of the Dodd-Frank Act, we are proposing to require registrants to include pay ratio disclosure in any filing described in Item 10(a) of Regulation S–K that requires executive compensation disclosure under Item 402 of Regulation S–K. Therefore, the proposed pay ratio disclosure would be required in annual reports on Form 10–K,[26] registration statements under the Securities Act and Exchange Act, and proxy and information statements, to the same extent that the requirements of these forms require compliance with Item 402.[27] We are not proposing changes to the requirements of these forms relating to Item 402. Section 953(b) does not direct the Commission to amend any of its forms to add the pay ratio disclosure requirements to filings that do not already require disclosure of Item 402 information, and we are not proposing to do so.

Although some commenters suggested that Section 953(b)(1) requires pay ratio disclosure in every Commission filing,[28] other commenters suggested that the statute, by referring to filings described in Item 10(a) of Regulation S–K, is intended to apply only to those filings for which the applicable form requires Item 402 disclosure.[29] We agree with the latter reading of Section 953(b). We believe that reading Section 953(b) to require pay ratio disclosure in filings that do not contain other executive compensation information would not present this information in a meaningful context. Because some commenters have asserted that the pay ratio disclosure would provide another metric to evaluate executive compensation disclosure,[30] we believe that the proposed pay ratio disclosure should be placed in context with other executive compensation disclosure, such as the summary compensation table required by Item 402(c) and the compensation discussion and analysis required by Item 402(b), rather than provided on a stand-alone basis. Therefore, we believe it is appropriate to read Section 953(b) as requiring pay ratio disclosure in only those filings that are required to include other Item 402 information.

Request for Comment

1. Should we require the pay ratio disclosure only in filings in which Item 402 disclosure is required, as proposed? Should we require the pay ratio disclosure in Commission forms that do

[25] The potential costs arising from the requirements of Section 953(b), as well as the potential costs relating to the proposed rules, are discussed in detail below in Section IV of this release.

[26] 17 CFR 249.310.

[27] Registrants would follow the instructions in each form to determine whether Item 402 information is required, including any instructions that allow for the omission of Item 402 information in certain circumstances, such as General Instructions I(2)(c) and J(1)(m) to Form 10–K containing special provisions for the omission of Item 402 information by wholly-owned subsidiaries and asset-backed issuers.

As described below in Section II.C.7., the proposed requirements do not require a registrant to update its pay ratio disclosure for the most recently completed fiscal year until it files its annual report on Form 10–K, or, if later, its proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of such a meeting).

In addition, we are proposing a transition period for compliance by new registrants that are subject to Section 953(b), so that the pay ratio requirement is not required in a registration statement on Form S–1 [17 CFR 239.11] or Form S–11 [17 CFR 239.18] for an initial public offering or registration statement on Form 10 [17 CFR 249.210]. *See* Section II.D.2. of this release.

[28] *See, e.g.,* COEC I and letters from American Benefits Council; Compensia, Inc.; Davis Polk; SCSGP; and Towers Watson.

[29] *See, e.g.,* letters from ABA and RILA.

[30] *See, e.g.,* AFL–CIO I, House Letter and Senate Letter; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

not currently require Item 402 disclosure? If so, which forms, and why? Would disclosure be meaningful to investors where no other executive compensation disclosures are required?

2. Do registrants need any additional guidance about which filings would require the proposed pay ratio disclosure? Are there circumstances where the requirements of a particular form call for Item 402 information in certain circumstances, but the applicability of the proposed pay ratio disclosure requirements may not be clear? If so, please provide details about what should be clarified and what guidance is recommended.

2. Registrants Subject to the Proposed Disclosure Requirements

The proposed pay ratio disclosure requirements would apply to only those registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c). We recognize that the reference to ''each issuer'' in Section 953(b) could be read to apply to all issuers that are not emerging growth companies, including smaller reporting companies and foreign private issuers. As a result of the specific reference in Section 953(b) to the definition of total compensation contained in Item 402(c)(2)(x), and the absence of direction to apply this requirement to companies not previously subject to Item 402(c) requirements, we propose to limit the pay ratio disclosure requirement to registrants that are subject to Item 402(c) requirements, as described in more detail below.

a. Emerging Growth Companies Are Not Covered

Under JOBS Act Section 102(a)(3), registrants that qualify as emerging growth companies, as that term is defined in Section 3(a) of the Exchange Act,[31] are not subject to Section 953(b). To give effect to the statutory exemption, we are proposing an instruction to Item 402(u) that provides that a registrant that is an emerging growth company is not required to comply with Item 402(u).[32]

b. Smaller Reporting Companies Are Not Covered

Section 953(b) requires total compensation to be calculated in accordance with Item 402(c)(2)(x). Smaller reporting companies (as defined in Item 10(f)(1) of Regulation S–K)[33] are permitted to follow the scaled disclosure requirements set forth in Items 402(m)–(r) instead of complying with the disclosure requirements set forth in Items 402(a)–(k) and (s),[34] and therefore are not required to calculate compensation in accordance with Item 402(c)(2)(x). The requirement set forth in Item 402(n) for disclosure of summary compensation table information, which includes disclosure of ''total compensation,'' does not require smaller reporting companies to include all of the same types of compensation required to be included in total compensation for other registrants under Item 402(c)(2).[35] We believe that by requiring the use of Item 402(c)(2)(x) to calculate total compensation (without mention of Item 402(n)(2)(x)), Congress intended to exclude smaller reporting companies from the scope of Section 953(b). In addition, requiring smaller reporting companies to provide the pay ratio disclosure consistent with the requirement for other registrants would require smaller reporting companies to collect data and calculate compensation for the PEO in a manner they otherwise would not be required to calculate compensation. Thus, we do not believe this is the intent of the provision.

Therefore, as proposed, the pay ratio disclosure requirements would not apply to smaller reporting companies. To make this clear, we are proposing a technical amendment to paragraph (*l*) of Item 402, to add proposed paragraph (u) to the list of items that are not required for smaller reporting companies.

c. Foreign Private Issuers and MJDS Filers Are Not Covered

Foreign private issuers that file annual reports and registration statements on Form 20–F and MJDS filers that file annual reports and registration statements on Form 40–F would not be required to provide the proposed pay ratio disclosure, because those forms do not require Item 402 disclosure.[36] We do not read Section 953(b) as requiring the Commission to expand the scope of Item 402 to apply to companies that are not currently subject to the executive compensation disclosure requirements set forth in Item 402. Accordingly, we are not proposing to amend Form 20–F or Form 40–F, and the proposed pay ratio disclosure requirements would not be applicable to foreign private issuers or MJDS filers. In addition, we are not proposing any changes to existing Item 402(a)(1), which provides for the treatment of foreign private issuers. Accordingly, foreign private issuers that file annual reports on Form 10–K will continue to be able to satisfy Item 402 requirements by following the requirements of Items 6.B and 6.E.2 of Form 20–F and would not be required to make the pay ratio disclosure mandated by Section 953(b). In addition, requiring foreign private issuers and MJDS filers to provide the pay ratio disclosure consistent with the requirement for other registrants would require these registrants to collect data and calculate compensation for the PEO in a manner they otherwise would not be required to calculate compensation. Thus, we do not believe this is the intent of the provision.

Request for Comment

3. Should the pay ratio disclosure requirements, as proposed, apply only to those registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c)? If not, to which registrants should pay ratio disclosure requirements apply?

4. Should we revise the proposal so that smaller reporting companies would be subject to the proposed pay ratio disclosure requirements? If so, why? If so, also discuss how smaller reporting companies should calculate total compensation for employees and the PEO. For example, should they be required to calculate total compensation in accordance with Item 402(c)(2)(x) instead of the scaled disclosure requirements? In the alternative, should smaller reporting companies be required to provide a modified version of the pay ratio disclosure? If so, why, and what should that modified version entail?

[31] 15 U.S.C. 78c(a).

[32] *See* proposed Instruction 6 to Item 402(u).

[33] 17 CFR 229.10(f)(1).

[34] *See* Item 402(*l*). Smaller reporting companies are permitted to choose compliance with either the scaled disclosure requirements or the larger company disclosure requirements on an ''a la carte'' basis. As discussed in the scaled disclosure adopting release, the staff evaluates compliance by smaller reporting companies with only the Regulation S–K requirements applicable to smaller reporting companies, even if the company chooses to comply with the larger company requirements. *See* Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33–8876 (Dec. 19, 2007) [73 FR 934], at 941.

[35] Specifically, under Item 402(n)(2)(viii), smaller reporting companies are not required to include the aggregate change in the actuarial present value of pension benefits that is required for companies subject to Item 402(c)(2)(viii).

[36] The term ''MJDS filers'' refers to registrants that file reports and registration statements with the Commission in accordance with the requirements of the U.S.- Canadian Multijurisdictional Disclosure System (the ''MJDS''). The definition for ''foreign private issuer'' is contained in Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)]. A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that, as of the last business day of its most recent fiscal year, has more than 50% of its outstanding voting securities held of record by United States residents and any of the following: A majority of its officers and directors are citizens or residents of the United States, more than 50% of its assets are located in the United States, or its business is principally administered in the United States.

Should it be based on the compensation amounts required under the scaled disclosure requirements applicable to smaller reporting companies, such as a ratio where the PEO compensation and other employee compensation are calculated in accordance with Item 402(n)(2)(x)? Please provide information as to particular concerns that smaller reporting companies may have. Please discuss whether the disclosure would be useful to investors in smaller reporting companies.

5. Should we amend either Form 20–F or Form 40–F to include disclosure that is similar to the proposed pay ratio disclosure requirements? If so, why? Assuming we would not otherwise subject foreign private issuers to the executive compensation disclosure rules, what modifications would be needed to address the different reporting requirements that foreign private issuers and MJDS filers have for executive compensation disclosure in order to require pay ratio disclosure? In particular, how should these registrants calculate total compensation (for the PEO and for employees) for purposes of such a requirement? Please provide information as to particular concerns that foreign private issuers or MJDS filers may have if they were required to comply with such a requirement. Please discuss whether the disclosure would be useful to investors, particularly in the absence of the executive compensation disclosure that would accompany disclosure of the ratio for registrants subject to Item 402 disclosure.

C. Proposed Requirements for Pay Ratio Disclosure

1. New Paragraph (u) of Item 402 (Pay Ratio Disclosure)

We are proposing new paragraph (u) of Item 402 that would require disclosure of:

(A) The median of the annual total compensation of all employees of the registrant, except the principal executive officer of the registrant;

(B) the annual total compensation of the principal executive officer of the registrant; and

(C) the ratio of the amount in (A) to the amount in (B), presented as a ratio in which the amount in (A) equals one or, alternatively, expressed narratively in terms of the multiple that the amount in (B) bears to the amount in (A).

For consistency with existing Item 402 requirements, the proposed requirements would use the defined term ''PEO'' (principal executive officer), instead of the term ''chief executive officer'' used in Section 953(b).[37] PEO is defined in Item 402(a)(3) as an ''individual serving as the registrant's principal executive officer or acting in a similar capacity during the last completed fiscal year.'' We believe that this consistency would simplify compliance for registrants and would clarify how the pay ratio disclosure relates to the PEO's total compensation figure disclosed in the summary compensation table. We also believe that this change in terminology is consistent with Section 953(b).

Section 953(b) specifies that registrants must disclose the ratio of the median of the annual total compensation of all employees to the PEO's annual total compensation. We note that three commenters raised concerns about the presentation of the pay ratio in the order set forth in Section 953(b).[38] These commenters noted that the customary manner of presenting similar types of ratios would include the PEO's annual total compensation in the numerator and the median of the annual total compensation of all employees in the denominator and would typically be expressed in terms of the multiple that the PEO amount bears to the median amount (such as ''PEO pay is X times the median employee pay''). These commenters recommended that we allow registrants to present the ratio in this more customary manner.

Although Section 953(b) calls for a ratio showing the median of the annual total compensation of all employees *to* the PEO's annual total compensation, it does not specify how the ratio should be expressed. In order to promote consistent presentation and address the potential for confusion, the proposed pay ratio disclosure requirements specify that the ratio must be expressed as a ratio in which the median of the annual total compensation of all employees is equal to one, or, alternatively, expressed narratively in terms of the multiple that the PEO total compensation amount bears to the median of the annual total compensation amount. For example, if the median of the annual total compensation of all employees of a registrant is $45,790,[39] and the annual total compensation of a registrant's PEO is $12,260,000,[40] then the pay ratio disclosed would be ''1 to 268'' (which could also be expressed narratively as ''the PEO's annual total compensation is 268 times that of the median of the annual total compensation of all employees'').

We believe that the proposed requirements for the expression of the ratio would help to address the concerns of commenters and are consistent with the statute. It does not appear that the order of the ratio specified in Section 953(b) would impact investor understanding or the usefulness, as expressed by some commenters,[41] to investors of the proposed pay ratio disclosure.

Request for Comment

6. Are there any other presentation issues that companies need guidance on or that should be clarified in the pay ratio disclosure requirements? If so, please provide details about such issues and any recommended guidance that should be provided.

2. Employees Included in the Identification of the Median

a. All Employees

Section 953(b) expressly requires disclosure of the median of the annual total compensation of ''all employees.'' Consistent with that mandate, the proposed requirements state that ''employee'' or ''employee of the registrant'' includes any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries[42] (including officers other

[37] The term chief executive officer in the executive compensation rules was replaced by the term ''principal executive officer'' as part of the 2006 amendments to Item 402 of Regulation S–K in order to maintain consistency with the nomenclature used in Item 5.02 of Form 8–K. *See* 2006 Adopting Release, *supra* note 14, at n. 326.

[38] *See* letters from Compensia, Inc. (''For example, if the annual total compensation of a company's chief executive officer was $3,750,000 and the median of the annual total compensation of all employees was $75,000, then as currently formulated, the required disclosure would be 0.02 to 1, rather than the commonly understood calculation of 50 to 1.''); Frederick W. Cook & Co., Inc.; and Group of Exec. Comp. Lawyers (''For example, if CEO pay were 2 million and the median annual compensation of all employees were $25,000, the statute literally requires a disclosure that the median annual compensation of all employees is 1/80 of the CEO's pay.'').

[39] Average salary for all occupations, U.S. Bureau of Labor Statistics, May 2012 National Occupational Employment and Wage Estimates United States, *available at http://www.bls.gov/oes/current/oes_nat.htm#00-0000.*

[40] Derived from 2012 Average CEO at S&P 500 Index Companies, AFL–CIO, *Trends in CEO Pay, available at http://www.aflcio.org/Corporate-Watch/CEO-Pay-and-the-99/Trends-in-CEO-Pay.*

[41] The commenters asserting that Section 953(b) disclosure would be useful to investors did not raise the order of the ratio components as a factor that would diminish the meaningfulness of the information. These commenters are listed at notes 155 through 165, *infra.*

[42] By directing the Commission to amend Item 402, we believe that Section 953(b) is intended to cover employees on an enterprise-wide basis, including both the registrant and its subsidiaries, which is the same approach as that taken for other Item 402 information. *See* Item 402(a)(2) and Instruction 2 to Item 402(a)(3). Because this issue

Continued

than the PEO).[43] Therefore, under the proposed requirements, ''all employees'' covers all such individuals. In contrast, workers who are not employed by the registrant or its subsidiaries, such as independent contractors or ''leased'' workers or other temporary workers who are employed by a third party, would not be covered.[44]

We note that commenters were split in their support for a rule that would include all employees of the issuer,[45] rather than only covering full-time U.S. workers.[46] Many commenters raised concerns that the inclusion of workers located outside the United States, as well as employees that are not permanent, full-time employees, would render the comparison to the PEO less meaningful, while at the same time imposing significant costs on registrants that have global operations.[47] According to these commenters, the international variation in compensation arrangements and benefits, in addition to cost-of-living differences and currency fluctuations, could distort the comparability of employee compensation to that of a PEO based in the United States.[48] In addition, these commenters noted that the types of compensation that are recorded in payroll and benefits systems outside the United States may vary from those recorded as compensation in the United States due to local accounting standards and tax regulations. Because of these variations, they further suggest that requiring registrants to recompute or adjust the output of payroll systems to include non-payroll items that would be reportable as compensation under Item 402 has the potential to impose significant compliance costs.[49]

In contrast, one commenter asserted that the provision was intended to cover all employees of the issuer, including full-time, part-time, U.S. and non-U.S. employees.[50] Some commenters asserted that the exclusion of non-U.S. and non-full-time employees would diminish the meaningfulness of the pay ratio disclosure to investors.[51] Some of these commenters suggested allowing companies to present separate pay ratios covering U.S. and non-U.S. employees, which they believed could mitigate concerns that the comparison of the PEO to workers located outside of the United States could distort the disclosure.[52]

We acknowledge the concerns of commenters that the inclusion of non-U.S. employees raises compliance costs for multinational companies, introduces cross-border compliance issues, and could raise concerns about the impact of non-U.S. pay structures on the comparability of the data to companies without off-shore operations. We also recognize that differences in relative compliance costs may have an adverse impact on competition. We have weighed these considerations and are proposing that the requirement cover all employees without carve-outs for specific categories of employees. Although we believe that the inclusion of non-U.S. employees in the calculation of the median is consistent with the statute, we have considered ways to address the costs of compliance that commenters attribute to the provision's coverage of a registrant's global workforce.

In particular, we are cognizant that data privacy laws in various jurisdictions could have an impact on gathering and verifying the data needed to identify the median of the annual total compensation of all employees. Commenters have asserted that, in some cases, data privacy laws could prohibit a registrant's collection and transfer of personally identifiable compensation data that would be needed to identify the median.[53] We also understand that in many cases, the collection or transfer of the underlying data is made burdensome by local data privacy laws, but is not prohibited.

For example, we acknowledge that multinational companies based in the United States may need to ensure compliance with data privacy regulations in transmitting personally identifiable human resources data (''personal data'') of European Union (''EU'') persons onto global human resource information system networks in the United States, sending personal data in hard copy from the European Union to the United States, as well as personal data ''onward transfers'' to third-party payroll, pension and benefits processors outside of the European Union.[54] In some EU Member States, employee consent is required, while in others, consent may not be sufficient.[55] Commenters also have asserted that other jurisdictions, such as Peru, Argentina, Canada and Japan also have data privacy laws that could be implicated by the gathering of data for purposes of the proposed pay ratio disclosure.[56]

Although we are not proposing any additional accommodation to address this concern, we believe that the flexibility afforded to all registrants under the proposed rules could permit registrants to manage any potential costs

was not addressed by commenters, we specifically request comment below on this approach.

In the context of Item 402 disclosure, a subsidiary of a registrant is an affiliate controlled by the registrant directly or indirectly through one or more intermediaries, as set forth in the definition of ''subsidiary'' under both Securities Act Rule 405 and Exchange Act Rule 12b–2. Therefore, for purposes of the proposed pay ratio disclosure, an employee would be covered by the disclosure requirements if he or she is employed by the registrant or a subsidiary of the registrant as defined in Rule 405 and Rule 12b–2.

[43] Rule 405 under the Securities Act states that the term ''employee'' does not include a director, trustee or officer. The parenthetical ''(including officers other than the PEO)'' in Item 402(u)(3) of the proposed rules is intended to clarify that officers, as that term is defined under Rule 405, are not excluded from the definition of employee for purposes of the proposed pay ratio disclosure requirements.

[44] For example, if a registrant pays a fee to another company (such as a management company or an employee leasing agency) that supplies workers to the registrant, and those workers receive compensation from that other company, those workers would not be counted as employees of the registrant for purposes of the proposed rules.

[45] *See* AFL–CIO I and letters from Americans for Financial Reform; CtW Investment Group; Group of International Investors; Senator Menendez; Social Investment Forum; Trillium Asset Management; UAW Medical Benefits Trust; and Walden Asset Management.

[46] *See* COEC I and letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; NACD; Protective Life Corporation; RILA; SCSGP; and Towers Watson.

[47] *See* COEC I and letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; NACD; Protective Life Corporation; RILA; SCSGP; and Towers Watson.

[48] *See, e.g.,* letter from Group of Exec. Comp. Lawyers.

[49] *Id.*

[50] *See* letter from Senator Menendez, the sponsor of Section 953(b) (''Specifically, I want to clarify that when I wrote 'all' employees of the issuer, I really did mean all employees of the issuer. I intended that to mean both full-time and part-time employees, not just full-time employees. I also intended that to mean all foreign employees of the company, not just U.S. employees.'').

[51] *See* AFL–CIO I and letters from Americans for Financial Reform; CtW Investment Group; Group of International Investors; Institute for Policy Studies; and UAW Medical Benefits Trust. *But see* letter from Social Investment Forum (''[W]e acknowledge that a comparison of a U.S. CEO's pay to the median for U.S. employees is the most useful comparison as a factor for the compensation committee in establishing executive pay packages.'') and letter from Walden Asset Management (''[F]or the purposes of analyzing trends in executive pay for U.S. executives, statistics comparing compensation of NEOs to the median U.S. employee [are] most useful.'').

[52] *See* AFL–CIO I and letters from Americans for Financial Reform; Walden Asset Management; and Social Investment Forum (''We recommend that the SEC require two statistics, one on pay disparity with only U.S. workers and another for non-U.S. workers so that investors can better study pay disparity trends and inherent risks.'').

[53] *See* COEC II and letters from Davis Polk; Group of Exec. Comp. Lawyers; and SCSGP.

[54] The EU Directive 95/46/EC, 1995 O.J. L 281 (European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data) sets forth the regulatory framework governing the transfer of personal data from an EU Member State to a non-EU country.

[55] *See* letter from Group of Exec. Comp. Lawyers.

[56] *Id.*

arising from applicable data privacy laws. For example, consistent with the proposed requirements, registrants in this situation would be permitted to estimate the compensation of affected employees. We request comment below on whether the proposed flexibility afforded to registrants in selecting a method to identify the median, such as the use of statistical sampling or other reasonable estimation techniques and the use of consistently applied compensation measures to identify the median employee, could enable registrants to better manage any potential costs and burdens arising from local data privacy regulations or if there are other alternatives that would be consistent with Section 953(b). Commenters did not provide us with information about applicable data privacy laws sufficient to analyze how the flexibility allowed to all registrants under the proposed requirements could impact the potential costs arising from such laws, and we request information about the specific impact these matters would have on collecting or transferring data needed to comply with the proposed requirements.

Request for Comment

7. Are there alternative ways to fulfill the statutory mandate of covering ''all employees'' that could reduce the compliance costs and cross-border issues raised by commenters? For example, would it be consistent with the statute to permit registrants to exclude non-U.S. employees from the calculation of the median? Would it be consistent with the statute to permit registrants to exclude non-full-time employees from the calculation of the median? If not, could these alternatives be implemented in a way that would be consistent with the statute?

8. Should registrants be allowed to disclose two separate pay ratios covering U.S. employees and non-U.S. employees in lieu of the pay ratio covering all U.S. and non-U.S. employees? Why or why not? Should we require registrants to provide two separate pay ratios, as requested by some commenters? [57] What should the separate ratios cover (*e.g.,* should there be one for U.S. employees and one for non-U.S. employees, or should there be one for U.S. employees and one covering all employees)? If separate ratios are required, should this be in addition to, or in lieu of, the pay ratio covering all U.S. and non-U.S. employees? Would such a requirement increase costs for registrants? Would it increase the usefulness to investors of the disclosure?

9. Please identify the applicable data privacy laws or regulations that could impact the collection or transfer of the data needed to comply with the proposed pay ratio requirement. Please also identify whether there are exclusions, exemptions or safe harbors that could be used to collect or transfer such data. Please quantify, to the extent practicable, the impact of such laws on registrants subject to Section 953(b), such as an estimate of the number of registrants affected or the average percentage of employees affected. How would the proposed flexibility afforded to all registrants (*i.e.,* selecting a method to identify the median, the use of statistical sampling or other reasonable estimation techniques and the use of consistently applied compensation measures to identify the median employee) impact any potential costs and burdens arising from local data privacy laws? In particular, would a registrant be able to make a reasonable estimation of the total compensation for affected employees? Would a registrant be able to select a consistent compensation measure that is not subject to local data privacy laws? If not, are there alternative ways to meet the statutory mandate of Section 953(b) that would reduce the costs and burdens arising from local data privacy laws?

10. Are there applicable local data privacy laws that would prohibit the collection or transfer of data necessary to calculate the annual total compensation of an employee or group of employees or the identification of a median employee using a consistent compensation measure? In that situation, would a registrant be able to reasonably estimate compensation? If not, are there alternatives to the proposed rule that would address such a situation while still being consistent with Section 953(b)? Should any such alternatives be permitted? If an alternative should be permitted, what limitations or conditions should be imposed on using the alternative? For example, should registrants be required to disclose the approximate number of employees affected and identify the law that prohibits the collection or transfer of data? Please discuss whether any such alternatives would significantly impact the pay ratio disclosure.

11. Should the rule cover employees of a registrant's subsidiaries as defined in Rule 405 and Rule 12b–2, as proposed? Are there any situations where an entity meets the subsidiary definition but its employees should not be included for purposes of the proposed requirement? For example, should the rule be limited to subsidiaries that consolidate their financial statements with those of the registrant? Should the rule not apply to subsidiaries of certain types of registrants, such as the portfolio companies of business development companies? Please provide details of any recommended limitations.

12. Alternatively, should the requirements be limited to employees that are employed directly by the registrant (*i.e.,* excluding employees of its subsidiaries)? Would such a limitation be consistent with Section 953(b)? How would such a limitation affect the potential benefits of the disclosure? Would such a limitation have other impacts, such as incentivizing registrants to alter their corporate structure, and, if so, are there alternative ways that the rule could address those impacts?

13. Should Section 953(b) be read to apply to ''leased'' workers or other temporary workers employed by a third party? Does the proposed approach to such workers raise costs or other compliance issues for registrants, or impact potential benefits to investors, that we have not identified? Do registrants need guidance or instructions for determining how to treat employees of partially-owned subsidiaries or joint ventures? If so, what should such guidance or instructions entail?

14. Is it likely that registrants would alter their corporate structure or employment arrangements to reduce the number of employees covered by the proposed requirements? How should we tailor the proposed requirements to address such an impact?

15. Does the proposed inclusion of all employees raise competition concerns? If so, are there some industries or types of registrants that would be more affected than others? How should we tailor the proposed requirements to address such concerns?

b. Calculation Date for Determining Who Is An Employee

The proposed requirement defines ''employee'' as an individual employed as of the last day of the registrant's last completed fiscal year.[58] This calculation date for determining who is an employee would be consistent with the one used for the determination of the three most highly compensated executive officers under Item

[57] *See* AFL–CIO I and letters from Americans for Financial Reform; Walden Asset Management; and Social Investment Forum.

[58] Proposed Item 402(u)(3).

402(a)(3)(iii). Two commenters expressly supported this approach.[59]

Additionally, two commenters suggested that only employees that have been employed for the entire annual period (and as of the last day of the fiscal year) should be covered.[60] The composition of a company's workforce typically changes throughout the fiscal year, and in some industries and businesses, it can change constantly. Although Section 953(b) requires the median calculation to cover all employees, it does not prescribe a particular calculation date for the determination of who should be treated as an employee for that purpose. We believe that a bright line calculation date for determining who is an employee would ease compliance for registrants by eliminating the need to monitor changing workforce composition during the year, while still providing a recent snapshot of the entire workforce.[61] We agree with the commenters who suggest that the most appropriate calculation date is one that is consistent with the calculation date for determining the named executive officers under current Item 402 requirements.

In proposing this approach, we have assumed that the potential benefits of the disclosure mandated by Section 953(b) would not be significantly diminished by covering only individuals employed on a specific date at year-end, rather than covering every individual who was employed at any time during the year. Although we believe that this approach could help contain compliance costs for registrants, we acknowledge that it could have other costs. For example, this approach would not capture seasonal or temporary employees that are not employed at year-end. This would enable a registrant with a significant amount of such workers to calculate a median that does not fully reflect the workforce that is required to run its business. It could also cause the proposed requirements to be costlier for, and thereby have an anti-competitive impact on, registrants whose temporary or seasonal workers are employed at year-end as opposed to other times during the year. Finally, it is possible, although commenters have asserted that it is remote, that registrants could try to structure their employment arrangements to reduce the number of workers employed on the calculation date.[62]

Request for Comment

16. Is the proposed calculation date workable for registrants? If not, what date should be used (*e.g.,* the last day of the registrant's second (or third) fiscal quarter) and why?

17. In the alternative, should registrants be permitted the flexibility to choose a calculation date for this purpose? Why or why not? If so, should we require the registrant to disclose why a particular date was chosen? Should such flexibility be limited to certain circumstances? If so, what principles should apply in identifying those circumstances?

18. Is it appropriate to limit the scope of covered employees to those who were employed on the last day of the registrant's fiscal year, as proposed? Why or why not? Is consistency with other Item 402 disclosure important in this context? Would this approach ease compliance costs for registrants? What impact would this calculation date have on registrants that employ seasonal workers and would the exclusion of seasonal workers not employed on the calculation date likely have an impact on the median or the ratio? Please provide data, such as an estimate of the number of registrants that employ seasonal workers and the average percentage of seasonal employees that would likely be excluded. Is it likely that registrants might structure their employment arrangements to reduce the number of workers employed on the calculation date? Are there other costs that would be incurred using this approach that we should consider? Would the proposed calculation date have a meaningful impact on the potential usefulness of the disclosure for investors? Are there other ways to deal with defining the scope of covered employees that are more effective at reducing costs and providing meaningful disclosure?

19. Should registrants be required to include any individual who was employed at any time during the year, or for some minimum amount of time (and if so, what amount of time) during the year?

20. Should the rule only apply to employees employed for the full fiscal year? Why or why not?

c. Adjustments for Certain Employees

Some commenters raised questions about how to treat employees who were not employed during the entire fiscal year and recommended that companies be permitted to annualize the compensation for these employees in order to more accurately reflect the employment relationship.[63] We agree that in instances where the employment relationship is permanent, and not temporary or seasonal, registrants should be permitted to annualize the total compensation for an employee who did not work for the entire year, such as a new hire or an employee who took an unpaid leave of absence during the period.[64]

Accordingly, the proposed requirements include an instruction that states that total compensation may be annualized for all permanent employees (other than those in temporary or seasonal positions) who were employed for less than the full fiscal year.[65] We are not proposing to require registrants to perform this type of adjustment, however, because we do not believe that the costs of requiring companies to make an extra calculation would be justified.

The proposed instruction is limited to permanent employees. In addition, as proposed, the instruction would not permit a registrant to annualize some eligible employees and not others. As discussed below, this instruction also would not permit adjustments that would cause the ratio to not reflect the actual composition of the workforce, such as annualizing the compensation of seasonal or temporary workers. Depending on the facts and circumstances, it could be appropriate for a registrant to annualize the compensation for a permanent part-time worker who has only worked a portion of the year (such as an employee who is permanently employed for three days a week and who took an unpaid leave

[59] *See* letters from RILA (''For consistency with the requirements of Item 402, we believe the best option is to determine the median total annual salary of the issuer's employees as of the close of the most recently completed fiscal year.'') and Towers Watson (''[I]t will be necessary to fix the employee group as of a particular date…The last day of the prior year would seem an obvious choice.'').

[60] *See* letters from ABA and RILA. One of these commenters suggested that the use of the word ''annual'' in Section 953(b) could be interpreted as limiting the scope of the provision to only those employees that have been employed for the full fiscal year. *See* letter from ABA.

[61] We note that a requirement to track which employees have been continuously employed for the entire annual period could increase costs for registrants, although, as discussed below, we are permitting registrants to annualize the compensation of certain employees.

[62] *See* AFL–CIO I (''The disclosure of compensation data under Section 953(b) will not have unintended consequences on public company employment decisions.'').

[63] *See, e.g.,* letters from Davis Polk; Frederick W. Cook & Co.; Social Investment Forum; RILA, Walden Asset Management; and Trillium Asset Management.

[64] RILA noted employees on leave under the Family and Medical Leave Act of 1993 [29 U.S.C. 2601 *et seq.*] and employees called for active military duty as common examples.

[65] By use of the term ''employee,'' this proposed instruction would apply to individuals who were employed on the last day of the fiscal year (the calculation date).

of absence under the Family and Medical Leave Act). In such a case, the adjustment should reflect compensation for the employee's part-time schedule over the entire year, but should not adjust the part-time schedule to a full-time equivalent schedule.

In proposing this approach, we have assumed that this annualizing adjustment would not significantly diminish the potential usefulness of the disclosure mandated by Section 953(b). For example, we would not expect that annualizing the salary of a permanent new hire would impact the potential ability of an investor to use the pay ratio disclosure as an indicator of employee morale or to gain an understanding of a registrant's investment in human capital, which some commenters have identified as potential benefits of the disclosure under Section 953(b).[66] We also note that some of the commenters that support Section 953(b) disclosure were also supportive of allowing annualizing adjustments for employees employed for less than the full year.[67]

By permitting but not requiring registrants to annualize compensation for these employees, the comparability of disclosure across companies could be reduced. As discussed elsewhere in this release,[68] we do not believe that precise comparability or conformity of disclosure from registrant to registrant is necessarily achievable due to the variety of factors that could cause the ratio to differ, and, accordingly, we do not believe that the costs associated with attempting to promote precise comparability in this respect would be justified.

Although we are proposing to permit the annualizing adjustments described above, we believe that some of the assumptions or adjustments suggested by commenters for calculating the annual total compensation of employees might present a distorted picture of the actual composition of a registrant's workforce or compensation practices. We believe that certain adjustments or assumptions, such as full-time equivalent adjustments for part-time workers, annualizing adjustments for temporary or seasonal employees, and cost-of-living adjustments for non-U.S. workers, would cause the median to not be reasonably representative of the registrant's actual employment and compensation arrangements for its workforce during the period and could, therefore, diminish the potential usefulness of the disclosure. Therefore, the proposed disclosure requirements would not permit such adjustments.

For example, under the proposed rules, a retailer that hires a seasonal worker at minimum wage for three months during the holiday season would need to calculate annual total compensation for that employee as three months at $7.25/hour ($3,480) and could not ''annualize'' the wages as if the seasonal worker was paid for a full 12 months of work ($13,920). In this example, if the seasonal worker was not still employed by the registrant on the last day of the registrant's fiscal year, the registrant would exclude that worker from the calculation of the median.[69]

We understand that some commenters believe that these types of adjustments could allow for a more meaningful comparison between the compensation of the PEO and that of the registrant's employees, especially where those employees are not full-time, U.S. employees.[70] We are concerned, however, that adjusting for these variables could distort an understanding of the registrant's compensation practices. For example, if a registrant with a workforce primarily located in jurisdictions with a lower cost of living than the United States adjusted the annual total compensation of those employees using purchasing power parity statistics, the median of the annual total compensation of all its employees would likely increase. Likewise, if a registrant with a workforce that is primarily part-time or seasonal adjusted the annual total compensation of those employees using full-time equivalent adjustments, the median of the annual total compensation of all its employees would likely increase. In these scenarios, the registrant's pay ratio would show less of a disparity in compensation levels, while its labor costs would appear to be higher than they actually were. We believe that, rather than making the disclosure more meaningful, such a result could diminish the potential usefulness of the disclosure because the ratio would show a less accurate reflection of actual workforce compensation and could permit a registrant to alter the reported ratio to achieve a particular objective with the ratio disclosure.

Request for Comment

21. Is it appropriate to allow registrants to annualize the compensation for non-seasonal, non-temporary employees that have only worked part of the year, as proposed? Why or why not? Would allowing annualizing the compensation for these employees likely impact the median or the pay ratio?

22. In the alternative, should registrants be required to annualize the compensation for these employees? Why or why not?

23. Should we require all registrants that rely on the proposed instruction to annualize compensation for these employees to disclose that they have done so (or only when the adjustment is material, as would be required under the proposed instruction for disclosure of material assumptions, adjustments and estimates)? Why or why not? If so, what should the disclosure entail? For example, should the registrant only be required to state that it has relied on the instruction, or should it also be required to discuss the number or percentage of employees for which compensation was annualized?

24. Should we allow full-time equivalent adjustments for part-time employees and temporary or seasonal employees, as recommended by some commenters?[71] Should we allow cost-of-living adjustments for non-U.S. employees as recommended by some commenters?[72] If so in either case, please explain why. In particular, please address the potential concern that these kinds of adjustments could cause the ratio to be a less accurate reflection of actual workforce compensation. Is there an alternative way to mitigate this concern?

3. Identifying the Median

Commenters have suggested that a potential purpose of the pay ratio disclosure is to allow investors to evaluate the annual total compensation of the PEO within the context of the registrant's internal compensation practices.[73] We note that Congress

[66] *See* AFL–CIO I and letters from; Calvert Investment Management; CtW Investment Group; Group of International Investors; Americans for Financial Reform; Drucker Institute; Institute for Policy Studies; Social Investment Forum; Trillium Asset Management; and UAW Retiree Medical Benefits Trust.

[67] *See* letters from Social Investment Forum and Trillium Asset Management.

[68] *See* Section IV of this release.

[69] *See* proposed Item 402(u)(3).

[70] *See* letters from American Benefits Council; Americans for Financial Reform; Davis Polk; Frederick W. Cook & Co., Inc.; RILA; Social Investment Forum; Trillium Asset Management; and Walden Asset Management.

[71] *See* letters from Americans for Financial Reform; Frederick W. Cook & Co., Inc.; and RILA.

[72] *See generally* letter from CtW Investment Group.

[73] *See* letter from Senator Menendez (''I wrote this provision so that investors and the general public know whether public companies' pay practices are fair to their average employees, especially compared to their highly compensated CEOs.'').

See also Representative Keith Ellison, *et al.* (''House Letter'') and Senator Robert Menendez *et al.* (''Senate Letter'') (noting that Section 953(b)

Continued

specifically chose ''median'' as the point of comparison for Section 953(b), rather than the average,[74] and, therefore, the proposed pay ratio requirements also require the median to be used.

Section 953(b) does not expressly set forth a methodology that must be used to identify the median, nor does it mandate that the Commission must do so in its rules. In order to allow the greatest degree of flexibility while remaining consistent with the statutory provision, the proposed requirements do not specify any required calculation methodologies for identifying the median. Instead, we are providing instructions and guidance designed to allow registrants to choose from several alternative methods to identify the median, so that they may use the method that works best for their own facts and circumstances. As discussed in detail below, we believe that even a registrant with a large number of employees should be able to provide the proposed disclosure in a relatively cost-efficient manner based on statistical sampling, estimates and the use of any consistently applied compensation measure to identify the median. For instance, an employer with a large number of employees could take a random sample of employees (as discussed further below, the size of the sample needed would typically depend on the overall distribution of compensation across employees) and determine the annual cash compensation, or any other consistently applied compensation measure, for those employees. Identifying the median employee would not necessarily require a determination of exact compensation amounts for each employee in the sample. The registrant could exclude the employees in the sample that have extremely low or extremely high pay because they would fall on either end of the spectrum of pay and, therefore, not be the median employee. Once the registrant identifies the median employee based on the selected compensation measure applied to each remaining employee in the sample, the registrant would calculate that employee's annual total compensation in accordance with Item 402(c)(2)(x) and disclose that amount as part of the pay ratio disclosure.

We believe that allowing a registrant to choose a method that works best for its particular facts and circumstances should help registrants to comply with the disclosure requirements in a relatively cost-efficient manner while still achieving the purpose of Section 953(b). As such, the proposed requirements permit registrants to identify the median by using a number of different methods, such as calculating total compensation for each employee using Item 402(c)(2)(x), using reasonable estimates, and/or statistical sampling.[75] We are not prescribing what a reasonable estimate would entail because we believe that would necessarily depend on the registrant's particular facts and circumstances. In addition, the proposed rules do not prescribe specific estimation techniques or confidence levels for an estimated median because we believe that companies would be in the best position to determine what is reasonable in light of their own employee population and access to compensation data. As discussed in Section II.C.5. below, we are proposing to require that the methodology and any material assumptions, adjustments or estimates used to identify the median be briefly disclosed and consistently used, and any estimated amounts be clearly identified as such. We are proposing this approach because we believe that the appropriate and most cost effective methodology would necessarily depend on a registrant's particular facts and circumstances, including, among others, such variables as:

- The size and nature of the workforce;
- the complexity of the organization;
- the stratification of pay levels across the workforce;
- the types of compensation the employees receive;
- the extent that different currencies are involved;
- the number of tax and accounting regimes involved;
- the number of payroll systems the registrant has and the degree of difficulty involved in integrating payroll systems to readily compile total compensation information for all employees.

We believe that these likely are the same factors that would cause substantial variation in the costs of compliance. By not prescribing specific methodologies that must be used, the proposed requirements would allow registrants to choose a method for identifying the median that is appropriate to the size, structure and compensation practices of their own businesses, including identifying the median employee based on any consistently applied compensation measure. In addition, this flexibility could enable registrants to manage compliance costs more effectively. We also believe that, by allowing registrants to better manage costs, a flexible approach could mitigate, to some extent, any potential negative effects on competition arising from the mandated requirements.[76] We recognize, however, that a flexible approach could increase uncertainty for registrants that prefer more specificity on how to comply with the proposed rules, particularly for those registrants that do not use statistical analysis in the ordinary course of managing their businesses.

We acknowledge that commenters provided a variety of recommendations for identifying the median aimed at reducing compliance costs or providing a roadmap for registrants to use to ensure compliance. For example, one commenter suggested that the Commission should establish safe harbor methodologies that authorize registrants to identify the median using a sampling method that is reasonably representative of its workforce, that could be certified by an independent expert or that exceeds a minimum number or percentage of the issuer's total employees.[77] Another commenter suggested that the Commission prescribe a ''menu of alternatives'' from which a registrant may select the calculation method that works best in its situation to facilitate disclosure that is meaningful while minimizing data collection costs; registrants would then be required to explain the method and assumptions used.[78] Several commenters recommended that registrants be permitted to use reasonable estimation techniques to identify median compensation for all employees and to determine all forms of compensation, including annual changes in pension value.[79] In considering these alternatives, we favored the recommendations that did not call for prescriptive requirements in order to avoid the additional costs that a less flexible approach could impose. In particular, we believe that the use of reasonable estimates could afford

''requires disclosure by public companies of the ratio between the compensation of their CEO and the typical worker at that company . . . and while comprehensive data will not be available until this provision takes effect, there is no question that CEO pay is soaring compared to that of average workers.'').

[74] Some commenters raised the possibility of using an average rather than a median, which they believed would reduce the costs of compliance. *See, e.g.,* letters from American Benefits Council and Brian Foley & Co.

[75] We discuss the specific recommendations of commenters regarding the use of statistical sampling techniques below in this section.

[76] *See* the discussion in Section IV of this release.

[77] *See* American Benefits Council.

[78] *See* letter from Group of Exec. Comp. Lawyers.

[79] *See* COEC I and letters from Meridian Compensation Partners, LLC and SCSGP.

registrants flexibility without imposing prescriptive requirements that may not be workable for all types of registrants. In addition, we highlight below two alternatives recommended by commenters that would be permitted under the proposal.

Use of Statistical Sampling. Two commenters suggested that companies should be permitted to identify the median through a sampling technique or other statistically reasonable method.[80] Two other commenters also provided views on statistical sampling. One commenter, based on a survey of 95 registrants, disagreed that statistical sampling methodology would reduce the compliance burden for companies because of the wide variability in pay practices and recordkeeping and asserted that requiring statistical sampling would introduce further complexity.[81] Another commenter supported the use of statistical sampling and described a random sampling technique that could yield an accurate and unbiased estimate of a registrant's actual median compensation using a relatively small sample size.[82] This commenter asserted that more complicated procedures, such as stratified sampling, would be unnecessary, regardless of company size, how many countries it operates in or how many subsidiaries it has.[83]

As we discuss in more detail in the economic analysis section of this release, the variance of underlying compensation distributions (that is, how widely employee compensation is spread out or distributed around the mean) can materially affect the sample size needed for reasonable statistical sampling.[84] Variation in the types of employees at a registrant across business units and geographical regions can also add complexity to the sampling procedure. While we generally agree that a relatively small sample size would be appropriate in certain situations, a reasonable determination of sample size would ultimately depend on the underlying distribution of compensation data.[85] As a result, compliance costs would vary across registrants according to the characteristics of their compensation distributions. Nevertheless, we believe that permitting registrants to use statistical sampling may lead to a reduction in compliance costs as compared to other methods of identifying the median.

We note that the identification of a median employee does not necessarily require a determination of exact compensation amounts for every single employee included in the sample. A registrant could, rather than calculating exact compensation, identify the employees in the sample that have extremely low or extremely high pay and that would therefore fall on either end of the spectrum of pay. Since identifying the median involves finding the employee in the middle, it may not be necessary to determine the exact compensation amounts for every employee paid more or less than that employee in the middle. Instead, just noting that the employees are above or below the median would be sufficient for finding the employee in the middle of the pay spectrum.

Use of a Consistently Applied Compensation Measure. Several commenters raised concerns about expected compliance costs arising from the complexity of the ''total compensation'' calculation under Item 402(c)(2)(x) and, in particular, the determination of total compensation in accordance with Item 402(c)(2)(x) for employees when identifying the median.[86] To address these concerns, several commenters recommended allowing companies to use total direct compensation (such as annual salary, hourly wages and any other performance-based pay) or cash compensation to first identify a median employee and then calculate that median employee's annual total compensation in accordance with Item 402(c)(2)(x).[87] We agree that this approach would provide a workable identification of the median for many registrants, and we expect that the costs of compliance would be reduced if registrants were permitted to identify the median using a less complex, more readily available figure, such as salary and wages, rather than total compensation as determined in accordance with Item 402(c)(2)(x). This approach could also help reduce costs for registrants that are not able to reduce costs using statistical sampling techniques.[88] Because some commenters have indicated that using cash compensation could be just as burdensome to calculate for registrants with multiple payroll systems in various countries,[89] we are not proposing to require companies to use a specific compensation measure, like cash compensation or total direct compensation, when they are identifying the median employee. Instead, we believe that registrants would be in the best position to select a compensation measure that is appropriate to their own facts and

[80] *See* AFL–CIO II (''The SEC can minimize issuer compliance costs by permitting the use of random statistical sampling to calculate the median. . . . Because the median is a statistical term that is frequently used to describe a set of observations randomly drawn from a larger population, it is reasonable for the SEC to permit issuers to sample their employee populations to calculate the median.'') and letter from Davis Polk (''We recommend that the Commission permit companies to identify a single employee, via a sampling technique or other statistically reasonable method, among its employee base as the representative for median compensation.'').

[81] *See* COEC II (noting that sampling ''would introduce additional complexity by requiring the development of a methodology to determine the appropriate stratification of the sample population, develop and assess the appropriate confidence intervals to enhance the reliability of the data collected and ensure that comparable forms of compensation are included across the varying pay practices that are common in different regions of the world.'').

[82] *See* letter from M. Ohlrogge.

[83] The commenter assumed that any compensation distribution is lognormal and that the variance of compensation distribution within a company is given as a constant number. We believe, however, that this may not be a practical assumption because, as described in detail in Section IV of this release, each registrant would have a company-specific compensation variance, which is impossible to be generally assumed. In addition, registrants that have multiple business or geographical segments may not necessarily have lognormal distribution of wages.

[84] Our analysis, further discussed in Section IV of this release, uses mean and median wage estimates from the Bureau of Labor Statistics (BLS) at the 4-digit NAICS industry level (290 industries) and assumes a lognormal wage distribution, a 95% confidence interval with 0.5% margin of error. The analysis focuses on the registrants that have a single business or geographical unit. The analysis also assumes that when the sampling is implemented, the sampling method would be a true random sampling, *i.e.,* it would not be biased by region, occupation, rank, or other factor. In our analysis, the appropriate sample size for the registrants with a single business or geographical unit varies between 81 and 1,065 across industries, with the average estimated sample size close to 560.

[85] We believe that reasonable estimates of the median for registrants with multiple business lines or geographical units could be arrived at through more than one statistical sampling approach. All approaches, however, require drawing observations from each business or geographical unit with a reasonable assumption on each unit's compensation distribution and inferring the registrant's overall median based on the observations drawn. Certain cases may not easily generate confidence intervals around the estimates or prescribe the appropriate minimum sample size. *See* Section IV of this release for further discussion.

[86] *See, e.g.,* COEC I and II and letters from American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

[87] *See* AFL–CIO II and letters from ABA; American Benefits Council; Americans for Financial Reform; CtW Investment Group; Protective Life Corporation; RILA; and SCSGP.

[88] Registrants would be permitted to use a consistently-applied compensation measure to identify the median employee regardless of whether they use statistical sampling.

[89] *See* COEC II (asserting that cash compensation is not an appropriate substitute since non-cash remuneration makes up a substantial part of compensation in certain parts of the world, and cash compensation would still need to be gathered manually for many registrants due to variances in payroll systems and tax regimes).

circumstances and that a consistently applied compensation measure would result in a reasonable estimate of a median employee at a substantially reduced cost. Therefore, the proposed instructions would permit a registrant to identify a median employee based on any consistently applied compensation measure, such as compensation amounts reported in its payroll or tax records, as long as the registrant briefly discloses the measure that it used (*e.g.* ''We found the median using salary, wages and tips as reported to the U.S. Internal Revenue Service on Form W–2 and the equivalent for our non-U.S. employees.'').[90]

We also understand from commenters that the annual period used for payroll or tax recordkeeping can sometimes differ from the registrant's fiscal year, and, therefore, for purposes of determining the annual compensation amounts when using a consistently applied compensation measure, the proposed instructions also permit the registrant to use the same annual period that is used in the payroll or tax records from which the compensation amounts are derived. We are not proposing to define or limit what would qualify as payroll or tax records. We note, however, that this proposed accommodation is intended to be construed broadly enough to allow registrants to use information that they already track and compile for payroll or tax purposes. We are persuaded by commenters who asserted that permitting companies to use compensation information in the form that it is maintained in their own books and records would reduce compliance costs without appreciably affecting the quality of the disclosure.

Two commenters suggested that registrants should be permitted to calculate the ratio using employee earnings estimates available through the U.S. Department of Labor's Bureau of Labor Statistics (''BLS''), which they believed would reduce costs for registrants and promote comparability across companies.[91] Although we agree that such an approach would greatly reduce the compliance burden for registrants, we do not believe it would be consistent with Section 953(b). In addition, we do not believe it would be useful for the Commission to require registrants to compile and disclose information that investors are already able to calculate using publicly available information.

Although the proposed flexible approach could reduce the comparability of disclosure across registrants, we do not believe that precise conformity or comparability of the ratio across companies is necessary. Some commenters believe that a primary benefit of the pay ratio disclosure would be providing a company-specific metric that investors could use to evaluate the PEO's compensation within the context of his or her own company,[92] rather than a benchmark for compensation arrangements across companies. Accordingly, we do not believe that improving the comparability of the disclosure across companies by mandating a specific method for identifying the median would be justified in light of the costs that would be imposed on registrants by a more prescriptive rule. We do not believe that mandating a particular methodology would necessarily improve the comparability across companies because of the numerous other factors that could also cause the ratios to be less meaningful for company-to-company comparison.[93] We believe that greater comparability across companies could increase the likelihood that a registrant's competitors could infer proprietary or sensitive information about the registrant's business,[94] which could increase the costs to registrants of the proposed requirements.

Finally, we recognize that allowing registrants to select a methodology for identifying the median, including identifying the median employee based on any consistently applied compensation measure and allowing the use of reasonable estimates, rather than prescribing a methodology or set of methodologies, could permit a registrant to alter the reported ratio to achieve a particular objective with the ratio disclosure, thereby potentially reducing the usefulness of the information. We believe that requiring the use of a consistently applied compensation measure should lessen this concern. We request comment on whether the flexibility of the proposed requirements would allow a registrant to distort its pay ratio in material respects.

Request for Comment

25. Should registrants be permitted, as proposed, to choose a method to identify the median that is workable for the company based on its particular facts and circumstances? Will registrants be able to use the proposed approach to identify the median? Do registrants need additional guidance or instructions to be able to use the proposed approach to identify the median? If so, what additional guidance is needed?

26. Do registrants need further guidance on the permitted use of reasonable estimates in identifying the median? If so, what should that guidance be? In the alternative, should the proposed requirement expressly disallow the use of reasonable estimates? Please explain how the usefulness of the pay ratio disclosure would be affected by the use of reasonable estimates. Should the rule specify requirements for statistical sampling or any other estimation methods, such as appropriate sample sizes for reasonable estimates or requiring the results to meet specified confidence levels? Why or why not? If so, what should the requirements be? For example, should the estimate have at least a 90% (or 85%, or some other percentage) confidence level?

27. Are registrants likely to use statistical sampling to identify the median? How would registrants conduct the sampling? Would it be outsourced or conducted by internal personnel? How much would statistical sampling cost? Would the use of statistical sampling address costs relating to the inclusion of non-U.S. employees in the calculation?

28. Should registrants be permitted, as proposed, to identify the median employee using a consistently applied compensation measure? Why or why not? How would this impact compliance costs? Would this address costs arising from having employees in multiple jurisdictions and payroll systems? Should there be any limitations on the

[90] As discussed in Section II.C.4 below, a registrant using a consistently applied compensation measure for purposes of identifying the median would be required to calculate and disclose the annual total compensation for that median employee using the definition of total compensation in Item 402(c)(2)(x).

[91] *See* COEC II and letter from Group of Exec. Comp. Lawyers. One of these commenters asserts that using BLS statistics would likely result in ratio with a higher disparity than comparing PEO compensation to median employee compensation, and, ''if a company decides to avoid the cost and other burdens of an actual median computation by publishing a statistic that shows a higher disparity, it should be allowed to do so.'' *See* letter from Group of Exec. Comp. Lawyers.

[92] *See, e.g.,* Senate Letter; House Letter; and AFL–CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

[93] These factors could include, among others, variations in the way companies organize their workforces to accomplish similar tasks; variations in pay between companies for identical tasks; differences in the geographical distribution of employees (domestic or international, as well as in high- or low-cost areas); degree of vertical integration; reliance on contract and outsourced workers; ownership structure; and differences in industry and business type.

[94] Where pay ratio information is more ''precisely'' comparable between companies in the same industry, information about median pay could allow inferences about the business, such as how a company and its workforce is structured, what its compensation practices are, its labor costs and use of outsourcing.

types of compensation measures that can be used? What compensation measure would registrants likely use for this purpose? How would that measure compare to total compensation calculated under Item 402(c)(2)(x)? How would the use of that measure affect the median (*e.g.* would it likely generate a median that is a reasonable approximation of the median of Item 402(c)(2)(x) total compensation)? What impact, if any, would the use of a consistently applied compensation measure have on the usefulness of the pay ratio disclosure? How could the proposed rules be changed to address any such impact? Are there any circumstances where it would be inappropriate to permit a registrant to use a consistently applied compensation measure to identify the median employee?

29. Should we, as proposed, permit registrants to use the time period that is used for payroll or tax recordkeeping when identifying the median employee based on consistently applied compensation measures, whether or not the time periods correspond with the last completed fiscal year or the tax year? Why or why not? Are there any parameters that should be set, such as requiring the period to end within a designated amount of time before the filing of the proxy or information statement relating to the annual meeting of shareholders or written consents in lieu of such meeting or annual report, as applicable, in which updated pay ratio information is required (such as 3 months, 6 months, 9 months or 12 months) or, alternatively, a period ending no more than 9 months (or 12 months or another amount of time) following the last annual meeting of shareholders? Should such flexibility only be permitted where the registrant's fiscal year-end is different from calendar year-end? Are we correct that this accommodation would decrease costs for registrants? Would the use of different time periods for different employees have an adverse impact on the disclosure? Would such flexibility meaningfully reduce the comparability of the median of the annual total compensation of all employees to the annual total compensation of the PEO, or otherwise impair the potential usefulness to investors of the pay ratio disclosure?

30. Could the flexibility of the proposed requirements allow a registrant to distort its pay ratio in material respects? If so, explain how.

31. Is our belief correct that allowing flexibility in identifying the median could minimize the potential anti-competitive impact of the costs of compliance? Would the proposed flexibility address other impacts on competition that could arise from the proposed requirements? Could a registrant's competitors infer proprietary or sensitive information about a company's business operations, strategy or labor cost-structure from the disclosure of the median of the annual total compensation of all employees? If so, how can this impact be addressed?

32. Are there alternative ways to satisfy the statutory mandate? Please be specific.

4. Determination of Total Compensation

As mandated by Section 953(b), the proposed requirements would define ''total compensation'' by reference to Item 402(c)(2)(x). We note that Section 953(b) refers to Item 402(c)(2)(x) as in effect on the day before the date of enactment of the Dodd-Frank Act, or July 20, 2010. No substantive amendments have been made to Item 402(c) since that date.[95] Therefore, the proposed requirements would refer to Item 402(c)(2)(x), without reference to the rules in effect on July 20, 2010. We expect to address the impact on the proposed rules of any future amendments to Item 402(c)(2)(x) if and when such future amendments are considered.

Commenters have observed that, because of the complexity of the requirements of Item 402(c)(2)(x), registrants typically compile information required by Item 402(c) manually for the named executive officers, which they have stated takes significant time and resources.[96] To address this issue, some of these commenters made various recommendations to simplify the total compensation definition, such as including only cash compensation, only cash compensation and equity-based compensation, or only compensation that is reported to the U.S. Internal Revenue Service on Form W–2.[97] As discussed above, we are proposing to allow registrants to identify the median in a variety of ways, including by identifying the median employee using any consistently applied compensation measure and then determining and disclosing the Item 402(c)(2)(x) total compensation for that median employee. As proposed, a registrant would be permitted to calculate total compensation for all employees in accordance with Item 402(c)(2)(x), but would only be required to calculate and disclose such information for the median employee.[98] Because the total compensation calculation using Item 402(c)(2)(x) would only be required for one additional employee (the median employee), we are not proposing to simplify the total compensation definition that is required to be used to disclose the median employee compensation and the ratio.

Some commenters have recommended that registrants be permitted to use reasonable estimates to determine the value of the various elements of total compensation for employees in accordance with Item 402(c)(2)(x).[99] We believe that the use of reasonable estimates would not diminish the potential usefulness of the pay ratio disclosure as a general point of comparison of PEO pay to employee pay within a company, and we believe that the use of reasonable estimates would be consistent with Section 953(b). Furthermore, we expect that requirements that allow registrants to use reasonable estimates in these calculations would impose lower compliance costs than requirements that prohibit the use of estimates. Accordingly, the proposed pay ratio requirements permit the use of reasonable estimates in determining any elements of total compensation of employees other than the PEO under Item 402(c)(2)(x), including when disclosing the annual total compensation of the median employee identified using a consistently applied compensation measure. If a registrant uses estimates, instructions to the proposed rule require that the resulting disclosure would need to be clearly identified as an estimated amount and include a brief description of the estimation methods used by the registrant.[100] In using an estimate for annual total compensation (or for a particular element of total compensation), a registrant should have a reasonable basis to conclude that the estimate approximates the actual amount of compensation under Item

[95] There have been technical amendments since that date. In August 2011, certain references to U.S. GAAP requirements in the instructions to Item 402 were updated to reflect the FASB's Accounting Standards Codification. *See Technical Amendments to Commission Rules and Forms Related to the FASB's Accounting Standards Codification,* Release No. 33–9250 (Aug. 8, 2011) [76 FR 50117].

[96] *See* letter from Davis Polk. *See also* letter from R. Morrison.

[97] *See* COEC I and letters from American Benefits Council; Brian Foley; Group of Exec. Comp. Lawyers; Protective Life Corporation; SCSGP; and Towers Watson.

[98] Given the specificity of the definition used in Section 953(b), the proposed requirements incorporate the Item 402(c)(2)(x) definition of total compensation as it is set forth in Section 953(b) for purposes of disclosing the median of the annual total compensation of employees and the pay ratio.

[99] *See* COEC I and letters from ABA and SCSGP.

[100] *See* proposed Instruction 2 to Item 402(u).

402(c)(2)(x) (or for a particular element of compensation under Item 402(c)(2)(iv)–(ix)) awarded to, earned by or paid to those employees. We are not prescribing what a reasonable basis would entail because we believe that would necessarily depend on the registrant's particular facts and circumstances.

Because the requirements of Item 402(c)(2)(x) were promulgated to address executive officer compensation, rather than compensation for all employees, we have considered the difficulties that registrants could face in applying the requirements of Item 402(c)(2)(x) to employees that are not executive officers.[101] First, to assist registrants in applying the definition of ''total compensation'' to an employee that is not an executive officer, the proposed requirements state that, in determining the total compensation of employees in accordance with Item 402(c)(2)(x), references to ''named executive officer'' in Item 402 and the related instructions may be deemed to refer instead, as applicable, to ''employee.'' Also, the proposed requirements clarify that, for non-salaried employees, references to ''base salary'' and ''salary'' in Item 402 may be deemed to refer instead, as applicable, to ''wages plus overtime.'' [102]

In addition, we understand that certain elements of total compensation may raise particular valuation issues that do not typically arise in the context of compensation for named executive officers. For example, in the case of pension benefits provided to union members in connection with a multi-employer defined benefit pension plan,[103] commenters have noted that the participating employers typically do not have access to information (or do not have access in the timeframe needed to compile pay ratio disclosure) from the plan administrator that would be needed to calculate the aggregate change in actuarial present value of the accumulated benefit of a particular individual under the plan.[104] In such circumstances, we believe it would be appropriate for a registrant to use reasonable estimates as described above in determining an amount that reasonably approximates the aggregate change in actuarial present value of an employee's defined pension benefit for purposes of Item 402(c)(2)(viii).

Commenters have also mentioned that interpretive questions will likely arise for registrants with non-U.S. employees in terms of how to value certain unique types of employee compensation given only in certain countries,[105] including personal benefits such as housing. Because we understand that compensation arrangements vary significantly both in the United States and globally, we do not believe it would be practicable for purposes of the proposed requirements to provide detailed, prescriptive rules on valuing particular types of employee compensation. We note, however, that the instructions to Item 402(c)(2)(ix) would permit the exclusion of personal benefits as long as the total value for the employee is less than $10,000 and that personal benefits should be valued on the basis of the aggregate incremental cost to the registrant.[106] In calculating any such amounts for purposes of determining the total compensation of employees other than the PEO, we are proposing that a registrant could use reasonable estimates in the manner described above.

In addition, questions have been raised involving the valuation of government-mandated pension plans,[107] and at least one commenter has noted that the valuation of these plans can be difficult.[108] Another commenter has noted that cross-border differences in government-mandated pension plans raise additional complexity for registrants calculating total compensation for employees located outside the United States.[109] In light of these comments, we acknowledge that some registrants may need clarity as to how to treat government-mandated pension plans for purposes of calculating an employee's total compensation and, specifically, for purposes of determining the aggregate change in actuarial present value of defined pension benefits under Item 402(c)(2)(viii).

In most cases, amounts relating to a government-mandated pension plan would not be included in an employee's total compensation, just as these amounts would not be included under current rules applicable to named executive officers. We note, in particular, that Item 402(c)(2)(viii) applies to a defined benefit plan, which, as explained in the 2006 Adopting Release, is a retirement plan in which the company pays the executive specified amounts at retirement that are not tied to the investment performance of the contributions that fund the plan.[110] The 2006 Adopting Release states that the disclosure required by Item 402(c)(2)(viii) is intended to permit a full understanding of the company's compensation obligations to named executive officers, given that defined

[101] *See* letter from RILA (''From a practical prospective, Item 402 raises a host of complexities when applied to an issuer's overall employee population for purposes of calculating the [pay ratio].'').

One commenter drew an analogy to the U.S. Treasury regulations [31 CFR Part 30] that required TARP recipients to identify their 100 most highly compensated employees using the definition of total compensation under Item 402; however, the Treasury regulations notably permitted the exclusion of actuarial increases in pension plans and above market earnings on deferred compensation. *See* letter from ABA (''In our experience, TARP companies found that calculating 'total compensation' to identify their 100 highest paid employees required weeks of work, and presented numerous interpretive issues that do not typically arise when calculating total compensation of executive officers.'').

[102] Letter from RILA (noting '' 'salary' and 'bonus' presumably would translate into total hourly wages plus overtime for non-salaried employees'').

[103] *See* letter from RILA (noting ''in cases involving multi-employer plans for union employees, the availability of the required information may be a significant issue when the plan is not required to provide such data on each beneficiary''). *See also,* J. Goldstein, *Cost Benefit Analysis of Pay Disparity Disclosure,* Oct. 16, 2010, *available at http://blogs.law.harvard.edu/corpgov/2010/10/16/cost-benefit-analysis-of-pay-disparity-disclosure/.*

[104] Section 101(k) and related regulations under the Employee Retirement Income Security Act of 1974, as amended [21 U.S.C. 1021(k)], govern the requirements for plan administrators to provide actuarial reports relating to the plan. Under the rules, a plan administrator has thirty days to respond to a request for an actuarial report, and it is not required to provide access to any reports that have not been its possession for more than thirty days. In addition, the rules prohibit the disclosure of reports that include information that the plan administrator reasonably determines to be ''personally identifiable information regarding a plan participant, beneficiary . . . or contributing employer.'' *See* 29 CFR 2520.101–6.

[105] *See* letters from SCSGP and Group of Exec. Comp. Lawyers. We discuss comments relating to non-U.S. employees in more detail in Section II.C.2 of this release.

[106] *See* Instruction 4 to Item 402(c)(2)(ix). This instruction applies to perquisites and personal benefits. Accordingly, perquisites provided to executive officers who are included in the identification of the median should be treated as set forth in Instruction 4. For this purpose, however, benefits that are provided to all employees or all salaried employees would not be considered ''perquisites.''

[107] *See* J. Goldstein, *supra* note 103.

[108] *See* letter from Group of Exec. Comp. Lawyers. This commenter raised the issue in the context of a discussion of cross-border differences in the availability of government-mandated retirement benefits, which this commenter believed would cause comparisons of employees across jurisdictions to be distorted. This commenter further suggested that the difficulty in valuing government-mandated pension benefits for individual employees would make it difficult for registrants to adjust the ratio for these differences. As described above in Section II.C.3., we believe that such an adjustment would not comply with the proposed requirements.

[109] *See* letter from Davis Polk (''The information for non-U.S. employees is complicated by local severance benefits and pension rights and related accounting outside the U.S.'').

[110] *See* 2006 Adopting Release, *supra* note 14, at 53175. This definition serves to distinguish defined benefit pension plans from defined contribution plans, in which the amount payable at retirement is tied to the performance of the contributions that fund the plan.

benefit plans guarantee what can be a lifetime stream of payments and allocate risk of investment performance to the company and its shareholders.[111] In contrast, under many government-mandated pension plans, the employee ultimately receives the pension benefit payment from the government, not the employer, and the purpose of the mandated pension benefit is not to provide compensation to the employee from the employer.[112] Notwithstanding any amounts that an employer may be obligated to pay (typically as a tax) to the government in respect of an employee or amounts the employee may be obligated to have withheld from wages and paid to the government,[113] where the pension benefit is being provided to the employee from the government and not by the registrant, a government-mandated defined benefit pension plan would not be considered a ''defined benefit plan'' for purposes of Item 402(c)(2)(viii) and any accrued pension benefit under such a plan would not be considered compensation for purposes of Item 402(c)(2)(x).

Finally, we acknowledge the concern from some commenters that the application of the definition of total compensation under Item 402(c)(2)(x) to employees that are not executive officers could understate the overall compensation paid to such employees.[114] One of these commenters explains that ''[b]y design, Item 402 captures all of the various compensation components received by a named executive officer, excluding certain limited items like benefits under non-discriminatory plans (*e.g.,* healthcare) and perquisites and personal benefits that aggregate less than $10,000. . . . Applied to an average worker, however, these rules will work in the opposite direction. By excluding certain benefit plans and perquisites (*e.g.,* employee discounts, transportation/parking benefits, education assistance) that do not exceed the $10,000 threshold, the rules understate the average employee's real total compensation. Relative to wages, benefits like healthcare and employee discounts both add significant economic value for an employee and are a prime motivator for the average employee when applying for and maintaining employment.'' [115] From this perspective, the omission of these components from the annual total compensation of employees, could render the ratio less meaningful, particularly for the purpose, suggested by some commenters, of evaluating employee morale. We note, however, that these exclusions are permissive, rather than mandatory.[116] Therefore, registrants would be permitted, at their discretion, to include personal benefits (and perquisites in the case of employees that are executive officers) that aggregate less than $10,000 and compensation under non-discriminatory benefit plans in calculating the annual total compensation of employees. In order to be consistent, the PEO total compensation used in the related pay ratio disclosure would also need to reflect the same approach to these items as is used for employees, and the registrant should explain any difference between the PEO total compensation used in the pay ratio disclosure and the total compensation amounts reflected in the summary compensation table.

Request for Comment

33. Are there other alternatives to calculating total compensation in accordance with Item 402(c)(2)(x) that would be consistent with Section 953(b)?

34. Should the requirements provide instructions or should we provide additional guidance about how to apply the definition of total compensation under Item 402(c)(2)(x) (or any particular elements of total compensation under Item 402(c)(2)) to employees that are not executive officers? If so, what specific instructions or guidance would be useful to registrants? Please also address whether specific instructions or guidance would limit flexibility and thereby raise costs for registrants.

35. Do registrants need further guidance on the permitted use of reasonable estimates in determining total compensation (or specific elements of total compensation) for employees other than the PEO in accordance with Item 402(c)(2)(x)? If so, what should that guidance entail? Would the use of reasonable estimates ever be inappropriate? Please also address whether specific instructions or guidance would limit flexibility and thereby raise costs for registrants.

36. Instead of allowing the use of reasonable estimates in determining total compensation (or any elements of total compensation) as described in this proposal, should the rules prohibit the use of reasonable estimates for that purpose? If so, why? Please include an explanation of how the potential usefulness of the pay ratio disclosure would be affected by a registrant's use of reasonable estimates in this context. Are there alternative ways to address this impact, such as requiring an explanation describing the use of estimates, rather than prohibiting the use of estimates?

37. Is it likely that the proposed requirements would affect the types of compensation that registrants provide to employees, and if so, what would that impact be? For example, one commenter suggested that registrants could decide to discontinue pension and incentive plans for employees or eliminate 401(k) plan matching contributions in order to facilitate their calculation of the pay ratio.[117] If so, how should the proposed requirements address that impact?

5. Disclosure of Methodology, Assumptions and Estimates

We are proposing instructions for the disclosure of the methodology and material assumptions, adjustments and estimates used in the calculation of the median or the annual total compensation of employees.[118] The proposed instruction provides that registrants must briefly disclose and consistently apply any methodology used to identify the median and any material assumptions, adjustments or estimates used to identify the median or to determine total compensation or any elements of total compensation, and registrants must clearly identify any estimated amount as such. Registrants' disclosure of the methodology and material assumptions, adjustments and estimates used should provide sufficient information for a reader to be able to evaluate the appropriateness of the estimates. For example, when statistical sampling is used, registrants should

[111] *Id.*

[112] Although Item 402(a)(2) includes in compensation transactions between a registrant and a third party where the purpose of the transaction is to furnish compensation to the employee, we generally would not consider a government-mandated pension plan to be such a transaction.

[113] As under current rules, amounts an employer pays to the government in respect of an employee are obligations of the registrant to that government and would not be ''compensation'' for purposes of Item 402(c)(2)(x).

Note, however, pursuant to Item 402(c)(2)(ix), tax gross-ups are included in total compensation. Therefore, if a registrant pays an employee's required contribution to the government (*i.e.,* the registrant satisfies the employee's obligation to the government), the amount of the employee's contribution that is paid by the registrant would be includable in total compensation as a tax gross-up.

[114] *See* letters from RILA and Protective Life Corporation.

[115] *See* letter from RILA; however, as discussed above, by definition, benefits provided on a non-discriminatory basis to all employees would not be considered perquisites.

[116] *See* Item 402(c)(ix)(A) and Item 402(a)(6)(ii).

[117] *See* letter from RILA.

[118] We note that other Commission rules require such disclosures, particularly where registrants are given the flexibility to choose a methodology. *See, e.g.,* Instructions to Item 402(h)(2), requiring registrants to disclose the valuation method and all material assumptions applied in quantifying the present value of accrued pension benefits for purposes of the Pension Benefit Table.

disclose the size of both the sample and the estimated whole population, any material assumptions used in determining the sample size, which sampling method (or methods) is used, and, if applicable, how the sampling method deals with separate payrolls such as geographically separated employee populations or other issues arising from multiple business or geographic segments. In order to promote comparability from year to year, the instruction also provides that, if a registrant changes methodology or material assumptions, adjustments or estimates from those used in the previous period, and if the effects of any such change are material, the registrant must briefly describe the change, the reasons for the change, and must provide an estimate of the impact of the change on the median and the ratio.

Because we are concerned that disclosure about methodology, assumptions, adjustments and estimates could become dense and overly technical, the instruction asks for a brief overview and makes clear that it is not necessary to provide technical analyses or formulas. In addition, we do not believe that a detailed, technical discussion (such as statistical formulas, confidence levels or the steps used in data analysis) would enhance the potential usefulness, as suggested by some commenters,[119] of the ratio as a metric to evaluate the level of PEO compensation. We expect that a succinct description of the methodology and material assumptions, adjustments or estimates would not be overly burdensome for registrants and would be more informative for investors. We expect that the costs of the additional disclosure on registrants would be marginal, as these additional disclosures are intended to simply describe what has already been done or assumed in the calculations and, therefore, will not require additional actions for registrants. It is likely that some costs may be incurred in developing and reviewing the appropriate language to describe the approach taken.

The instruction also provides that the methodology and any material assumptions, adjustments and estimates should be consistently applied by the registrant in identifying the median. Likewise, where a registrant uses estimates in calculating the annual total compensation (or elements thereof) of employees, the methodology and any material assumptions, adjustments and estimates used in the calculation (such as currency translations[120] or annualizing newly hired, non-temporary employees) should be used consistently by a registrant. Similarly, when using a compensation measure to identify the median employee, that compensation measure should be consistently applied to each employee included in the calculation. We believe that requiring consistent use of methodology, and particularly material assumptions, adjustments and estimates, could reduce incentives for registrants to use methodology to affect the outcome of the identification of the median or the ratio.

Several commenters recommended that registrants be required to describe the methodology, assumptions and estimates used in identifying the median.[121] Some commenters further suggested that a narrative discussion of the ratio and its components (including methodology and assumptions used), together with supplemental information about employee compensation structures and policies, be required, in order to provide additional context for the ratio.[122] Other than the brief description of methodology described above, the proposed requirements do not include a specific requirement for narrative discussion of the ratio, the median or any supplemental information. Section 953(b) requires disclosure of the pay ratio, but it does not require any additional information to provide context for or to explain the ratio or its components, therefore, we are not proposing to require additional information. We are sensitive to the costs of the mandated disclosure, and we believe that additional narrative disclosure about the ratio would not, for many registrants, provide useful information for investors that would justify the costs associated with providing that additional disclosure. The types of additional information that may be relevant to further understanding the ratio in a particular period would necessarily vary from company to company and could also vary from time to time as a registrant's business evolves or due to external factors, such as changes in the global economic environment or the labor marketplace. While some investors and other market participants could find supplemental information about a registrant's employment practices, the composition of its workforce and similar topics (such as employment policies, use of part-time workers, use of seasonal workers, outsourcing and off-shoring strategies) useful or informative, we do not believe that the cost of prescribing additional disclosure would be justified. Therefore, we are not proposing requirements for a narrative discussion beyond the proposed brief description of the calculation methodology where estimation techniques have been used.

Finally, one commenter suggested that the rule expressly permit additional disclosure to accompany the pay ratio.[123] Although we do not believe that it is necessary to include instructions in the proposed requirements for this purpose, we emphasize that, as with other mandated disclosure under our rules, registrants would be permitted to supplement the required disclosure with a narrative discussion if they choose to do so. Likewise, we note that registrants may, at their discretion, present additional ratios to supplement the required ratio. As with other disclosure under our rules, however, any additional ratios should be clearly identified and not misleading, and should not be presented with greater prominence than the required ratio.[124]

Request for Comment

38. Should we require registrants to disclose information about the methodology and material assumptions, adjustments or estimates used in identifying the median or calculating annual total compensation for employees, as proposed? Why or why not? Would this information assist investors in understanding the pay ratio? Are there changes we could make to the requirement to avoid boilerplate disclosure? Should we require a more technical discussion, such as requiring the disclosure of statistical formulas,

[119] *See, e.g.,* Senate Letter; House Letter; and AFL–CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

[120] Some commenters requested guidance on converting wages to U.S. dollars for purposes of pay ratio disclosure. Instruction 2 to Item 402(c) requires registrants to identify by footnote the currency, exchange rate and conversion methodology used in connection with compensation that is paid to or received by an executive officer in a different currency than U.S. dollars. In connection with the proposed requirements, registrants generally would not be required to disclose the currencies, exchange rates and conversion methodologies used in determining the annual total compensation of employees, but, where applicable, the rates and conversion methodologies used should be consistent with those used for the named executive officers in the summary compensation table.

[121] *See* AFL–CIO II and COEC I; and letters from ABA; Group of Exec. Comp. Lawyers; Meridian Compensation Partners, LLC; and SCSGP.

[122] *See* AFL–CIO I (recommending a required discussion and analysis ''including their use of outsourcing and off-shoring strategies, use of part-time and temporary employees, and use of efficiency wages to boost productivity'') and letter from Americans for Financial Reform.

[123] *See* letter from Towers Watson.

[124] *See, e.g.,* Exchange Act Rule 12b–20; and Commission's Guidance Regarding Management's Discussion and Analysis or Financial Condition and Results of Operations, Release No. 33–8350 (Dec. 19, 2003) [68 FR 75056], at 75060.

confidence levels or the steps used in the data analysis?

39. Should we require disclosure when a registrant changes its methodology (or material assumptions, adjustments or estimates) from previous periods, where such change has a material effect, as proposed? Should registrants be required to describe the reasons for the change, as proposed? Should registrants be required to provide an estimate of the impact of the change on the median and the ratio, as proposed? Is the proposed information useful? Is there other information that should be required?

40. Should we require registrants to disclose additional narrative information about the pay ratio or its components, or factors that give context for the median, such as employment policies, use of part-time workers, use of seasonal workers, outsourcing and off-shoring strategies? If so, what additional information should be required? Please be specific as to how this information would assist investors in understanding the pay ratio or in using the pay ratio disclosure. Please also be specific about the costs of providing such disclosure. How could such a requirement be designed to avoid boilerplate disclosure? Would such a requirement raise competition concerns?

41. Should we require registrants to disclose additional metrics about the total compensation of all employees (or of the statistical sample if one is used), such as the mean and the standard deviation, as a supplement to the required disclosure? Would additional metrics be useful to investors? We assume that these metrics could be provided without additional cost or at a low cost once the median has been identified. Is this assumption correct? If not, please identify the costs and benefits of such additional disclosure. Would such a requirement raise competition concerns?

6. Clarification of the Meaning of ''Annual''

In order to provide clarity, the proposed requirement defines ''annual total compensation'' to mean total compensation for the last completed fiscal year, consistent with the time period used for the other Item 402 disclosure requirements. This clarification is intended to address questions from commenters about the need to update the pay ratio disclosure throughout the year and make clear that the disclosure does not need to be updated more than once a year.[125] One commenter expressly supported this approach.[126]

Two commenters suggested other possible alternatives for the calculation of ''annual'' total compensation. One of these commenters recommended that registrants should have flexibility to select a time period for calculating the annual total compensation of employees, noting that registrants without a calendar year fiscal year-end might benefit from the flexibility to use the calendar year period since that would be consistent with the registrant's tax reporting obligations.[127] Another commenter suggested two timing rules that would grant registrants further flexibility to use the 12-month time periods that their payroll systems use.[128] We understand that these suggestions are intended to reduce compliance costs for registrants by giving registrants the ability to use information in the form that it is currently compiled for other purposes, such as tax and payroll recordkeeping. We believe, however, that it is appropriate for the time period for the pay ratio disclosure to be the same as the time period used for the registrant's other executive compensation disclosures, and, therefore, a registrant would be required to calculate the total compensation for the median employee for the last completed fiscal year. As discussed above, for purposes of estimating the median employee, we propose to allow a registrant to use compensation amounts derived from its payroll or tax records for the same annual period that is used in the payroll or tax records. We believe that permitting companies to identify the median employee using compensation information in the form that it is maintained in their own books and records would reduce compliance costs and that the proposed flexibility in estimating the median employee could address the concerns raised by these commenters. Registrants using payroll or tax records to identify the median employee would be required to calculate the Item 402(c)(2)(x) total compensation for that median employee for the last completed fiscal year, rather than the annual period used in the payroll or tax records.

Request for Comment

42. For purposes of the disclosure of the median of the annual total compensation of employees and the pay ratio, should we, as proposed, require total compensation to be calculated for the last completed fiscal year, rather than some other annual period? Why or why not? How does this impact the ability of a registrant to compile the disclosure in time to include it in a proxy or information statement relating to an annual meeting of shareholders (or written consents in lieu of such meeting)?

7. Timing of Disclosure

a. Updating Pay Ratio Disclosure for the Last Completed Fiscal Year

We are proposing instructions to clarify the timing for updating pay ratio disclosure after the end of a registrant's fiscal year.[129] As discussed above, proposed Item 402(u) would require annual total compensation amounts used in the ratio to be calculated for the registrant's last completed fiscal year. In addition, pay ratio disclosure would be required in any filing by the registrant that requires Item 402 disclosure. Accordingly, without the proposed instructions, a registrant could be required to include pay ratio disclosure in an annual report or registration statement filed after the end of the fiscal year, but before it has compiled the executive compensation information for that fiscal year for inclusion in its proxy statement relating to its annual meeting of shareholders,[130] which could raise additional incremental costs for registrants that elect to provide executive compensation disclosure in their annual proxy statement rather than their annual report and for registrants that are conducting registered offerings at the beginning of their fiscal year.

To address this issue, some commenters recommended that pay ratio disclosure not be required to be

[125] *See, e.g.,* letters from American Benefits Council and ABA.

[126] *See* letter from RILA (noting ''we recommend that the Compensation Ratio be based on the issuer's last completed fiscal year, which would make it consistent with the executive compensation disclosure under Item 402 and reduce the compliance costs and burdens at least in so far as the information required for the Summary Compensation Table could be used for purposes of the Compensation Ratio as well.'').

[127] *See* letter from American Benefits Council.

[128] *See* letter from Group of Exec. Comp. Lawyers (recommending: ''Rule One—the registrant can select any date as of which to calculate median compensation, provided the date is within 12 months of the proxy filing, and is the most recent practicable date, and Rule Two—if different payroll systems are involved, the 12-month period for computing compensation data for each payroll system's data will be acceptable so long as the period ends within 12 months of the date chosen under Rule One.'').

[129] *See* letter from ABA (noting ''the Commission should clarify when information for the most recently completed fiscal year is required to first be disclosed'').

[130] Many registrants typically satisfy their disclosure obligations under Part III of Form 10–K (which includes Item 402 requirements) by incorporating the required information by reference from their proxy or information statement that is filed after their annual report on Form 10–K. *See* General Instruction G(3). We discuss the mechanics of General Instruction G(3) in more detail below.

updated for the most recently completed fiscal year until the registrant files its proxy statement for its annual meeting of shareholders.[131] We agree with this suggested approach, and we believe that such an approach would not diminish the potential usefulness of the disclosure. At least one commenter who supported Section 953(b) disclosure also recommended a similar approach.[132] We also believe that this approach could hold down additional costs for registrants in connection with filings made or required to be made before the filing of the proxy or information statement for the annual meeting of shareholders (or written consents in lieu of such a meeting) that would typically contain the registrant's other Item 402 disclosure covering the most recently completed fiscal year. For example, under the proposed approach, updating the pay ratio disclosure would not be an additional hurdle for a registrant that requests effectiveness of a registration statement after the end of its fiscal year and before the filing of the proxy statement for its annual meeting of shareholders. We believe that the proposed instruction would provide certainty to registrants as to when the updated information is required and would allow sufficient time after the end of the fiscal year to identify the median.

Although we agree with the recommendation of commenters to not require updated annual pay ratio disclosure until a registrant files its annual proxy or information statement, we note that not all registrants that would be subject to the proposed pay ratio disclosure file proxy or information statements in connection with annual meetings of shareholders. For example, reporting companies that do not have securities registered under Section 12 of the Exchange Act are not required to file proxy or information statements for their annual meeting of shareholders and therefore typically provide Item 402 information updated for the most recently completed fiscal year in their annual report on Form 10–K. In addition, some registrants are not required to file annual proxy or information statements because they are not required to hold annual meetings (such as registrants that are organized as master limited partnerships) or because the securities that are registered under Section 12 of the Exchange Act have limited voting rights (such as common units representing limited liability company interests). Accordingly, we are proposing a modified version of the recommendation of commenters in order to provide a similar accommodation for registrants that do not file annual proxy statements and to align the proposed requirement to the timing rules for providing Item 402 disclosure in annual reports and proxy and information statements.

As noted above, registrants typically disclose Item 402 information for the most recently completed fiscal year in their proxy or information statement relating to their annual meeting of shareholders, in reliance on General Instruction G(3) of Form 10–K. This instruction allows the information required by Part III of Form 10–K (including Item 402 information) to be incorporated by reference from the registrant's definitive proxy statement (filed or required to be filed pursuant to Regulation 14A) or definitive information statement (filed or required to be filed pursuant to Regulation 14C) if that statement involves the election of directors and is filed not later than 120 days after the end of the fiscal year covered by the annual report. If a definitive proxy statement or information statement is not filed in the 120-day period (or is not required to be filed by virtue of Rule 3a12–3(b) under the Exchange Act), the Part III information must be filed as part of the Form 10–K, or as an amendment to the Form 10–K, not later than the end of the 120-day period.

In order to align with this timeframe, the proposed instruction would state that a registrant is not required to include pay ratio disclosure with respect to its last completed fiscal year until the filing of its annual report for that last completed fiscal year or the filing of a definitive proxy or information statement relating to an annual meeting of shareholders (or written consents in lieu of such a meeting), provided that updated pay ratio information must, in any event, be filed as provided in General Instruction G(3) of Form 10–K not later than 120 days after the end of such fiscal year. As an example, a registrant would not be required to disclose pay ratio information relating to compensation for fiscal year 2014 until its definitive proxy or information statement for its 2015 annual meeting of shareholders.[133] Consistent with the treatment of other information required by Part III of Form 10–K, if that registrant does not file its definitive proxy or information statement within 120 days of the end of 2014 (*i.e.,* April 30, 2015), it would need to file updated pay ratio disclosure in its Form 10–K for 2014 or an amendment to that Form 10–K. In contrast, a registrant that is not subject to the proxy rules or does not file a proxy or information statement in connection with an annual meeting of shareholders would be required to update its pay ratio disclosure for fiscal year 2014 in its annual report on Form 10–K for that year.

In order to provide guidance to registrants in connection with filings made before the annual update is triggered, the proposed instruction would also state that, in any filing made by a registrant after the end of its last completed fiscal year and before the filing of such Form 10–K or proxy or information statement, as applicable, a registrant must include or incorporate by reference its pay ratio disclosure (if such disclosure had been required) for the fiscal year prior to the last completed fiscal year.

Although the annual update is not required to be disclosed until the filing of an annual report for the last completed fiscal year, or if later, the filing of a definitive proxy statement or information statement relating to the registrant's annual meeting of shareholders, this updating provision does not alter the requirements for Item 402 disclosure under Item 8 of Schedule 14A in other proxy or information statement filings. For example, if a registrant files a proxy statement (other than the definitive proxy statement for its annual meeting) that requires Item 402 information pursuant to Item 8 of Schedule 14A, the registrant would be required to include or incorporate by reference pay ratio disclosure for the most recent period that had been filed in its Form 10–K or definitive proxy statement for its annual meeting.

Request for Comment

43. Should we, as proposed, require the pay ratio disclosure to be updated no earlier than the filing of a registrant's annual report on Form 10–K or, if later, the filing of a proxy or information statement for the registrant's annual meeting of shareholders (or written consents in lieu of such a meeting), and in any event not later than 120 days after the end of its fiscal year? Are we correct that the proposed timing rule

[131] *See* letters from ABA and Compensia, Inc.

[132] *See* AFL–CIO II (asserting that pay ratio disclosure will be useful to investors and recommending that the disclosure be limited to annual proxy statements).

[133] Consistent with the proposed instructions, we note that a registration statement that incorporates by reference a Form 10–K (or amended Form 10–K) containing all Part III information *other than* updated pay ratio information could be declared effective before the registrant's definitive proxy or information statement containing updated pay ratio information is filed in accordance with General Instruction G(3).

would not affect the potential usefulness of the pay ratio disclosure for investors? If not, how should the requirements be changed to address that impact? Are we correct that the proposed timing rule would help to keep costs down for registrants by providing certainty as to the timing for annual updates and by allowing registrants to compile the disclosure at the same time as other executive compensation disclosure under Item 402? Are we correct that the proposed timing rule would help keep down costs for registrants that request effectiveness of registration statements after the end of the last fiscal year but before the filing of their annual proxy statement?

44. Is the proposed timing workable for registrants? Does it provide enough time after the end of the fiscal year for companies to identify the median of the total compensation of all employees for that year? We note that one commenter asserted that it could take registrants three months or more each year to calculate pay ratio disclosure, and, accordingly, that the disclosure would not be available in time to be included in the annual proxy statement or annual report.[134] Would the ability to use reasonable estimates, consistently applied compensation measures, or statistical sampling be sufficient to alleviate this issue? For example, if a registrant is unable to calculate its employees' incentive compensation before such time, would it be able to reasonably estimate such compensation? Instead, should the proposed rules provide an accommodation for a company that cannot compile compensation information in time to be included in its proxy statement for the annual meeting of shareholders or Form 10–K, as applicable? For example, should registrants be permitted to delay the pay ratio disclosure until it is calculable and then file the disclosure under Item 5.02(f) of Form 8–K? [135] If so, under what circumstances should registrants be permitted to do so? Or, if we were to allow for such a delay, should we specify when the disclosure should be required to be made? If so, what deadline should we impose? Would such a delay impact the usefulness to investors of the disclosure, particularly if the disclosure would not be available in time for inclusion in proxy or information statements for the annual meeting of shareholders?

b. Proposed Instruction for Pay Ratio Disclosure When the Registrant Omits Salary or Bonus Information for the PEO in Reliance on Instruction 1 to Item 402(c)(2)(iii) and (iv), and Proposed Technical Amendment to Item 5.02(f) of Form 8–K

In accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv) of Regulation S–K, a registrant is permitted to omit disclosure in the summary compensation table of the salary or bonus of a named executive officer if it is not calculable as of the latest practicable date. In that circumstance, a registrant must include a footnote disclosing that fact and providing the date that the amount is expected to be determined, and the amount must be disclosed at that time by filing a Form 8–K. Item 5.02(f) of Form 8–K sets forth the requirements for the filing of information that was omitted from Item 402 disclosure in accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv), including the requirement to include a new total compensation figure for the named executive officer.

In cases where a registrant is relying on this instruction because the salary or bonus of the PEO is not calculable until a later date, we believe that it is also appropriate for a registrant to omit pay ratio disclosure until those elements of the PEO's total compensation are determined and provide its pay ratio disclosure in the same filing under Item 5.02(f) of Form 8–K in which the PEO's salary or bonus is disclosed. Accordingly, the proposed rule would include an instruction that provides that a registrant relying on Instruction 1 to Items 402(c)(2)(iii) and (iv) with respect to the salary or bonus of the PEO would be required to disclose that the pay ratio disclosure is being omitted because the PEO's total compensation is not available and to disclose the expected date that the total compensation for the PEO will be determined.[136] The instruction would then require the registrant to include its pay ratio disclosure in the filing on Form 8–K that includes the omitted salary or bonus information as contemplated by Instruction 1 to Items 402(c)(2)(iii) and (iv). We are also proposing a conforming amendment to Item 5.02(f) of Form 8–K to reflect the addition of this pay ratio disclosure requirement. In addition, although a filing is triggered under Item 5.02(f) when the omitted salary or bonus becomes calculable in whole or in part, under the proposed amendments to Form 8–K, the pay ratio information would be required only when the salary or bonus becomes calculable in whole, which would avoid the need for multiple updates to the pay ratio disclosure until the final total compensation amount for the PEO is known.

In proposing this instruction, we have assumed that the potential benefits of the disclosure could be diminished if the pay ratio were to be calculated using less than the entire amount of the PEO's total compensation for the period and that these potential benefits could justify the potential costs to investors of a delay in the timing of the disclosure. For example, in some cases, the amount of compensation that is omitted under Instruction 1 to Items 402(c)(2)(iii) and (iv) could be significant, and, therefore, the pay ratio would be lower if it were presented using that incomplete compensation amount. Based on the number of registrants that have historically relied on Instruction 1 to Items 402(c)(2)(iii) and (iv),[137] we do not expect that the proposed instruction would impact a significant number of registrants each year.

Request for Comment

45. Is the proposed instruction appropriate in instances where registrants are relying on Instruction 1 to Items 402(c)(2)(iii) and (iv) with respect to the salary or bonus of the PEO?

46. Instead of the proposed approach, should these registrants be required to calculate pay ratio disclosure using only the amounts of total compensation of the PEO that are available at the time of the filing, or in the alternative, make a reasonable estimate of the omitted total compensation amounts? Would such disclosure be useful or meaningful? In that case, should the registrant be required to update (by Form 8–K or otherwise) its pay ratio disclosure to reflect the PEO's recalculated total compensation?

47. Is the proposed instruction clear? If not, what changes should be made to clarify it?

48. Should we require any additional or supplemental disclosure when a registrant relies on the proposed instruction? If so, what would that disclosure entail? For example, should the proposed instruction require registrants to report the median annual total compensation of employees, even if the PEO total compensation and pay

[134] *See* COEC II.

[135] Item 5.02(f) of Form 8–K sets forth the requirements for the filing of information that was omitted from Item 402 disclosure in accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv). These are described in more detail in the next subsection of this release.

[136] *See* Proposed Instruction 4 to Item 402(u).

[137] For example, based on a review of EDGAR filings in 2012, only 22 registrants relied on Instruction 1 to Items 402(c)(2)(iii) and (iv) in connection with the total compensation of their PEO.

ratio are not available? Should registrants relying on the proposed instruction be required to disclose the pay ratio for the prior year in the Form 10–K or proxy or information statement?

49. Would the proposed instruction cause registrants to change their compensation practices? Alternatively, would the proposed instruction have an adverse impact on the usefulness to investors of the proposed pay ratio disclosure? How should we change the proposed requirements to address such impacts?

8. Status as ''Filed'' Not ''Furnished''

Some commenters suggested that pay ratio information be deemed ''furnished'' and not ''filed'' for purposes of the Securities Act and Exchange Act.[138] We note that Section 953(b) refers to the pay ratio information being disclosed in the registrant's ''filings'' with the Commission. We believe that the use of the word ''filing'' in Section 953(b) is consistent with the disclosure being filed and not furnished. Accordingly, we are not proposing to permit the pay ratio information to be deemed ''furnished.'' Like other Item 402 information, the pay ratio disclosure would be considered ''filed'' for purposes of the Securities Act and Exchange Act and, accordingly, would be subject to potential liabilities thereunder.

We note that one of the reasons that commenters recommended treating the information as furnished and not filed is because of the difficulty that some companies may have in determining and verifying the information, which must be covered by the certifications required for Exchange Act filings under the Sarbanes-Oxley Act of 2002.[139] We also recognize that some registrants could have more difficulty in gathering and verifying the information than others. Nevertheless, we believe that the flexibility afforded to registrants in connection with identifying the median could reduce some of the difficulties of compiling the required information, because registrants would be able to tailor the methodology to reflect their own facts and circumstances. The ability to use reasonable estimates in connection with the calculation of annual total compensation for employees other than the PEO could also alleviate some of these concerns. In addition, we believe that the proposed transition periods discussed below, which are designed to give registrants sufficient time to develop and implement compliance procedures, could mitigate some concerns about compiling and verifying the information.

Request for Comment

50. Should the Section 953(b) information be filed rather than furnished? What weight should we give to the use of the word ''filing'' in the statute?

51. Are there other ways to address commenters' concerns about the ability to compile and verify the pay ratio information that still fulfills the statutory mandate?

D. Transition Matters

1. Proposed Compliance Date

Section 953(b) does not specify a date when registrants must begin to comply with the requirements that we implement. We are proposing to require that a registrant must begin to comply with proposed Item 402(u) with respect to compensation for the registrant's first fiscal year commencing on or after the effective date of the rule, and, as proposed, a registrant would be permitted to omit this initial pay ratio disclosure from its filings until the filing of its annual report on Form 10–K for that fiscal year or, if later, the filing of a proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such year. Similar to the proposed instructions for updating pay ratio disclosure, this initial pay ratio disclosure would be required, in any event, to be filed as provided in connection with General Instruction G(3) of Form 10–K not later than 120 days after the end of such fiscal year. Thus, if the final requirements were to become effective in 2014, a registrant with a fiscal year ending on December 31 would be first required to include pay ratio information relating to compensation for fiscal year 2015 in its proxy or information statement for its 2016 annual meeting of shareholders (or written consents in lieu of such a meeting). Consistent with the treatment of other information required by Part III of Form 10–K, if that registrant does not file its proxy or information statement within 120 days of the end of 2015 (*i.e.,* April 30, 2016), it would need to file its initial pay ratio disclosure in its Form 10–K for 2015 or an amendment to that Form 10–K. Similarly, a registrant with a fiscal year ending on December 31 that is not subject to the proxy rules or does not file a proxy or information statement in connection with an annual meeting of shareholders would be required to include pay ratio information relating to compensation for fiscal year 2015 in its Form 10–K covering fiscal year 2015, which would be due in the first quarter of 2016. Registrants would be permitted to begin compliance earlier on a voluntary basis.

Several commenters noted that companies will need a long transition period before they can implement systems to compile the disclosure and verify its accuracy.[140] We understand that this time would likely be needed by large, multinational registrants and any registrants that currently do not have a centralized, consolidated payroll, benefits and pension system that captures the information necessary to identify the median.[141] We expect that it will take registrants one full reporting cycle to implement and test any necessary systems,[142] and we believe that the proposal provides that time for transition and implementation.

We believe it is appropriate to allow a registrant to omit its initial pay ratio disclosure from filings that would otherwise require Item 402 information for its first fiscal year commencing on or after the effective date of the final rule until the filing of its annual report on Form 10–K or, if later, a proxy or information statement relating to its next annual meeting of shareholders (and in any event not later than 120 days after the end of such fiscal year), for the same reasons described in Section II.C.7.a. above.

Request for Comment

52. Should the proposed requirements have a transition period, as proposed? Is the period too long? Too short? If so, how long should the transition period be and why? Please be specific (for example, instead of the proposed period, should compliance be delayed until the first fiscal year beginning on or after six months following the effective date of the final rules?).

53. In the alternative, should the transition periods be different for different types of registrants? If so, what transition periods should apply to which registrants? For example, should registrants with a workforce below a certain size (*e.g.,* fewer than 1,000 employees) have a shorter phase-in

[138] *See* COEC I and letters from ABA; Protective Life Corporation; and RILA. In contrast, no commenters have asserted that the disclosure should be filed.

[139] *See, e.g.,* COEC I.

[140] *See* letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

[141] *See* letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

[142] *See, e.g.,* letters from American Benefits Council and Group of Exec. Comp. Lawyers.

period than others? Should there be a longer phase-in for multinational registrants? Please provide specific information about how to define the categories of registrants that should be subject to any recommended phase-in.

54. Are there any other accommodations that we should consider for particular types of companies or circumstances (other than the proposed transition period for new registrants described below in this release)?

• Should we provide a transition period for business combinations? If so, what should the transition be? For example, should a registrant be permitted to omit the employees of a newly acquired entity until a period of time (*e.g.,* six months, 12 months) has passed following the closing of the business combination transaction? Instead of a specific transition period, would guidance about when the employees of a newly acquired entity need to be covered in the pay ratio provide sufficient direction for registrants? What should that guidance entail?

• Should we permit a registrant that is not subject to the proxy rules to amend its Form 10–K no later than 120 days after the end of the fiscal year covered by the report to provide the pay ratio disclosure? Should we permit such a registrant to provide the disclosure by filing a Form 8–K instead of an amendment to Form 10–K?

• Should we provide a transition period for registrants that cease to be smaller reporting companies? If so, what should the transition be?

• Does the fact that Title I of the JOBS Act provides transition periods for provisions other than Section 953(b) for registrants that cease to be emerging growth companies suggest that we should not provide a transition period for such registrants? Should we provide a transition for registrants that cease to be emerging growth companies? If so, what should the transition be? If not, would these registrants have the information available to compile the disclosure in time for their first proxy statement or annual report, as applicable, following the date they exit emerging growth company status? Should a transition period depend on the disqualifying event that occurs, on the basis that the registrant may have more advance notice of the occurrence for some types of events? [143] For example, should a company that exits emerging growth company status because it reaches the fifth anniversary of its first sale of common equity be required to first disclose pay ratio information relating to the fiscal year in which its fifth anniversary occurred? Alternatively, should the amount of transition time provided depend on how long a company has enjoyed emerging growth company status, such as a longer transition for registrants that lose that status after one year or less?

2. Proposed Transition for New Registrants

New registrants that do not qualify as emerging growth companies are not exempted from the application of Section 953(b). The proposed requirements include instructions that would permit new registrants to delay compliance, so that pay ratio disclosure would not be required in a registration statement on Form S–1 or S–11 for an initial public offering or a registration statement on Form 10.[144] Instead, such a registrant would be required to first comply with proposed Item 402(u) with respect to compensation for the first fiscal year commencing on or after the date the registrant becomes subject to the requirements of Section 13(a) or Section 15(d) of the Exchange Act, and, as proposed, the registrant would be permitted to omit this initial pay ratio disclosure from its filings until the filing of its Form 10–K for such fiscal year or, if later, the filing of a proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such fiscal year. Similar to the proposed instructions for updating pay ratio disclosure, these proposed instructions also require that this initial pay ratio disclosure must, in any event, be filed as provided in connection with General Instruction G(3) of Form 10–K not later than 120 days after the end of such fiscal year.

For example, assuming the proposed requirements become effective in 2014, a company with a fiscal year ending on December 31 that completes its initial public offering in October 2016 would not be required to include any pay ratio information in its registration statement on Form S–1. The company would then not be required to include pay ratio disclosure in any filing until it files its definitive proxy or information statement for its 2018 annual meeting of shareholders (or written consents in lieu of such a meeting), which would include pay ratio disclosure relating to 2017 compensation amounts. Consistent with the treatment of other information required by Part III of Form 10–K, if the company does not file its definitive proxy or information statement within 120 days of the end of its fiscal year (*i.e.,* April 30, 2018), it would need to file its initial pay ratio disclosure in its Form 10–K for 2017 or an amendment to that Form 10–K. If that company were not required to file a proxy statement relating to its annual meeting of shareholders, the first filing that would be required to include pay ratio disclosure would be its Form 10–K covering fiscal year 2017, which would include pay ratio disclosure relating to 2017 compensation amounts.

Commenters did not address the impact of pay ratio disclosure requirements on newly public companies. Although investors might benefit from pay ratio information in connection with an initial public offering or Exchange Act registration, we believe it is appropriate to give companies time to develop any needed systems to compile the disclosure and verify its accuracy. The transition period for new registrants is similar to the proposed time frame provided for other registrants to comply with pay ratio disclosure requirements following the effective date of the final rules. The proposed approach is also similar to the current phase-in for newly public companies in connection with Item 308 of Regulation S–K, for management's report on the registrant's internal control over financial reporting.[145]

We are sensitive to the impact that the proposed rules could have on capital formation. We note that the requirements of Section 953(b), as amended by the JOBS Act, distinguish between certain newly public companies and all other issuers by providing an exemption for emerging growth companies. We note that the incremental time needed to compile pay ratio disclosure could cause companies that are not emerging growth companies to delay an initial public offering, which could have a negative impact on capital formation. In this regard, we assume that, in order to be disqualified for emerging growth company status, these companies are likely to be businesses with more extensive operations or a greater number of employees than many emerging growth companies, which

[143] The definition of emerging growth company provides that an issuer continues to be deemed an emerging growth company until the earliest of: (1) The last day of the fiscal year during which it had total annual gross revenues of $1 billion; (2) the last day of the fiscal year following the fifth anniversary of the first sale of its common equity securities; (3) the date on which it has issued more than $1 billion in non-convertible date during the previous three years; or (4) the date on which it is deemed a large accelerated filer. *See* Exchange Act Section 3(a)(80) [15 U.S.C. 78c(a)(80)] and Securities Act Section 2(a)(19)[15 U.S.C. 77b(a)(19)].

[144] *See* proposed Instruction 5 to paragraph (u).

[145] *See* Instruction 1 to Item 308 of Regulation S–K.

could increase the initial efforts needed to comply with the proposed requirements. We believe that providing a transition period for these newly public companies could mitigate this potential impact on capital formation.

Request for Comment

55. Instead of the proposed transition period, should we require new registrants that are not emerging growth companies to comply with pay ratio disclosure requirements in registration statements on Form S–1, Form S–11 or Form 10? Are we correct that the incremental time needed to compile pay ratio disclosure could cause companies that are not emerging growth companies to delay an initial public offering? What costs would be imposed on these companies if we did not provide the transition? Does the potential importance of the information to investors justify the burden on these companies of complying with the requirements in their Form S–1, Form S–11 or Form 10?

56. Does the proposed transition period for compliance by new registrants provide sufficient time (or, alternatively, too much time) for these companies to be able to comply? Why or why not?

57. Are there any alternatives to the proposed transition period that we should consider? For example, should we permit new registrants to omit pay ratio disclosure from Form S–1 and Form 10 (as proposed), but require them to comply with the proposed pay ratio disclosure requirements in their first proxy statement or annual report, as applicable?

58. Are there other accommodations we should consider for new registrants?

III. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of the proposals, other matters that might have an impact on the amendments and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments, particularly quantitative information as to the costs and benefits, and by alternatives to the proposals where appropriate. Where alternatives to the proposals are suggested, please include information as to the costs and benefits of those alternatives.

59. Have we struck the appropriate balance between prescribing rules to satisfy the mandate of Section 953(b) and allowing a registrant flexibility to identify the median in a manner that is appropriate to its own facts and circumstances?

60. Are there alternatives to the proposals we should consider that would satisfy the requirements of Section 953(b) of the Dodd-Frank Act?

IV. Economic Analysis

A. Background

As discussed in detail above, Section 953(b) directs the Commission to amend Item 402 of Regulation S–K to add the pay ratio disclosure requirements prescribed by the Dodd-Frank Act. Section 953(b) imposes a new requirement on registrants to disclose the median of the annual total compensation of all employees and the ratio of that median to the annual total compensation of the chief executive officer. In doing so, Section 953(b) requires registrants to determine total compensation in accordance with Item 402(c)(2)(x). The Commission's rules for compensation disclosure have traditionally focused on compensation matters that relate to executive officers and directors. Although registrants subject to Item 402 are required to provide extensive information about the compensation of the principal executive officer and other named executive officers identified pursuant to Item 402(a), current disclosure rules generally do not require registrants to disclose detailed compensation information for other employees in their filings with the Commission. In addition, the Commission's executive compensation disclosure rules differ from tax accounting and reporting standards.[146] Therefore, Section 953(b) requires registrants to disclose specific information about non-executive employee compensation that is not currently required for disclosure, accounting or tax purposes. We do not expect that many registrants, if any, currently disclose or track total compensation as determined pursuant to Item 402 for their workforce.[147]

We are proposing these amendments to Item 402 in order to satisfy the statutory mandate of Section 953(b). We note that neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision or a specific market failure, if any, that is intended to be remedied;[148] however, commenters supporting Section 953(b) have emphasized that potential benefits could arise from adding pay ratio-type information to the total mix of executive compensation information.[149]

As discussed throughout this release, in proposing amendments to implement Section 953(b), we have considered the statutory language and exercised our discretion to develop rules designed to lower the cost of compliance while remaining consistent with Section 953(b). In doing so, we have considered a variety of issues, including, among others, the specificity of the statute, whether the rules should specify a methodology for determining the median, the use of estimates and assumptions, whether and how to define certain terminology used in the statute, the form of the disclosure, how often the disclosure should be updated in the required filings, and compliance and transition matters.

We are sensitive to the costs and benefits imposed by the statutory requirements and the proposed pay ratio disclosure requirements, and our analysis of these costs and benefits is discussed below. Some of the costs and benefits stem directly from the statutory mandate in Section 953(b), while others are affected by the discretion we exercise in implementing that mandate. Our economic analysis of the proposed pay ratio disclosure requirements addresses both the costs and benefits that stem directly from Section 953(b) and those arising from the policy choices under the Commission's discretion, recognizing that it may be difficult to separate the discretionary aspects of the rules from those elements required by statute. The economic analysis that follows focuses first on the benefits and costs arising from the new mandatory disclosure requirements prescribed by the Dodd-Frank Act and then focuses on those that arise from the choices we have made in exercising our discretion.

We request comment throughout this release on alternative means of meeting the statutory mandate of Section 953(b) and on all aspects of the costs and benefits of the proposals and possible alternatives. We also request comment on any effect the proposed pay ratio disclosure requirements may have on efficiency, competition and capital formation.[150] We particularly appreciate

[146] ''Total compensation'' as determined pursuant to Item 402 is not an amount that is reported or calculated in connection with a registrant's financial statements. The elements of compensation that are required to be calculated and reported for U.S. tax purposes are not the same as those covered by Item 402 requirements, and the reported amounts relate to the relevant calendar year for tax purposes, rather than the registrant's fiscal year.

[147] *See supra* note 17.

[148] *See supra* note 23.

[149] *See supra* note 24.

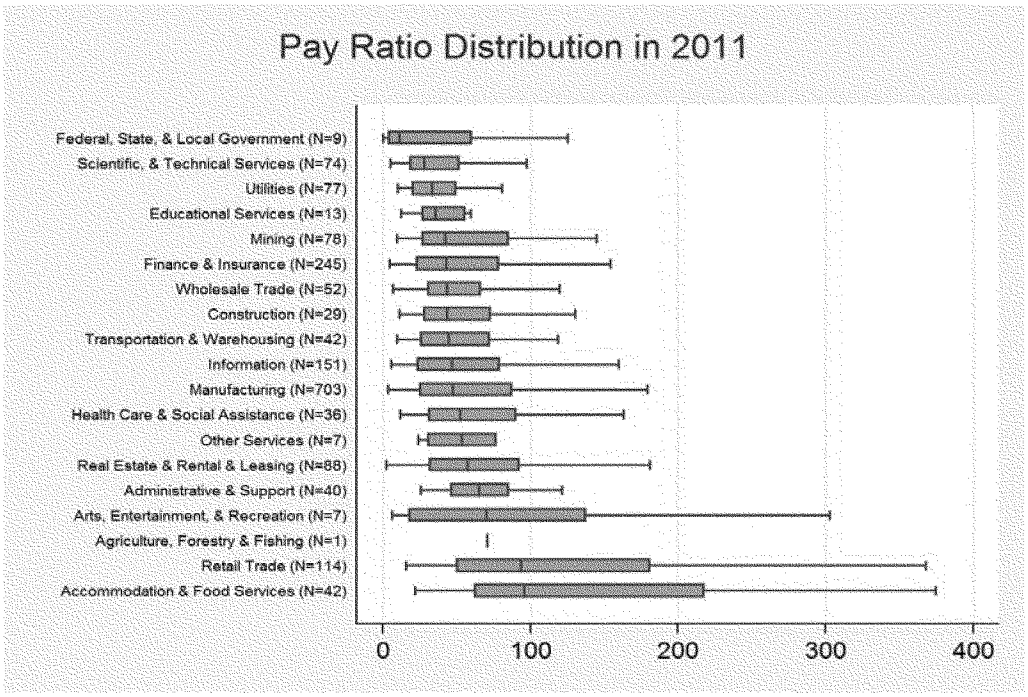
[150] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)] require us, when engaging in

comments that distinguish between costs and benefits that are attributed to the statute and costs and benefits that are a result of policy choices made by the Commission in implementing the statutory requirements, as well as comments that include both qualitative information and data quantifying the costs and the benefits identified.

B. Baseline

To assess the economic impact of the proposed rules, we are using as our baseline the current state of the market without a requirement for registrants to disclose pay ratio information. At present, the registrants subject to Item 402(c)(2)(x) already provide disclosure of their executive officer compensation as Section 953(b) requires. Other registrants, such as emerging growth companies, smaller reporting companies and foreign private issuers, are not required to comply with to Item 402(c)(2)(x) and provide disclosure of executive compensation different from Item 402(c)(2)(x). We do not expect that many registrants, if any, currently maintain payroll and information systems that track total compensation as determined pursuant to Item 402 for their employees, or make that information publicly available. Therefore, investors cannot calculate registrant-specific median employee compensation because there are no existing or publicly available sources for this data. Correspondingly, they cannot currently calculate the annual pay ratio in accordance with Section 953(b). Statistics on the earnings of U.S. workers in various ''industries'' are publicly available from the Bureau of Labor Statistics. Therefore, investors may be able to approximate the ratio using the industry median employee compensation and the information about PEO compensation for the registrants subject to Item 402(c). For example, the distribution of the ratios of PEO to industry median employee compensation for a sample of large reporting companies is reported by North American Industry Classification System (''NAICS'') industry sectors in the figure below for fiscal year 2011.[151]

Figure 1. Pay ratio distribution using industry median compensation.



The pay ratio compiled with currently available information as in the above example is different from the ratio that Section 953(b) requires issuers to disclose; the above example uses the median wage information of U.S. workers within the same 3-digit NAICS industries, while Section 953(b) mandates registrants to use company-specific information about median employee compensation for ''all employees'' which would include employees in workplaces outside the United States. Also, the example is based on only wages and does not consider other forms of compensation for employees other than PEOs because the Bureau of Labor Statistics does not report those components. In contrast, Section 953(b) requires registrants to present the ratio using total compensation including all forms of compensation in Item 402(c)(2)(x).

rulemaking under those Acts 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.

Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

[151] The ratios in the figure are calculated for each registrant with executive total compensation data from the Standard and Poor's Compustat Executive Compensation database which tracks compensation for the companies currently or previously in the S&P 1500 index and industry median employee wage information at each 3-digit NAICS level from the U.S. Department of Labor's Bureau of Labor Statistics (*available at http://www.bls.gov/bls/wages.htm*). The distribution of the registrant-level ratios within each NAICS industry sector (2-digit) is represented using horizontal box plots that show the minimum and maximum, and 25th, 50th (median) and 75th percentiles.

Although the ratio described in the above example does not represent the ratio mandated by Section 953(b), it shows that there is considerable disparity in the compensation differentials between industries. It is not clear how the distribution of ratios by industry would change if company-specific median employee wage and other compensation components for employees were used. In the example above, the variation in ratios within the same industry group at the 3-digit NAICS level is determined only by the variation in PEO pay between companies. The Section 953(b) disclosure of median pay at the company level would introduce an additional factor for the variation, which is the company-specific median employee compensation. This could widen or narrow the distribution of ratios depending on how median pay corresponds to PEO pay at each company.

To assess the effects of the proposed rule, we consider the impact of the rule on investors, registrants subject to the pay ratio disclosure and all their employees including executive officers. The proposed disclosure requirement would apply to all registrants that are not emerging growth companies, smaller reporting companies and foreign private issuers, which we estimate to be approximately 3,830 registrants.[152] We estimate that there are approximately 900 emerging growth companies, approximately 3,750 smaller reporting companies, approximately 750 foreign private issuers filing on Form 20–F and approximately 144 MJDS filers.[153]

An important factor to consider when analyzing the competitive effects of the proposed pay ratio disclosure requirements on the affected registrants is the difference in size and nature of the workforce, complexity of the organization and the degree of integration of payroll systems that are likely to exist among these registrants. The average number of business and geographical segments and employees of each segment disclosed by some of the potentially affected registrants in the calendar year 2011 are reported in the table below.[154]

TABLE 1—REGISTRANTS WITH MULTIPLE BUSINESS OR GEOGRAPHICAL SEGMENTS

	Average	Min	Median	Max	Number of registrants
No. of Geographic Segments	2.92	1	2	28	2,691
No. of Business Segments	2.36	1	1	11	2,947
Total Assets ($ millions)	10,472	0	1,287	3,211,484	2,691
Geographic Segment Assets ($ millions)	8,833	0	905	3,211,484	1,411
No. of Employees per Registrant	12,681	0	2,300	2,100,000	2,652
No. of Employees per Geographic Segment	7,096	0	1,155	338,000	1,433

The above table shows that the average number of segments among potentially affected registrants was about three in 2011. Also, the approximate number of average employees per registrant and per geographic segment was 13,000 and 7,000 respectively. Although we do not have information on how the registrants maintained their payroll systems across the multiple segments, the number of segments for the registrants serves as one indication of the potential complexity of trying to comply with the proposed rules (whether by sampling at each segment and aggregating the samples across the segments, or aggregating the payroll observations and sampling from the aggregated pool).

Another important factor in analyzing the competitive effects of the proposed disclosure requirement is the current level of competition in the labor market for PEOs. Unfortunately, we do not have data that would allow us to assess the degree of competitiveness of the current market for PEOs.

C. Discussion of Benefits and Costs Arising From the Mandated Disclosure Requirements

1. Benefits

We have considered the impact that the requirements prescribed by Section 953(b) could have on the efficiency of the U.S. capital markets, particularly the informational efficiency. The following discussions of potential informational benefits are mainly intended to address benefits of the mandated disclosure to investors and shareholders and the employees (other than executive officers) of the registrants that are subject to Section 953(b).

As noted above, there is limited legislative history to inform our understanding of the legislative intent behind Section 953(b) or the specific benefits the provision is intended to secure. In particular, the lack of a specific market failure identified as motivating the enactment of this provision poses significant challenges in quantifying potential economic benefits, if any, from the pay ratio disclosure. Some commenters have noted that there is an information gap between registrants and investors with regard to internal pay parity at companies.[155] Although investors are able to compare compensation arrangements for the PEO across companies, registrants are not required to provide, and investors may not have access to, information that would allow them to assess the level of a PEO's compensation as it compares to

[152] Based on a review of EDGAR filings in 2011, we estimate that of the approximately 8,870 annual reports on Form 10–K filed in that year, approximately 3,750 annual reports were filed by smaller reporting companies, approximately 290 were filed by ABS issuers and approximately 100 were filed by wholly-owned subsidiaries of other registrants. We have also reduced the total number affected registrants by 900 to reflect the approximate number of emerging growth companies that have identified themselves as such in their EDGAR filings as of May 2013.

[153] We estimate that approximately 900 SEC registrants have identified themselves as emerging growth companies in their EDGAR filings as of May 2013. The estimates for smaller reporting companies and foreign private issuers including MJDS filers are based on a review of EDGAR filings for calendar year 2011. Based on a review of EDGAR filings in 2012, there approximately 8,154 registrants filing on Form 10–K, approximately 3,640 smaller reporting companies, approximately 715 foreign private issuers filing on Form 20–F and approximately 152 MJDS filers. Registrants can fall into multiple categories among emerging growth companies, smaller reporting companies and foreign private issuers.

[154] The corporate segments data used in the table come from the Standard and Poor's Compustat Segment database and the information is self-reported by the companies. As such, it is not based on standardized definitions of lines-of-business and geographic areas. Segment information of approximately 65% of the potentially affected registrants is available from the database.

[155] *See* letter from Social Investment Forum (noting ''a number of investors, including several of our members, have been active in submitting shareholder resolutions in recent years supporting corporate disclosure of similar pay disparity data.''). *See generally* House Letter and Senate Letter; and letters from Americans for Financial Reform; Group of International Investors; Calvert Investment Management; K. Burgoyne; Institute for Policy Studies; and Trillium Asset Management. *See also* Form Letter A.

that of employees at the same company.[156] Some investors have suggested that this type of comparison would assist in their ability to evaluate the PEO's compensation in the context of the company's overall business,[157] and could provide insight into the effectiveness of board oversight.[158] Other commenters have suggested that a comparison of PEO compensation to employee compensation could be used by investors to approximate employee morale and productivity,[159] or analyzed as a measure of a particular company's investment in human capital.[160]

These commenters did not quantify the magnitude or value of these potential benefits. Statistics on the average earnings of U.S. workers in various industries are already publicly available to investors.[161] Company-specific information about median employee pay would be new information generated pursuant to the Section 953(b) requirements, and thus the potential incremental benefits identified by commenters primarily derive from this company-specific information. Commenters have not specified whether this type of company-specific information would be equally useful in connection with all types of companies or whether the potential benefits are more relevant to certain types of businesses, industries, business structure or size of registrant. One commenter asserted that the impact of pay disparity on employee performance and morale is ''particularly strong in industries based on technology, creativity and innovation,'' [162] which suggests that a measure of employee morale could be more potentially useful in evaluating those businesses or that this pay ratio may be a more sensitive indicator of that effect in those industries.

Furthermore, commenters have not specified what an optimal pay ratio is or what a proper benchmark should be. They also have not specified what effect a pay ratio has on employee morale and productivity relative to other environment-specific and company-specific factors. To the extent that factors exist that could cause the ratios to differ, precise comparability across companies may not be relevant and could generate potentially misleading interpretations or conclusions. In particular, the ratio may significantly depend on how a company structures its business. For example, one company might outsource the labor-related (manufacturing) aspects of its business to a third-party to focus on product innovation, while another company competing in the same industry might choose to retain the labor aspect of its business. To the extent that product innovation requires higher pay than manufacturing, the outsourcing company will have a lower pay ratio for the same PEO pay. If pay ratio parity between these two companies were pursued, and a lower ratio sought, this could create incentive for the manufacturing company to outsource jobs. Therefore, the potential value of this disclosure for assessing issues related to employee morale, productivity and investment in human capital may be diminished by the indirect costs of creating incentives for registrants to change their business structure.

Some commenters have asserted that the intended purpose of the provision is to address a broader public policy concern relating to income inequality, which they suggest is exacerbated by increasingly high levels of PEO compensation relative to other workers.[163] More specifically, some of these commenters have suggested that the mandated disclosure requirement will encourage the boards of public companies to consider the relationship between the PEO's compensation and the compensation of other employees, which, these commenters suggest could, in turn, curb excessive PEO compensation.[164] It has also been suggested that shareholders of public companies could use pay ratio information, together with pay-for-performance disclosure, to help inform their say-on-pay votes, which could also serve to limit PEO compensation.[165]

Commenters have also suggested [166] that comparing PEO pay to the compensation of the median worker may help offset an upward bias in executive pay resulting from the practice of benchmarking PEO compensation solely against the compensation of other PEOs.[167] To the extent that pay ratio disclosure diminishes the focus of benchmarking executive compensation exclusively to the level of peer-PEO pay, the mandate of Section 953(b) may provide indirect economic benefits to registrants and their shareholders by reducing the frequency of pay increases that are tied to a benchmarking process that is not based on performance. It is also possible, however, that pay ratio disclosure could exacerbate any upward bias in executive pay by providing another benchmark that could be used in certain situations to increase PEO compensation (*i.e.,* for a PEO whose company's pay ratio is lower than its peers' pay ratios). In addition to these possibilities, there is also evidence that setting executive compensation through benchmarking practices is practical and efficient,[168] particularly when the

[156] *See, e.g.,* Senate Letter; House Letter; and AFL–CIO I (noting ''few companies provide meaningful disclosure of how employee compensation is allocated over their workforce'').

[157] *See, e.g.,* letter from UAW Retiree Medical Benefits Trust (''Disclosure of internal pay equity, whether the ratio between median employee wages and those of the CEO or the ratio between compensation awarded to the CEO and to other top executives, will ultimately help investors evaluate executive pay practices by better contextualizing the information provided to the shareholders through the proxy statement and other corporate filings.'') and letter from CtW Investment Group (''The new [pay ratio] disclosure offers an insight into compensation within the entire organization, and provides a different way for boards and shareholders to evaluate the relative worth of a CEO.'').

[158] *See* letter from CtW Investment Group (noting that ''compensation disclosure is important, not only in its own right, but the ability it offers shareholders to evaluate and hold accountable board members''); and letter from UAW Retiree Medical Benefits Trust (noting ''we view Section 953(b) as an essential tool that will increase corporate board accountability to investors'').

[159] *See* AFL–CIO I and letters from Americans for Financial Reform; Calvert Investment Management; Drucker Institute; and Institute for Policy Studies. *See also* Form Letter A.

[160] *See* AFL–CIO I and letter from CtW Investment Group.

[161] *See* U.S. Department of Labor's Bureau of Labor Statistics, *available at http://www.bls.gov/bls/wages.htm.*

[162] *See* AFL–CIO II (''These sectors . . . depend significantly on the ability of employees to collaborate, share ideas, and function effectively as teams, all of which are damaged by extreme differentials in compensation amongst employees.'').

[163] *See* Letter from Americans for Financial Reform (''[T]his information clearly bears directly on the important public policy issues of pay equity and income inequality''). *See also* House Letter and Senate Letter (each stating ''income inequality is a growing concern among many Americans . . . by 2010 large company CEO pay had skyrocketed to $10.8 million, or 319 times the median worker's pay. Section 953(b) was intended to shine a light on figures like this at every company.'').

[164] *See, e.g.,* AFL–CIO I and letters from Americans for Financial Reform; Group of International Investors; Institute for Policy Studies. In contrast, the National Association of Corporate Directors asserted that pay ratio information would not be useful for this purpose. *See* letter from NACD.

[165] *See* letters from CtW Investment Group and S. Towns.

[166] *See* AFL–CIO II and letter from Americans for Financial Reform.

[167] *See, e.g.,* M. Faulkender and J. Yang, *Inside the Black box: the Role and Composition of Compensation Peer Groups,* J. of Financial Economics. 96, 257–270 (2010); C. Elson and C. Ferrere, *Executive Superstars, Peer Groups and Overcompensation: Cause, Effect and Solution,* J. of Corporation Law. Forthcoming (2013) for one view that benchmarking is inefficient because it can lead to increases in executive compensation not tied to firm performance.

[168] *See, e.g.* J. Bizjak, M. Lemmon, and L. Naveen, *Does the use of peer groups contribute to higher pay and less efficient compensation?* J. of Financial

Continued

market can observe the method used.[169] To the extent that current benchmarking practices and disclosure requirements are efficient, additional pay ratio disclosure would not provide additional benefits.

Similar benefits to the potential benefits cited by commenters may be achieved using the currently available information on PEO compensation and the industry median or average wages of U.S. workers, although currently available data do not provide company-specific information. Also, these commenters did not provide details about the causes of compensation disparity within particular companies or industries and did not address whether there are alternative means to effect an overall reduction in PEO compensation, or, alternatively, an overall improvement in the wages and benefits for workers. The evidence that the current PEO compensation practice is not efficient or that the benchmarking process causes the upward bias in executive compensation is not sufficiently clear to establish that the purpose of the provision is a remedy for a specific market failure in the current compensation practice.[170]

In contrast, other commenters believe that the disclosure mandated by Section 953(b) would not have any benefit, or, at most, would not have benefits sufficient to justify the compliance costs, which many of such commentators anticipate would be substantial.[171] Some of these commenters questioned the materiality of pay ratio information to an investment decision and specifically questioned the meaningfulness of the information in the form expressly required by Section 953(b).[172] This view was also asserted by the minority in the Senate Report accompanying the legislation.[173] In light of these comments, we are particularly interested in receiving information relating to material, direct economic benefits to investors or shareholders of the affected registrants derived from the pay ratio disclosure.

We note that some commenters asserted that certain investors incorporate social and governance issues, like pay equity, as part of their investment decisions.[174] These investors may realize non-economic benefits associated with their investment decisions based on this type of information. These commenters, however, did not quantify the extent to which investors would value pay ratio information or would incorporate the disclosure required by Section 953(b) into their investment or voting decision, if at all.[175] We also note that many commenters disagreed with the assertion that this type of disclosure is material to investors or would be useful to an investment or voting decision, particularly in the form required by the Dodd-Frank Act.[176] As mentioned above, currently it is not possible to quantify the usefulness to investors of company-specific pay ratio information as required by Section 953(b) as compared to the usefulness of publicly available statistics on average salaries, or the usefulness of any other company-specific metric of employee compensation or satisfaction. We understand from some commenters that the proposed pay ratio disclosure could be used by some investors in allocating capital and from that perspective would be perceived by such investors as a benefit, although not necessarily an economic benefit measured by a financial return. It is uncertain whether the investment decisions by these investors would impact the overall efficiency of U.S. capital markets, or if there would be an impact, whether the impact would be net positive or negative.

Nevertheless, as discussed above, in designing the proposed requirements, we have sought to preserve what we believe to be the potential benefits, as articulated by commenters, of the mandated requirement. To the extent that some investors and other stakeholders may seek the disclosure of pay ratio information, both those investors and the registrants who have already disclosed similar information voluntarily may benefit from mandated, rather than voluntary, disclosure of pay ratio information. Given that some registrants have already disclosed information similar to the pay ratio voluntarily,[177] those registrants may benefit from the mandated disclosure requirement to the extent that standardized pay ratio information may decrease uncertainty around, or increase the relevance of, the voluntarily disclosed information.[178] To the extent that the voluntarily disclosed information and the manner in which it

Economics. 90, 152–168 (2008). This study shows that benchmarking is a practical and efficient mechanism used to gauge the market wage necessary to retain valuable human capital.

[169] *See, e.g.,* J. Bizjak, M. Lemmon, and T. Nguyen, *Are all CEOs Above Average? An Empirical analysis of compensation Peer Groups and Pay Design.* J. of Financial Economics. 100, 538–555 (2011). This study finds that disclosure of peer groups mandated in the 2006 Adopting Release has reduced the bias in peer group choice.

[170] *See, e.g.,* J. Core, W. Guay, and R. Thomas, *Is U.S. CEO Compensation Broken?* J. of Applied Corporate Finance. 12, 97–104 (2005); C. Fryman and D. Jenter, *CEO Compensation,* Annual Review of Financial Economics. 2, 75–102 (2010).

[171] *See, e.g.,* letter from Meridian Compensation Partners LLC (stating that ''disclosure of the CEO pay ratio will provide investors with little or no meaningful information about an issuer's executive or employee pay practices. We further believe that what value this information may have to investors is far outweighed by the administrative burden and associated costs borne by issuers in accumulating the compensation data necessary to make the CEO pay ratio disclosure.''); COEC I (opposing Section 953(b) because it ''does not believe that [the ratio] will provide any meaningful or material information that will be used by investors.''); Brian Foley & Co. (asserting that Section 953(b) disclosure ''realistically provides little serious added analytical value, and presents, in its current form, a variety of practical issues and potentially significant calculation costs.''); letter from NACD (stating that ''it would take global companies months and thousands of hours to come up with a completely useless number'').

[172] *See, e.g.,* letters from Group of Exec. Comp. Lawyers (''We are unaware of any evidence correlating corporate performance to the ratio of CEO pay to median employee pay.'') and Group of Trade Associations (''While it may be of general interest to some investors for different purposes, it is unclear how the pay ratio disclosure will be material for the reasonable investor when making investment decisions.''). *See also,* letter from RILA (noting ''current Item 402 requirements if applied to the overall employee population of an issuer will only serve to distort the already questionable meaning of the Compensation Ratio'').

[173] *See* Senate Report, *supra* note 23 (''Although provisions like this appeal to popular notions that chief executive officer salaries are too high, they do not provide material information to investors who are trying to make a reasoned assessment of how executive compensation levels are set. Existing SEC disclosures already do this.'').

[174] *See* letters from Americans for Financial Reform; Group of International Investors; and Social Investment Forum.

[175] We are not aware of any empirical studies that address the value of pay disparity disclosure specifically. We are aware of research that has studied whether there is a correlation between information about employee satisfaction and long-term equity returns in an effort to understand how the market values a public company's intangible assets. This research was based on the equity prices of companies that were identified on Fortune Magazine's list of the ''100 Best Companies to Work For in America.'' *See* A. Edmans, *Does the stock market fully value intangibles? Employee satisfaction and equity prices,* J. of Financial Economics 101, 621–640 (2011) (finding evidence implying that the market fails to incorporate intangible assets, like employee satisfaction, fully into stock valuations until the intangible subsequently manifests in tangibles, such as earnings, that are valued by the market; and finding evidence suggesting that the non-incorporation of intangibles into stock prices is not simply due to the lack of salient information about them).

[176] *See, e.g.,* COEC I and letters from Brian Foley & Co.; Group of Trade Associations; Meridian Compensation Partners, LLC; NACD; and RILA.

[177] We are not aware of any registrants that currently provide pay ratio disclosure in the form contemplated by the proposed rules in their filings with the Commission. However, several registrants provide (or in the past have provided) voluntary disclosures that provide a comparison of CEO compensation with worker pay.

[178] *See, e.g.,* B. Bushee and C. Leuz, *Economic consequences of SEC disclosure regulation: evidence from the OTC bulletin board,* J. of Accounting and Economics. 39, 233–264 (2005); R. Lambert, C. Leuz, and R Verrecchia, *Accounting Information, Disclosure, and the Cost of Capital,* J. of Accounting Research. 45, 385–420 (2007).

is calculated differs from the disclosure that would be required under the proposed rules, those companies may incur costs. We request comment throughout this release about the potential benefits of the disclosure mandated by the Dodd-Frank Act and the proposed rules and any alternative ways of achieving these benefits in a manner consistent with the Dodd-Frank Act. We seek further comment on the impact of the proposed requirements on the efficiency of the U.S. capital markets.

2. Costs

The following discussions are mainly intended to address costs to registrants that are subject to the pay ratio disclosure, investors who invest their capital in those registrants and employees of the registrants who invest their human capital in those registrants. As noted above, the provision does not identify a specific objective and therefore, the appropriateness of the costs in relation to the statutory objective is not readily assessable. Therefore, the following analysis on costs focuses on direct compliance costs on registrants and possible second-order effects on efficiencies and competition. We expect that the effects of the pay ratio disclosure requirement on capital formation would be minimal.

Many commenters raised concerns about the significant compliance costs that would arise from requiring the use of ''total compensation'' as defined in Item 402(c)(2)(x) to calculate employee pay and requiring registrants to identify the median instead of the average.[179] According to these commenters, the primary driver of the significant compliance costs is that many registrants, whether large multinationals or companies of modest revenue size and market capitalization, maintain multiple and complex payroll, benefits and pension systems (including systems maintained by third party administrators) that are not structured to easily accumulate and analyze all the types of data that would be required to calculate the annual total compensation for all employees in accordance with Item 402(c)(2)(x). Thus, in order to compile such disclosure, registrants would either need to integrate these data systems or consolidate the data manually, which, in both cases, these commenters have stated would be highly costly and time consuming.[180]

In addition, several commenters raised concerns about expected compliance costs arising from the complexity of the ''total compensation'' calculation under Item 402(c)(2)(x).[181] These commenters made various recommendations to simplify the total compensation definition, such as including only cash compensation, including only cash compensation and equity-based compensation, including only compensation that is reported to the U.S. Internal Revenue Service on Form W–2 or other relevant tax authority, or including only compensation that is required to be recorded in the payroll system of a particular jurisdiction and its overseas equivalents.[182]

As discussed elsewhere in this release, registrants would be able to choose from several options in order to identify the median and provide the required disclosure. Registrants may choose to calculate the annual total compensation for each employee and the PEO using Item 402(c)(2)(x) and to identify the median using this method. In addition, the proposed requirements would allow registrants to choose a statistical method to identify the median that is appropriate to the size and structure of their own businesses and the way in which they compensate employees, rather than prescribing a particular methodology or specific computation parameters. The proposed rules also would permit registrants to use a consistently applied compensation measure to identify the median employee and calculate and disclose that median employee's total compensation in accordance with Item 402(c)(2)(x). The proposed requirements also would permit registrants to use reasonable estimates in calculating the annual total compensation for employees other than the PEO, including when disclosing the annual total compensation of the median employee identified using a consistently applied compensation measure. We believe that this flexible approach is consistent with Section 953(b) and could ease commenters' concerns about the potential burdens of complying with the disclosure requirement. Also, allowing these specific alternatives could reduce the potential uncertainty for registrants as to how to comply with the proposed rules.

Although some commenters have estimated the cost of compliance for certain registrants,[183] the estimates we have received vary significantly. The estimates provided by commenters are also based on the commenters' initial reading and interpretation of the statute and not the proposed means of implementation. One commenter reported that a registrant estimated that compliance would cost approximately $7.6 million and take approximately 26 weeks,[184] while another registrant estimated approximately $2.0 million annually solely for computing the actuarial change in accrued pension benefit.[185] We have also received cost information from discussions with registrants and industry groups, including the following estimates:

- Approximately 201 to 500 hours per year, plus significant costs;
- $3 to $6.5 million for a multinational manufacturing company with 90 separate payrolls;
- $4.725 million for a multinational consumer products company (including an estimated 50 hours per country for employees located in 80 countries);
- $100 million dollars for a multinational company; and

[179] *See, e.g.,* letters from Davis Polk (noting that compliance will be ''highly costly and burdensome, with tremendous uncertainty as to accuracy. Companies are justifiably concerned about the costs and burdens to accomplish the formidable data collection and calculation tasks for employees worldwide between the end of the year and the first required filing.''); Frederick W. Cook & Co., Inc. (stating ''the calculation of median total pay for all employees other than the CEO is problematic, burdensome and perhaps impossible for many issuers'') and Protective Life Corporation (''It is difficult to overemphasize how burdensome this requirement could be for large employers. Calculating annual total compensation is much more complicated than simply adding up numbers that companies already have available . . . . Since many large companies use outside accounting, actuarial and compensation and pension administration firms to perform these calculations, the costs of disclosure will increase accordingly.'') *See also* COEC I and letters from ABA; Group of Exec. Comp. Lawyers; Group of Trade Associations; Meridian Compensation Partners, LLC; NACD; and R. Morrison.

[180] *See, e.g.,* COEC II and letters from Meridian Compensation Partners, LLC; R. Morrison; and Group of Trade Associations (''There is a widespread misconception that this information is readily available at the touch of a button.'').

For example, one commenter submitted a survey demonstrating that, of the 95 companies surveyed, 10.9% maintained a centralized payroll computer system that could be used to calculate cash compensation of each employee (or a sample of employees); 28.3% had payroll systems in each location or regionally that could be used to aggregate the data; 47.8% expected to compile the data manually and 13% expected to be able to use some combination of information technology and manual data gathering. *See* COEC II.

[181] *See, e.g.,* COEC I and II; and letters from American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

[182] *See* COEC I and letters from American Benefits Council; Brian Foley & Co; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

[183] *See* COEC II and letter from Group of Trade Associations.

[184] *See* letter from Group of Trade Associations (the commenter does not clarify whether these estimates reflect a one-time or ongoing annual burden).

[185] *See* letter from Group of Trade Associations.

• $350,000 to implement plus $100,000 a year for ongoing compliance for a global technology company.

We are, however, unable to quantify with any precision the compliance costs at this time.[186] Although these estimates are a useful starting point for our analysis, we do not believe the aggregate of these estimates necessarily represents an accurate indication of the expected compliance costs because they do not take into account the flexibility allowed under the proposed requirements.[187] Also, these estimates, although providing potentially useful data points, do not reflect costs incurred across the breadth of the registrant population subject to the requirement. Commenters did not provide sufficient information on the factors used to produce these estimates to enable us to evaluate these cost estimates, such as, among others, how separate payrolls are maintained within a company across divisions or subsidiaries, how the compensation components that the current payroll systems record compare to the ''total compensation'' as defined in Item 402(c)(2)(x), whether the estimated costs reflect internal personnel costs, technology costs or the costs of third-party service providers and outside professionals, and any assumptions used in deriving the estimates. Accordingly, we could not quantify differential costs from these estimates when the flexibility allowed under the proposed requirements is applied to each of those inputs. Also, these estimates do not precisely distinguish between initial and ongoing costs, while we expect that, for many registrants, the overall compliance burden will diminish after systems are in place to gather and verify the underlying data. We request comment throughout this release for additional information about the costs of compliance, including, where applicable, estimates or data that differentiate between categories of registrants facing relatively harder or easier burdens that could better inform our understanding of the direct and indirect costs of the proposed rules.

We are particularly sensitive to the competitive effects that could impact registrants subject to the requirements of Section 953(b). In this regard, we have assumed that these registrants would incur direct costs to compile the information and may incur indirect costs arising from revealing information about the cost structure of their workforce that registrants not covered by Section 953(b) would not have to reveal. Such costs are potentially significant, although as described elsewhere in this release we have sought to exercise our discretion to reduce such costs. Any material costs resulting from Section 953(b), however, could result in differential pressures from and treatment by market participants for companies competing in the same industry that are similar except for whether they are covered by Section 953(b). Accordingly, registrants covered by Section 953(b) could be at a competitive disadvantage to registrants (including private companies, foreign private issuers, smaller reporting companies and emerging growth companies) that are outside the scope of Section 953(b). This disadvantage could be greater for registrants that have already completed an initial public offering but that would otherwise have qualified for emerging growth company status.[188] In addition, we understand from commenters that some registrants covered by Section 953(b) would likely incur higher costs of compliance based on size, business type and level of integration of payroll and benefits systems—such as large, multinational companies that do not maintain integrated employee compensation information on a global basis. Therefore, the competitive impact of compliance with the disclosure requirements prescribed by Section 953(b) could disproportionately fall on U.S. companies with large workforces and global operations, although the incremental impact of the fixed cost components of compliance will be proportionally smaller for large, multinational companies compared to smaller companies.

We also acknowledge that there could be competitive impacts that result from indirect costs of disclosure. Registrants subject to Section 953(b) could be subject to competitive harm if their competitors are able to infer proprietary or sensitive information from the disclosure of the median of the annual total compensation of all employees. For example, it could be possible for a competitor to infer sensitive information about a registrant's cost structure based on information about median levels of employee compensation. This could also have an impact on labor markets if competitors use the disclosure to target and hire away a registrant's employees. We have sought to use our discretion to reduce the potential for such indirect costs, by permitting flexibility in the manner in which issuers may determine median compensation. We request comment on whether the flexibility provided by the proposed rule would make it more difficult for competitors to infer a registrant's cost structure from such disclosure. Alternatively, a registrant subject to Section 953(b) could be at a competitive disadvantage when hiring or retaining a PEO if there is pressure to limit PEO wages based on the pay ratio disclosure while non-covered registrants are not subject to the same pressure.

Finally, a registrant subject to Section 953(b) could face pressure from its PEO or from employees to increase compensation in light of the pay ratio disclosure of the registrant's competitors. Alternatively, there could be incentives to alter the median employee compensation either by increasing all employee compensation or by reducing the number of lowest wage employees or groups of employees, such as a specific office or division of a company. One method of doing this, as previously mentioned, is through outsourcing operations to third parties, including through the use of independent contractors, ''leased'' workers or other temporary employees. In some instances this might not harm and could even improve the profit margin of the registrant, but it could also result in changes to the business structure that are inefficient. Pressure for a registrant to maintain a low pay ratio could also curtail the expansion of business operations into lower cost geographies. This could adversely affect states and municipalities in lower wage geographies seeking to generate jobs for their communities. We do not have data that can be used to analyze the likelihood or potential magnitude of these impacts. We request comment on these and any other potential uses of the disclosure that could result in costs for registrants or that could impact competition.

[186] In light of the limitations of these estimates, we were not able to use these estimates to inform the hour and cost burden estimates that are required by the Paperwork Reduction Act of 1995 (the ''PRA''). *See* Section V of this release. Our discussion and analysis in that section describes the assumptions we made for purposes of deriving our PRA estimates. We request comment on our PRA estimates in Section V. We expect to review and revise those PRA estimates in light of any further information we receive on estimated costs.

[187] We expect that the flexibility allowed under the proposed requirements could, at least for some registrants, substantially reduce the overall compliance burden, and we request estimates or data that quantifies this impact.

[188] Registrants that completed their first sale of common equity in a registered offering before December 8, 2011 do not qualify as emerging growth companies, regardless of the level of their annual total revenues or public float. *See* Section 101(d) of the JOBS Act. These registrants could be at a competitive disadvantage to companies with similar levels of revenue and public float that do qualify as emerging growth companies.

D. Discussion of Benefits and Costs Arising From the Exercise of Our Discretion

1. General

In addition to the statutory benefits and costs described above, we believe that the use of our discretion in implementing the statutory requirements could result in benefits and costs to registrants and users of the pay ratio disclosure. We discuss below the choices we made in implementing the statute and the associated benefits and costs. We are unable, in most cases, to provide quantified estimates of these benefits and costs because we lack particularized data on the potential effects of these policy choices. Specifically, we expect that most registrants do not currently track total compensation as determined pursuant to Item 402 for their employees, thus we would not be able to acquire sufficiently analogous data.

In general, the proposed rules implementing Section 953(b) are designed to comply with the statutory mandate. Because commenters supporting Section 953(b) have emphasized the potential benefits that could arise from adding pay ratio information to the total mix of executive compensation information,[189] we have sought to make the mandated disclosure of Section 953(b) work with the existing executive compensation disclosure regime. In light of the significant potential costs that commenters attribute to the requirements of Section 953(b),[190] we believe that it is appropriate for the proposed rules to allow registrants flexibility, which we believe should help lower the costs of compliance generally. The proposal seeks to implement Section 953(b) without imposing additional requirements that are not mandated by the Dodd-Frank Act. In this respect, the proposed requirements reflect our consideration of the relative costs and benefits of a more flexible approach as opposed to a more prescriptive approach.

In weighing alternatives, we considered the potential costs and benefits of comparability of disclosure across registrants. Although a flexible approach could reduce the comparability of disclosure across registrants, we do not believe that precise conformity or comparability of the ratio across companies is necessarily achievable, due to the variety of factors that could influence the ratio,[191] or justifiable, in light of the substantial additional costs that such an approach would impose on registrants. In addition, we believe that a flexible approach would not significantly diminish the potential benefits of the mandated disclosure. In this respect, we note that some commenters suggest that the expected benefits of pay ratio disclosure derive from its ability to offer an internal comparison, by providing a metric by which a PEO's compensation can be evaluated within the context of his or her own company.[192] We also acknowledge that some commenters that support Section 953(b) disclosures suggest that the mandated disclosure could be used to compare compensation practices between companies and registrants,[193] and our flexible approach could impose costs on investors seeking to use the pay ratio disclosure to compare registrants. We note, however, that using the ratios to compare compensation practices between registrants without taking into account inherent differences in business models, which may not be readily available information, could possibly lead to potentially misleading conclusions and to unintended consequences.

2. Implementation Choices and Alternatives

a. Filings Subject to the Proposed Disclosure Requirements

Although some commenters raised questions as to whether Section 953(b)(1) could be read to require pay ratio disclosure in every Commission filing,[194] other commenters suggested that the statute, by referring to filings described in Item 10(a) of Regulation S–K, is better read as applying only to those filings for which the applicable form requires Item 402 disclosure.[195] The proposed requirements follow the latter approach. We believe that requiring pay ratio disclosure in filings that do not contain other executive compensation information would not present this information in a meaningful context. Because some commenters have asserted that the pay ratio disclosure would provide another metric to evaluate executive compensation disclosure,[196] we believe that the proposed pay ratio disclosure would be less useful for this purpose if it were provided on a stand-alone basis, unaccompanied by other Item 402 information, such as the summary compensation table required by Item 402(c) and the compensation discussion and analysis required by Item 402(b). Therefore, we believe it is appropriate to read Section 953(b) as requiring pay ratio disclosure in only those filings that are required to include other Item 402 information. We seek information from commenters regarding how to quantify the costs or the benefits of this approach.

b. Registrants Subject to the Proposed Pay Ratio Disclosure Requirements

The proposed requirements would apply to only those registrants that are required to provide summary compensation table disclosure pursuant to Item 402(c). We recognize that the reference to ''each issuer'' in Section 953(b) could be read to apply to all issuers that are not emerging growth companies, including smaller reporting companies and foreign private issuers. As a result of the specific reference in Section 953(b) to the definition of total compensation contained in Item 402(c)(2)(x), and the absence of Congressional direction to apply this requirement to companies not previously subject to Item 402(c) requirements, the proposals would not apply to registrants that are not subject to Item 402(c) requirements.

As discussed in detail above in Section II.B.2.a., we considered whether a broader reading of the statute was warranted in the context of smaller reporting companies. Requiring smaller reporting companies to provide the pay

[189] *See, e.g.,* letters from Americans for Financial Reform; Group of International Investors; Calvert Investment Management; CtW Investment Group; K. Burgoyne; House Letter; Institute for Policy Studies; Senate Letter; Social Investment Forum; Trillium Asset Management; UAW Retiree Medical Benefits Trust; and S. Towns.

[190] *See, e.g.,* letter from Group of Trade Associations.

[191] We note that some commenters raised the issue of comparability in their letters. For example, Towers Watson noted, ''Among other issues, there's no way (without significantly more information) to reliably compare ratios between companies. For example, companies in different industries will pay their employees at different levels. And even within the same industry, companies located in different geographical areas will pay their employees at different levels. As a result, this disclosure does not provide much meaningful information regarding differences in executive to employee pay ratios from company to company.'' *See* letter from Towers Watson. *See also* letter from RILA (noting that pay ratio disclosure ''is more likely to result in confusion and erroneous comparisons between companies because of inherent differences in business models, staffing and compensation practices . . . these disparate results are only magnified if the ratio is used to compare publicly traded companies across industry sectors.'').

[192] *See* letters from CtW Investment Group; and letter from Senator Menendez.

[193] *See, e.g.,* AFL–CIO I and letter from Americans for Financial Reform.

[194] *See, e.g.,* COEC I and letters from American Benefits Council; Davis Polk; Compensia, Inc.; SCSGP; and Towers Watson.

[195] *See, e.g.,* letters from ABA and RILA.

[196] *See, e.g.,* Senate Letter; House Letter; and AFL–CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

ratio disclosure consistent with the requirement for other registrants would require smaller reporting companies to collect data and calculate compensation for the PEO in a manner they otherwise would not be required to calculate compensation. Although quantifying the costs to smaller reporting companies of calculating PEO compensation under Item 402(c)(2)(x) instead of under Item 402(n)(2)(x), or of complying with the requirements prescribed by Section 953(b), is not currently feasible, we assume that such costs could be significant. Based on a review of EDGAR filings for calendar year 2011, we estimate that there are approximately 3,750 smaller reporting companies that would benefit by not being required to comply with the proposed requirements.

We also considered whether to expand the coverage of the proposed requirements to registrants, such as foreign private issuers and MJDS filers, that are not currently required to provide Item 402 disclosure. Foreign private issuers, for example, provide a modified version of executive compensation disclosure under Form 20–F, while MJDS filers follow the executive compensation requirements arising under Canadian law. Although quantifying the costs to these registrants of calculating PEO compensation under Item 402(c)(2)(x) or of complying with the requirements prescribed by Section 953(b) is not currently possible, we assume that such costs could be significant. Based on a review of EDGAR filings for calendar year 2011, we estimate that there are approximately 750 foreign private issuers filing on Form 20–F and 144 MJDS filers that would benefit from the exclusion from the proposed requirements.

c. Employees Included in the Identification of the Median

Section 953(b) expressly requires disclosure of the median of the annual total compensation of ''all employees.'' Consistent with that mandate, the proposed requirements state that ''employee'' or ''employee of the registrant'' includes any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries (including officers other than the PEO).[197] Therefore, under the proposed requirements, ''all employees'' covers all such individuals. In contrast, workers who are not employed by the registrant or its subsidiaries, such as independent contractors or ''leased'' workers or other temporary workers who are employed by a third party, would not be covered.

We considered whether Section 953(b) is intended to cover employees of the registrant alone, or also cover employees of the registrant's subsidiaries. By directing the Commission to amend Item 402, we believe that Section 953(b) is intended to cover employees on an enterprise-wide basis, including both the registrant and its subsidiaries, which is the same approach as that taken for other Item 402 information. This interpretation could raise compliance costs for registrants that are holding companies that have a significant portion of their workers employed by operating subsidiaries rather than by the holding company. We also note that allowing a holding company registrant to exclude employees from the identification of the median solely on the basis of its corporate structure could affect the potential meaningfulness of the disclosure. Further, allowing holding company registrants to exclude employees could provide a potential competitive advantage over non-holding company registrants due to lower compliance costs associated with having fewer workers covered by the rule.

Because Section 953(b) directs the Commission to amend Item 402, we believe it is appropriate to apply the same definition of subsidiary that is used for other disclosure under Item 402. We acknowledge that compliance costs for some registrants potentially could be further reduced if we limited the application of the proposed rules to employees of wholly-owned subsidiaries, or some other definition of subsidiary. We request comment on whether using a different definition of subsidiary would reduce costs for registrants, or whether it would raise costs by causing registrants to make a new, separate determination of which entities are subsidiaries for purposes of pay ratio requirements. Comment is also requested on whether a different definition of subsidiary would affect any benefits expected to be derived from the proposed rule. Because registrants already make the determination of which entities are subsidiaries for purposes of Rule 405 and Rule 12b–2 in connection with other required disclosure, we believe that using the same set of entities for purposes of the proposed requirements would simplify compliance for most registrants and make the information easier for users of the information to understand.

We recognize that it is possible that a registrant could alter its corporate structure or its employment arrangements in order to reduce the number of employees covered by the rule, and, therefore, reduce its costs of compliance or to alter the reported ratio to achieve a particular objective with the ratio disclosure. For example, a registrant could choose to use only independent contractors or ''leased'' workers instead of hiring its own employees. Or a registrant could choose to outsource or franchise some aspects of its business, either to lower compliance costs by having fewer employees subject to the proposed pay ratio requirements or in an effort to ''improve'' its pay ratio. One commenter has questioned the likelihood of this behavior.[198] To the extent that there is an incentive for companies to change their business model to adjust their pay ratio, such an incentive would arise wherever a prescriptive standard is used. Therefore, we have sought to avoid adding prescriptive standards that are not mandated by the Dodd-Frank Act.

As discussed in Section II.C.2.a., we acknowledge the concerns of commenters that the inclusion of non-U.S. employees raises compliance costs for multinational companies and introduces cross-border compliance issues. We also recognize that these companies could suffer competitively if they compete with companies that have lower costs of compliance, due to, for example, fewer employees, fewer global locations, or data systems that are more centralized. We have weighed these considerations and are proposing that the requirement cover all employees without carve-outs for specific categories of employees.

Although we believe that the inclusion of non-U.S. employees in the calculation of the median is consistent with the statute, we considered ways to address the costs of compliance that commenters attribute to the provision's coverage of a registrant's global workforce. In particular, we considered the concerns of commenters that data privacy regulations in various jurisdictions could impact the ability of registrants to gather and verify the data needed to identify the median. We believe that the proposed flexibility

[197] Rule 405 under the Securities Act states that the term ''employee'' does not include a director, trustee or officer. This parenthetical in the proposed rules is intended to clarify that officers, as that term is defined under Rule 405, are not excluded from the definition of employee for purposes of the proposed pay ratio disclosure requirements.

[198] *See* AFL–CIO I (''It is simply not credible to suggest that companies will dramatically restructure their operations to manipulate this [pay ratio] data. Moreover, such a business decision would be improper under state corporate laws that require boards of directors to put the interests of shareholders before the interests of company CEOs who may be potentially embarrassed by their companies' Section 953(b) disclosures.'').

afforded to registrants in selecting a methodology to identify the median, such as statistical sampling, the use of a consistently applied compensation measure to identify a median employee, as well as the ability of registrants to use reasonable estimates in the calculation of total compensation of employees other than the PEO and the identification of the median, could enable registrants to better manage the costs and burdens arising from local data privacy regulations. We specifically requested comment on these issues in order to gain more information about appropriate ways to address these potential issues in a way that is consistent with Section 953(b) and the costs and benefits of any alternatives.

Section 953(b) does not prescribe a particular calculation date for the determination of who should be treated as an employee for purposes of the rule. We believe that a bright line calculation date for determining who is an employee would ease compliance for registrants by eliminating the need to monitor changing workforce composition during the year, while still providing a recent snapshot of the entire workforce. Accordingly, the proposed requirement includes a calculation date for determining who is an employee for purposes of identifying the median by defining ''employee'' as an individual employed as of the last day of the registrant's last completed fiscal year.[199] This calculation date would be consistent with the one used for determining the named executive officers under current Item 402 requirements.

We believe that the potential benefits of the disclosure mandated by Section 953(b) would not be significantly diminished by covering only individuals employed at year-end, rather than covering every individual employed during the year. Although we believe that this approach could help contain compliance costs for registrants, by not requiring registrants to monitor the composition of the workforce during the year, we note that it could have other economic effects. For example, this approach would not capture seasonal or temporary employees that are not employed at year-end. In the case of a registrant with a significant amount of such workers, the exclusion of such workers from the median calculation could reduce the potential benefits of the rule, as a median so calculated may not fully reflect the workforce required to run the registrant's business. It could also cause the proposed requirements to be costlier for, and thereby have an anti-competitive impact on, registrants whose temporary or seasonal workers are employed at year-end as opposed to at other times during the year. Finally, it is possible that registrants could try to structure their employment arrangements to reduce the number of workers employed on the calculation date or to alter the reported ratio to achieve a particular objective with the ratio disclosure, although it is not known whether registrants will do so. Currently, it is not possible to quantify whether any such restructuring of employee arrangements would have a material impact on a registrant's reported median annual total compensation. Comment is requested on this issue.

The proposed requirements also include an instruction that permits a registrant to annualize the compensation for all permanent employees (other than those in temporary or seasonal positions) who were employed for less than the full fiscal year. We did not propose to require registrants to perform this type of adjustment, however, because we do not believe that the costs of requiring companies to make an extra calculation would be justified.

We believe that this annualizing adjustment would not significantly diminish the potential usefulness of the disclosure mandated by Section 953(b), particularly because the ratio uses median employee compensation, not average employee compensation. For example, we would not expect that annualizing the salary of a permanent new hire would impact the potential ability of an investor to use the pay ratio disclosure as an indicator of employee morale or to gain an understanding of a registrant's investment in human capital, which some commenters have identified as a benefit of the disclosure under Section 953(b).[200] For annualizing adjustments to have any significant impact on the reported pay ratio, both the fraction of permanent new hires to all employees of the registrant and their annualized compensation would have to be relatively large. We do not believe those factors are typical of employment arrangements of many registrants. We also note that some of the commenters that support Section 953(b) disclosure were also supportive of allowing annualizing adjustments.[201]

By permitting, but not requiring, registrants to annualize compensation for these employees, the comparability of disclosure across companies could be reduced. We do not believe that precise comparability or conformity of disclosure from registrant to registrant is necessarily achievable due to the variety of factors that could cause the ratio to differ, and, accordingly, we do not believe that the costs associated with promoting precise comparability would be justified. We assume that comparability of disclosure would be promoted at a lower cost to registrants by proscribing all annualizing adjustments, rather than by prescribing rules for making such adjustments for employees who were employed for less than the full year.

d. Identifying the Median

Section 953(b) does not expressly set forth a methodology that must be used to identify the median, nor does it mandate that the Commission must do so in its rules. In order to allow the greatest degree of flexibility while maintaining consistency with the statutory provision, the proposed requirements do not specify any required calculation methodologies for identifying the median.[202]

Several commenters recommended allowing companies to use total direct compensation (such as annual salary, hourly wages and any other performance-based pay) or cash compensation to first identify a median employee.[203] We agree that the costs of compliance could be reduced if registrants were permitted to identify the median of a less complex, more readily available figure, such as salary and wages, rather than total compensation as determined in

[199] Proposed Item 402(u)(4).

[200] *See* AFL–CIO I and letters from Calvert Investment Management; CtW Investment Group; Group of International Investors; Americans for Financial Reform; Drucker Institute; Institute for Policy Studies; Social Investment Forum; Trillium Asset Management; and UAW Retiree Medical Benefits Trust.

[201] *See* AFL–CIO II and letters from Social Investment Forum and Trillium Asset Management.

[202] One of the difficulties in identifying a median arises from the situation that a registrant with multiple business units, geographical operations, or subsidiaries maintains payroll data at each business unit or subsidiary. Calculating the average for the consolidated entity only requires each subsidiary or business unit to convey information on the total (or average) compensation and the number of its employees to its parent entity, whereas identifying the median requires transferring the entire set of compensation data from each subsidiary to the parent entity. We recognized that registrants with multiple operations are likely to maintain payroll data at the business unit or subsidiary level, and thus allowing them to use the average employee compensation could reduce their compliance costs. Nevertheless, we believe that Section 953(b) is clear in requiring the median rather than the average.

[203] *See* AFL–CIO II and letters from ABA; American Benefits Council; Americans for Financial Reform; CtW Investment Group; Protective Life Corporation; RILA; and SCSGP.

accordance with Item 402(c)(2)(x). This approach could also help reduce costs for registrants that are not able to reduce costs using statistical sampling techniques. We are proposing to permit registrants to use any consistently applied compensation measure to identify the median employee and then calculate that median employee's annual total compensation in accordance with Item 402(c)(2)(x). For purposes of estimating the median employee, registrants may use the same annual period that is used in the payroll or tax records from which the compensation amounts are derived. We believe that registrants would be in the best position to select a compensation measure that is appropriate to their own facts and circumstances and that a consistently applied compensation measure would result in a reasonable estimate of a median employee. After identifying the median employee, registrants would be required to calculate that employee's annual total compensation in accordance with Item 402(c)(2)(x) for the last completed fiscal year, which would provide comparability with the calculation of the PEO's total compensation without imposing significant costs.

Allowing registrants to choose this alternative approach is likely to reduce registrants' compliance costs significantly, compared to requiring registrants to calculate total compensation in accordance with Item 402(c)(2)(x) for all employees and then identify the median. Registrants that choose this alternative approach would be able to identify a median employee from employee compensation data that they may already track or record or that may be less expensive for them to acquire than acquiring and computing all of the Item 402(c)(2)(x) compensation information for each employee. We acknowledge, however, that some registrants would still incur costs if they have to combine or sample from separately maintained payroll systems across segments and/or geographic locations. In addition, the proposal specifically permits registrants, in identifying a median employee, to use compensation amounts reported in payroll or tax records. This approach would reduce uncertainty for registrants and may also be less costly to them, compared to other alternatives that may use various sources of compensation data to generate reasonable estimates of total compensation in accordance with Item 402(c)(2)(x).

We are proposing this flexible approach because we believe that the appropriate and most cost effective methodology would necessarily depend on a registrant's particular facts and circumstances, including, among others, such variables as size and nature of the workforce, complexity of the organization, the stratification of pay levels across the workforce, the types of compensation the employees receive, the extent that different currencies are involved, the number of tax and accounting regimes involved, the number of payroll systems the registrant has and the degree of difficulty involved in integrating payroll systems to readily compile total compensation information for all employees. We believe that these are likely the same factors that would cause substantial variation in the costs of compliance. By not prescribing specific methodologies that must be used, the proposed requirements would allow registrants to choose a method to identify the median that is appropriate to the size, structure and compensation practices of their own businesses, including permitting a registrant to identify the median employee using any consistently applied compensation measure. In addition, this flexibility could enable registrants to manage compliance costs more effectively than a more prescriptive approach would allow. We also believe that, by allowing registrants to minimize direct compliance costs, a flexible approach could mitigate, to some extent, any potential negative effects of the mandated requirements on competition. We recognize, however, that a flexible approach could increase uncertainty for registrants that prefer more specificity on how to comply with the proposed rules, particularly for registrants that do not use statistical analysis in the ordinary course of managing their businesses. In light of this potential uncertainty, we have provided clarity to registrants that the use of statistical sampling or other reasonable estimates in identifying the median would be permitted, as well as identifying the median employee based on any consistently applied compensation measure.

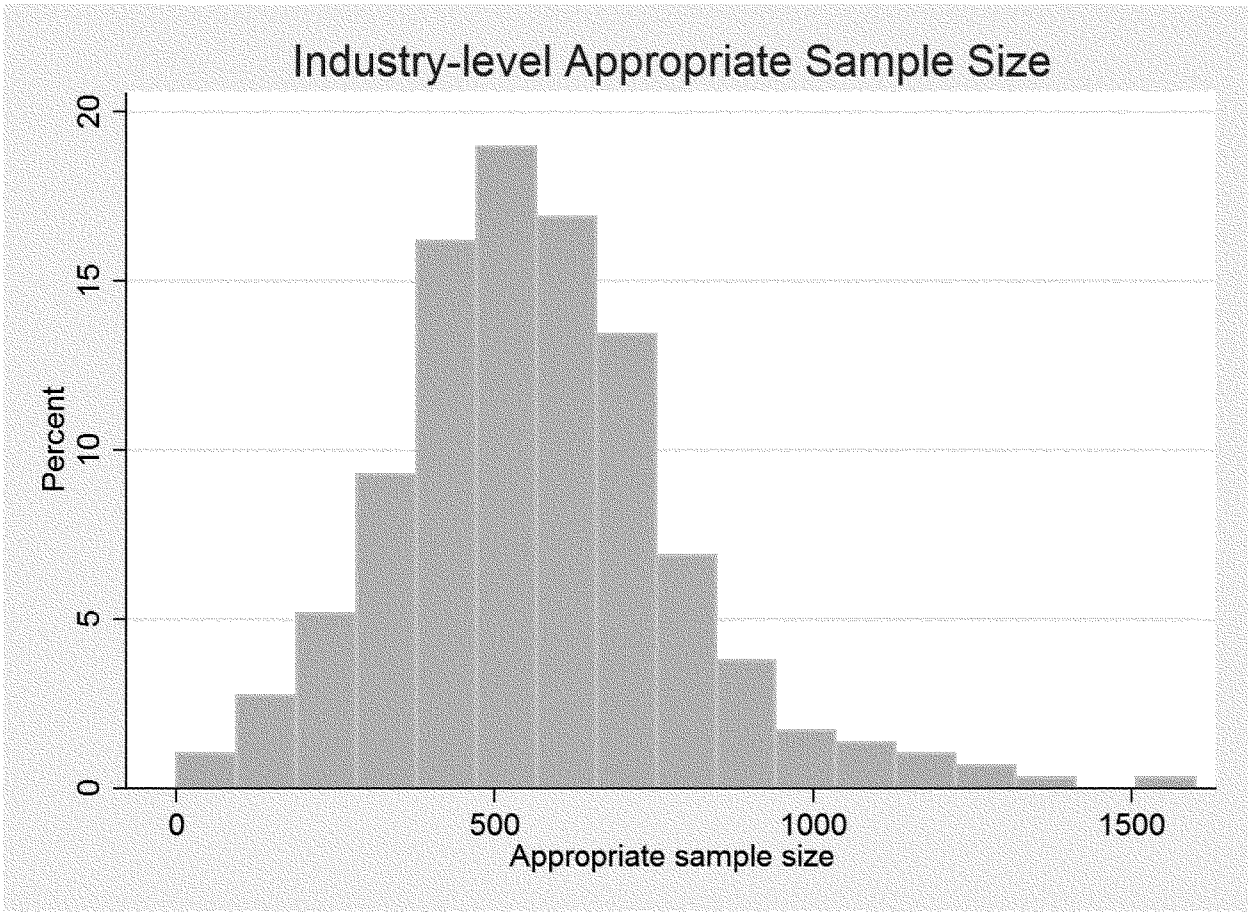
The reduction in compliance costs by using statistical sampling or other reasonable estimates in determining median would ultimately depend on a registrant's particular facts and circumstances. For example, in the following figure and tables, we show that the variance of underlying wage distributions can materially affect the appropriate sample size for statistical sampling.[204] Industries characterized by the Bureau of Labor Statistics as having low wage variances, such as *Motor Vehicle Manufacturing, Electric Power Generation, Coal Mining,* have estimated minimum appropriate sample sizes for an accurate median estimate of less than one hundred. In contrast, industries characterized by the high wage variances, such as *Offices of Physicians, Spectator Sports, and Motion Picture and Video* industries, have estimated minimum appropriate sample sizes of more than 1,000 employees. Figure 2 shows the distribution of estimated minimum appropriate sample sizes for each of the 290 4-digit NAICS industries tracked by the BLS.

[204] The analysis uses mean and median wage estimates from the Bureau of Labor Statistics (BLS) at the 4-digit NAICS industry level (290 industries) and assumes a lognormal wage distribution, a 95% confidence interval with 0.5% margin of error in the estimate of the median of the logarithm of wage. The lognormal wage distribution assumption is supported by the following studies: F. Clementi, and M. Gallegati, *Pareto's law of income distribution: evidence for Germany, the United Kingdom, and the United States.* Econophysics of Wealth Distributions, New Economic Window. 3–14 (2005), and J. López and L. Servén, *A Normal Relationship? Poverty, Growth and Inequality.* World Bank Policy Research Working Paper 3814 (2006). Also, see M. Pinkovskiy and X. Sala-i-Martin, *Parametric Estimations of the World Distribution of Income,* NBER Working Paper 15433, (2009). This analysis also assumes that when the sampling is implemented, the sampling method would be a true random sampling, *i.e.,* it would not be biased by region, occupation, rank, or other factor.

TABLE 2—THE INDUSTRIES WITH THE LARGEST AND SMALLEST APPROPRIATE SAMPLE SIZES

Industry	Mean wage ($)	Median wage ($)	Appropriate sample size
10 industries with smallest variance in wage distribution:			
Electric Power Generation, Transmission and Distribution	67,950	65,790	81
Motor Vehicle Manufacturing	56,160	54,430	81
Coal Mining	53,560	51,610	97
Support Activities for Water Transportation	57,220	55,080	99
Other Pipeline Transportation	67,240	64,180	117
Metal Ore Mining	56,540	53,900	124
Natural Gas Distribution	68,630	64,930	139
Wired Telecommunications Carriers	62,540	59,050	147
Software Publishers	91,050	85,290	156
Rail Transportation	56,020	52,560	166
10 industries with largest variance in wage distribution:			
Offices of Physicians	69,710	38,960	1,601
Spectator Sports	40,550	25,720	1,357
Motion Picture and Video Industries	61,280	38,580	1,276
Health and Personal Care Stores	40,860	26,790	1,248
Home Health Care Services	36,650	24,600	1,199
Cut and Sew Apparel Manufacturing	34,530	23,280	1,199
Independent Artists, Writers, and Performers	63,560	41,550	1,156
Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures	67,660	44,820	1,104
Other Professional, Scientific, and Technical Services	45,860	31,470	1,079
Electronic Shopping and Mail-Order Houses	43,710	30,230	1,065

Figure 2. The distribution of appropriate sample size for median estimates for different industries.



Because these estimated minimum appropriate sample sizes are based on wage distributions measured by the BLS in standardized industries, they may not correspond to the appropriate minimum sample size at registrants with an

employee base that does not correspond precisely to one of these industries. Even for registrants whose operations are wholly within one of these standardized industries, their appropriate sample size may also be different to the extent that their distribution of employee wages is different than that of the industry. In these instances, a registrant's appropriate sample size could be higher or lower than that estimated for its industry.

Of the nearly 4,000 registrants that we believe will be subject to the rule, we estimate that approximately 50% have an organizational structure characterized by a compensation distribution that falls into a tractable statistical distribution category, which would allow the registrant use a simple random sampling method.[205] Of these registrants for which we have industry classifications that match the BLS data, Table 3 shows estimated minimum appropriate sample sizes assuming that each registrant's wage distribution is similar to the BLS-measured industry distribution.

TABLE 3—NUMBER OF REGISTRANTS ACCORDING TO SAMPLE SIZE RANGES

Sample size (n) ranges	Number of registrants	Mean wage ($)	Median wage ($)
n < 100	77	62,281	60,245
100 ≤ n < 250	149	50,269	46,298
250 ≤ n < 500	441	45,154	39,232
500 ≤ n < 750	682	41,736	33,410
750 ≤ n < 1000	119	46,997	34,897
n ≥ 1000	29	61,221	37,906
Total	1,497		

For the remaining 50% of the potentially affected registrants that have multiple business segments, and thus are likely to maintain their payroll systems separately for each segment, statistical sampling could involve more steps and other assumptions. This may be particularly true for approximately 25% of the potentially affected registrants that self-report that they have both multiple business segments and geographical segments.

While we believe that there is more than one statistical sampling approach that could result in reasonable estimates of the median for these registrants, all would be more complicated than simple random sampling. The alternative approaches would require drawing observations from each business or geographical segment with a unique distribution of compensation and statistically inferring the registrant's overall median based on the observations drawn. For example, the statistical inference may involve a weighted sample median using a stratified cluster sampling,[206] or a numerically solved median estimate based on their knowledge or assumptions on the size and distribution for each segment and pre-estimated mean and variance of each business or geographical segment. Some methods, however, may not easily generate confidence intervals around the estimates or prescribe a minimum sample size. As a result, generating reasonable estimates through statistical sampling could result in a disproportionally higher cost to registrants with more complicated payroll systems or organization structures. Nevertheless, we believe that permitting registrants to use statistical sampling may lead to a reduction in compliance costs as compared to other methods of identifying the median.

We believe that a flexible approach would not significantly diminish the potential benefits of the disclosure mandated by Section 953(b). Although the proposed flexible approach could reduce the comparability of disclosure across registrants, we do not believe that precise conformity or comparability of the ratio across companies is necessary. As noted earlier in this release, some commenters believe that a primary benefit of the pay ratio disclosure would be providing a company-specific metric that investors could use to evaluate the PEO's compensation within the context of his or her own company, rather than a benchmark for compensation arrangements across companies. Accordingly, we do not believe that improving the comparability of the disclosure across companies by mandating a specific method for identifying the median would be justified in light of the costs that would be imposed on registrants by a more prescriptive rule. We do not believe that mandating a particular methodology would necessarily improve the comparability across companies because of the numerous other factors that could also cause the ratios to be less meaningful for company-to-company comparison. We also believe that greater comparability across companies could increase the likelihood that a registrant's competitors could infer proprietary or sensitive information about the registrant's business. This in turn could increase the indirect costs to registrants of the proposed requirements, such as competitive harms in labor markets discussed in the previous section or general costs arising from the mandated disclosure requirement.

Finally, we recognize that allowing registrants to select a methodology to identify the median, including identifying the median employee using and allowing the use of reasonable estimates, rather than prescribing a methodology or set of methodologies, could reduce benefits for investors if that flexibility enables a registrant to make its pay ratio appear more ''favorable'' and thus results in a pay ratio that does not reflect a more precisely and consistently calculated ratio. We are not able to determine, however, the extent to which the flexibility allowed by the proposed requirements could actually enable a registrant to adjust its pay ratio in any material respects.

[205] This estimate is based on data from Standard and Poor's Compustat Segment database. Segment information is available for approximately 65% of the potentially affected registrants. Among these, 50% report having multiple business segments and 60% report having multiple geographical segments. Also, 25% of the potentially affected registrants self-report that they have both multiple business segments and geographical segments. Because the segment information is self-reported by the companies, it not based on standardized definitions of geographic areas such as states, countries or regions. Multiple geographical segments could represent different geographies with similar operations and thus similar wage distributions, for examples, different states within the United States.

[206] *See, e.g.,* S. Gross. Median estimation in sample surveys. In Proceedings of the Section on Survey Research Methods. American Statistical Association, 181–184. (1980).

e. Determination of Total Compensation

As mandated by Section 953(b), the proposed requirements would define ''total compensation'' by reference to Item 402(c)(2)(x) as in effect on the day before the date of enactment of the Dodd-Frank Act, or July 20, 2010. We note that several commenters raised concerns about the potential compliance costs that could arise from the complexity of the ''total compensation'' calculation under Item 402(c)(2)(x).[207] Commenters have observed that, because of this complexity, registrants typically compile information required by Item 402(c) manually for the named executive officers, which they have stated takes significant time and resources.[208] We also note that commenters have raised concerns about the ability of companies to compile and verify the data needed to calculate total compensation in accordance with Item 402(c)(2)(x) for every employee and have asserted that the costs of doing so would be significant and unwarranted in light of the potential benefits of the disclosure, which such commenters anticipate to be minimal.[209] To address these concerns, some commenters recommended that registrants be permitted to use reasonable estimates to determine the value of the various elements of total compensation of employees in accordance with Item 402(c)(2)(x).[210] We generally support this recommendation and we provided guidance about the use of estimates in this context.

We do not believe that the use of reasonable estimates would diminish the potential usefulness of the pay ratio disclosure as a general point of comparison of PEO pay to employee pay within a company, and we do not believe that the use of reasonable estimates would be inconsistent with Section 953(b). Furthermore, we believe that requirements that allow registrants to use reasonable estimates in these calculations would impose lower compliance costs than requirements that prohibit the use of estimates. We acknowledge that, however, to the extent that the use of estimates causes the ratio to be an inaccurate reflection of the registrant's median compensation, it could diminish the potential usefulness of the disclosure.

As discussed above, the proposal allows registrants to identify the median employee using any consistently applied compensation measure and then determine and disclose the Item 402(c)(2)(x) total compensation for that median employee. A registrant would be permitted to calculate compensation for all employees in accordance with Item 402(c)(2)(x), but would only be required to calculate and disclose such information for the median employee. The proposed rules also permit registrants to use reasonable estimates in the calculation of annual total compensation for the median employee that must be disclosed and used in the pay ratio.

f. Disclosure of Methodology, Assumptions and Estimates; Additional Disclosure

We are proposing instructions for the disclosure of the methodology and material assumptions, adjustments and estimates used in the identification of the median or the calculation of the annual total compensation (or any elements of total compensation) of employees. The proposed instruction provides that registrants must briefly disclose and consistently apply any methodology used to identify the median and any material assumptions, adjustments or estimates used to identify the median or to determine total compensation or any elements of total compensation, and registrants must clearly identify any estimated amount as such. Registrants' disclosure of the methodology and material assumptions, adjustments and estimates used should be designed to provide information for a reader to be able to evaluate the appropriateness of the estimates. For example, when statistical sampling is used, registrants should disclose the size of both the sample and the estimated whole population, any material assumptions used in determining the sample size, which sampling method (or methods) is used, and, if applicable, how the sampling method deals with separate payrolls such as geographically separated employee populations or other issues arising from multiple business or geographic segments. In order to promote comparability from year to year, the instruction also provides that, if a registrant changes methodology or material assumptions, adjustments or estimates from those used in the previous period, and if the effects of any such change are material, the registrant must briefly describe the change, the reasons for the change and an estimate of the impact of the change on the median and the ratio. This approach is consistent with other Commission rules that allow registrants flexibility to choose a methodology, such as the valuation method for determining the present value of accrued pension benefits in Item 402(h)(2) or the description of models, assumptions and parameters in Item 305 of Regulation S–K (quantitative and qualitative disclosures about market risk). Five commenters recommended requiring this information in cases where the rules allowed registrants to use estimation techniques.[211]

Because we are concerned that disclosure about methodology, assumptions, adjustments and estimates could become dense and overly technical, which we believe would limit its usefulness, the instruction asks for a brief overview and makes clear that it is not necessary to provide technical analyses or formulas. We do not believe that a detailed, technical discussion (such as statistical formulas, confidence levels or the steps used in data analysis) would enhance the potential usefulness of the pay ratio, as suggested by some commenters,[212] as a metric to evaluate the level of PEO compensation. We expect that a succinct description of the methodology and material assumptions, adjustments and estimates used would not be overly burdensome for registrants and would be more informative for investors. We expect that the costs of the additional disclosure on registrants would be marginal, as these additional disclosures are intended to simply describe what has already been done or assumed in the calculations, and therefore will not require additional actions for registrants. It is likely that some costs may be incurred in developing and reviewing the appropriate language to describe the approach taken.

We considered the recommendations of commenters relating to requirements for additional narrative discussion of the ratio and supplemental information about a registrant's employee compensation structures and policies.[213] Section 953(b) does not mandate a narrative discussion to accompany the pay ratio disclosure, and the proposed requirements do not include a specific requirement for narrative discussion of the ratio, its components or any supplemental information that could provide context

[207] *See, e.g.,* COEC I and II; and letters from American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Group of Trade Associations; Protective Life Corporation; SCSGP; and Towers Watson.

[208] *See* letter from Davis Polk.

[209] *See, e.g.,* COEC I and II; and letters from ABA; American Benefits Council; Protective Life Corporation; and R. Morrison.

[210] *See* COEC I and letters from ABA and SCSGP.

[211] *See* AFL–CIO II and COEC I; and letters from Group of Exec. Comp. Lawyers, Meridian Compensation Partners, LLC; and SCSGP.

[212] *See, e.g.,* Senate Letter; House Letter; and AFL–CIO I; and letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

[213] *See* AFL–CIO I and letter from Americans for Financial Reform.

for or explain the ratio. We believe that additional narrative disclosure about the ratio would not, for many registrants, provide useful information for investors that would justify the costs associated with providing that additional narrative disclosure. While some investors could find supplemental information about a registrant's employment practices, the composition of its workforce and similar topics (such as employment policies, use of part-time workers, use of seasonal workers, outsourcing and off-shoring strategies) useful or informative, we note that Section 953(b) does not call for that level of detail. We note too, that, as with other mandated disclosure under our rules, registrants would be permitted to supplement the required disclosure with a narrative discussion if they choose to do so.

g. Defining ''Annual''

In order to provide clarity, the proposed requirement defines ''annual total compensation'' to mean total compensation for the last completed fiscal year, consistent with the time period used for the other Item 402 disclosure requirements. This clarification is intended to address questions from commenters about the need to update the pay ratio disclosure throughout the year and make clear that the disclosure does not need to be updated more than once a year.

Two commenters suggested other possible alternatives for the calculation of ''annual'' total compensation. One of these commenters recommended that registrants should have flexibility to select a time period for calculating the annual total compensation of employees, noting that registrants without a calendar year fiscal year-end might benefit from the flexibility to use the calendar year period since that would be consistent with the registrant's tax reporting obligations.[214] Another commenter suggested two timing rules that would grant registrants further flexibility to use the 12-month time periods that their payroll systems use.[215] We understand that these suggestions are intended to reduce compliance costs for registrants by giving registrants the ability to use information in the form that it is currently compiled for other purposes, such as tax and payroll recordkeeping. We believe, however, that it is appropriate for the time period for the pay ratio disclosure to be the same as the time period used for the registrant's other executive compensation disclosures, although the proposed flexibility in identifying the median employee could address the concerns raised by these commenters.

As discussed above, we propose to allow a registrant that is identifying the median employee by reference to compensation amounts derived from its payroll or tax records to use the same annual period that is used in the payroll or tax records from which the compensation amounts are derived. We also did not propose to define or limit what would qualify as payroll or tax records so that registrants would be able to use information that they already track and report for tax purposes. We believe that permitting companies to identify the median employee using compensation information in the form that it is maintained in their own books and records would reduce compliance costs, yet still yield a reasonable estimate of the median employee. Registrants using that approach to identify the median employee would be required to calculate the Item 402(c)(2)(x) total compensation for that median employee for the last completed fiscal year, in order to maintain consistency with other Item 402 information.

h. Updating the Pay Ratio Disclosure for the Last Completed Fiscal Year

The proposed requirements include instructions to clarify the timing for updating pay ratio disclosure after the end of a registrant's fiscal year. Without the proposed instructions, a registrant could be required to include pay ratio disclosure in an annual report or registration statement filed after the end of the fiscal year, but before it has compiled the executive compensation information for that fiscal year for inclusion in its proxy statement relating to its annual meeting of shareholders, which could raise additional incremental costs for registrants that elect to provide executive compensation disclosure in their annual proxy statement rather than their annual report and for registrants that are conducting registered offerings at the beginning of their fiscal year.

To address this, we considered the recommendation of commenters that pay ratio disclosure not be required to be updated for the most recently completed fiscal year until the registrant files its proxy statement for its annual meeting of shareholders. The proposed requirements generally follow this approach, but the proposed instructions provide a similar accommodation for registrants that do not file annual proxy statements[216] and align the proposed requirement to the timing rules for providing Item 402 disclosure in annual reports and proxy and information statements. We believe that the proposed instruction would provide certainty to registrants as to when the updated information is required and would allow sufficient time after the end of the fiscal year to identify the median. We believe that such an approach would not diminish the potential usefulness of the disclosure.

We also believe that this approach could reduce additional costs for registrants in connection with filings made or required to be made before the filing of the proxy or information statement for the annual meeting of shareholders (or written consents in lieu of such a meeting) that would typically contain the registrant's other Item 402 disclosure covering the most recently completed fiscal year. In addition, under the proposed approach, updating the pay ratio disclosure would not be an additional hurdle for a registrant that requests effectiveness of a registration statement after the end of its fiscal year and before the filing of the proxy statement for its annual meeting of shareholders. In this regard, the proposed approach could alleviate some of the potential impact on capital formation from Section 953(b).

i. Instructions for Registrants Relying on Instruction 1 to Items 402(c)(2)(iii) and (iv)

We have also proposed instructions to provide consistency with current executive compensation disclosure rules in cases where a registrant cannot compute the total compensation of the PEO because the salary or bonus of the PEO is not calculable until a later date. Similar to existing requirements for the disclosure of PEO total compensation under those circumstances, the proposed requirements permit the registrant to omit pay ratio disclosure until those elements of the PEO's total compensation are determined and to provide the pay ratio disclosure in the same filing under Item 5.02(f) of Form

[214] *See* letter from American Benefits Council.

[215] *See* letter from Group of Exec. Comp. Lawyers (recommending: ''Rule One—the registrant can select any date as of which to calculate median compensation, provided the date is within 12 months of the proxy filing, and is the most recent practicable date, and Rule Two—if different payroll systems are involved, the 12-month period for computing compensation data for each payroll system's data will be acceptable so long as the period ends within 12 months of the date chosen under Rule One.'').

[216] Based on a review of EDGAR filings in calendar year 2012, approximately 250 registrants that would be subject to the proposed requirements do not file proxy or information statements in connection with annual meetings of shareholders, including 15D filers (other than smaller reporting companies and ABS issuers) and registrants that are not corporate entities required to hold annual meetings of shareholders.

8–K in which the PEO's salary or bonus is disclosed. In taking the proposed approach, we have assumed that the potential benefits of the disclosure could be diminished if the pay ratio were to be calculated using less than the entire amount of the PEO's total compensation for the period, because the ratio would be lower than if it reflected the full PEO total compensation, and that this could justify the potential costs to investors of a delay in the timing of the disclosure.

Instead of this approach, we considered whether to require registrants to report pay ratio disclosure using a reasonable estimate of the elements of PEO compensation that are not calculable. We also considered whether registrants should be permitted to use an incomplete amount, comprising only the elements of total compensation that are calculable at the time.

In some cases, the amount of compensation that is omitted under the Instruction 1 to Items 402(c)(2)(iii) and (iv) could be significant. Therefore, the pay ratio could be lower if it were presented using an amount of PEO total compensation that fails to adequately account for the amounts of salary or bonus ultimately included in the PEO's actual total compensation, including the alternative approach of using estimated PEO compensation, and such an approach could incentivize registrants to give their PEOs more of these types of compensation in order to achieve a more favorable ratio at the time of the proxy statement or annual report. We believe that the potential incentive to change compensation practices could be exacerbated by an alternative approach that permitted or required calculation using incomplete total compensation amounts.

Based on the number of registrants that have historically relied on Instruction 1 to Items 402(c)(2)(iii) and (iv),[217] we do not expect that the proposed instruction would impact a significant number of registrants each year.

j. Status of Disclosure as Filed Not Furnished

Some commenters suggested that pay ratio information be deemed ''furnished'' and not ''filed'' for purposes of the Securities Act and the Exchange Act.[218] We note that Section 953(b) states that the pay ratio information be disclosed in the registrant's ''filings'' with the Commission. We further note that one of the reasons that commenters recommended treating the information as furnished and not filed is because of the difficulty that some companies may have in determining and verifying the information, which must be covered by the certifications required for Exchange Act filings under the Sarbanes-Oxley Act of 2002. We also recognize that some registrants could have more difficulty in gathering and verifying the information than others. Nevertheless, we believe that the flexibility afforded to registrants in connection with identifying the median could reduce some of the difficulties of compiling the required information, because registrants would be able to tailor the methodology to reflect their own facts and circumstances. The ability to use reasonable estimates in connection with the calculation of annual total compensation for employees other than the PEO could also alleviate some of these concerns. In addition, we believe that the proposed transition periods discussed below, which are designed to give registrants sufficient time to develop and implement compliance procedures, could mitigate some concerns about compiling and verifying the information.

k. Proposed Compliance Date

Section 953(b) does not specify a date when registrants must begin to comply with the requirements that we implement under the provision. We are proposing to require that a registrant must begin to comply with proposed Item 402(u) with respect to compensation for the registrant's first fiscal year commencing on or after the effective date of the rule, and, as proposed, a registrant would be permitted to omit this initial pay ratio disclosure from its filings until the filing of its annual report on Form 10–K for that fiscal year or, if later, the filing of a proxy or information statement for its next annual meeting of shareholders (or written consents in lieu of a meeting) following the end of such year. Similar to the proposed instructions for updating pay ratio disclosure, the proposed transition instructions also require that this initial pay ratio disclosure must, in any event, be filed as provided in connection with General Instruction G(3) of Form 10–K not later than 120 days after the end of such fiscal year.

Several commenters noted that companies will need a long transition period to enable them to implement systems to compile the disclosure and verify its accuracy.[219] We understand that this time would likely be needed by large, multinational registrants and any registrants that currently do not have a centralized, consolidated payroll, benefits and pension system that captures the information necessary to identify the median of the annual total compensation of all employees,[220] however, we seek comment on whether the flexibility in the proposed rules would reduce the need for a lengthy transition period. We expect that it will take registrants one full reporting cycle to implement and test any necessary systems,[221] and we have designed the initial transition period to provide that time for transition and implementation.

l. Proposed Transition Periods

The proposed requirements also include a transition period for new registrants because we are sensitive to the impact that the proposed rules could have on capital formation. We note that the requirements of Section 953(b), as amended by the JOBS Act, distinguish between certain newly public companies and all other issuers by providing an exemption for emerging growth companies. We also note that the incremental time needed to compile pay ratio disclosure could cause companies that are not emerging growth companies to delay an initial public offering, which could have a negative impact on capital formation. In this regard, we expect that, in order to be disqualified for emerging growth company status, these companies are likely to be businesses with more extensive operations or a greater number of employees than many emerging growth companies, which could increase the initial efforts needed to comply with the proposed requirements. We believe that providing a transition period for these newly public companies could mitigate this potential impact on capital formation.

Accordingly, the proposed requirements also include instructions that would permit new registrants to delay compliance, so that pay ratio disclosure would not be required in a registration statement on Form S–1 or S–11 for an initial public offering or a registration statement on Form 10. Instead, such a registrant would be

[217] For example, based on a review of EDGAR filings in 2012, only 22 registrants relied on Instruction 1 to Items 402(c)(2)(iii) and (iv) in connection with the total compensation of their PEO.

[218] *See* COEC I and letters from ABA; Protective Life Corporation; and RILA.

[219] *See* letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

[220] *See* letters from ABA; American Benefits Council; Brian Foley & Co.; Group of Exec. Comp. Lawyers; Davis Polk; NACD; SCSGP; RILA; and Towers Watson.

[221] *See* letters from American Benefits Council and Group of Exec. Comp. Lawyers.

required to first comply with proposed Item 402(u) with respect to compensation for the first fiscal year commencing on or after the date the registrant first becomes subject to the requirements of Section 13(a) or Section 15(d) of the Exchange Act.

We note that commenters did not address the impact of pay ratio disclosure requirements on newly public companies. Although investors might benefit from pay ratio information in connection with an initial public offering or Exchange Act registration, we believe it is appropriate to give companies time to develop any needed systems to compile the disclosure and verify its accuracy. The transition period for new registrants is similar to the proposed time frame provided for other registrants to comply with pay ratio disclosure requirements following the effective date of the final rules. The proposed approach is also similar to the current phase-in for newly public companies in connection with Item 308 of Regulation S–K, for management's report on the registrant's internal control over financial reporting. We seek comment in this release on whether these timing and transition rules are sufficient to address the burdens on capital formation that could arise due to the mandated pay ratio disclosure requirements.

We have not proposed a separate transition period for companies that cease to qualify as emerging growth companies. We acknowledge that companies exiting emerging growth status could need additional time to implement systems to compile and verify their pay ratio disclosure, particularly because registrants may not be able to predict in advance, depending on which of the four conditions occurs, when they will cease to be an emerging growth company. By exempting emerging growth companies from the scope of Section 953(b), the JOBS Act essentially provides a transition period for companies for as long as they qualify for emerging growth company status. In connection with other executive compensation provisions, the JOBS Act includes specific transition periods for companies exiting emerging growth company status.[222] It does not, however, include a similar transition provision in the case of Section 953(b). Therefore, we are not proposing any additional transition period for compliance after a company ceases to qualify as an emerging growth company. We seek comment in this release on whether additional transition periods are needed for these companies.

E. Request for Comment

Throughout this release, we have discussed the anticipated costs and benefits of the proposed rules. We request data to quantify the costs and the value of the benefits described throughout this release. We seek estimates of these costs and benefits, as well as any costs and benefits not described, that may result from the adoption of these proposed amendments. We also request comments on the qualitative benefits and costs we have identified and any benefits and costs we may have overlooked.

61. We request comment on all aspects of the costs and benefits of the proposed rules, including identification and assessment of any costs and benefits not already discussed. We seek comment and data on the magnitude and the value of the benefits identified. We also welcome comments on the accuracy of the cost estimates and request that commenters provide data that may be relevant to these cost estimates. In addition, we seek estimates and views regarding these costs and benefits for particular covered registrants, including small registrants, and, where relevant, for particular categories of covered registrants, as well as any other costs or benefits that may result from the adoption of these proposed amendments.

62. What are the characteristics of employee compensation data that current payroll systems (or other management information systems) maintain? Would it be necessary for registrants to change such systems or other employee compensation records in order to track the information needed to comply with the proposed pay ratio rules? What would the transition costs be to make any such changes? How generally are payroll systems maintained across business or geographic segments and how would the separate payroll information across segments be aggregated to comply with the proposed rules? What are the initial and ongoing costs to comply and what activities incur those costs, such as burden hours/wages of company personnel, development and maintenance of computer systems, use of third-party service providers and other professionals? How would the use of reasonable estimates or statistical sampling affect these costs generally, including the need to change current payroll systems? Please also describe benefits, if any, to the registrant, beyond compliance with the proposed rules, from implementing changes to current payroll systems or management information systems.

63. How would allowing registrants to choose an approach for determining the median influence potential costs? How would allowing registrants to choose an approach that permits registrants to use any consistently applied measure of compensation and/or statistical sampling to identify the median employee and then calculate that employee's total compensation in accordance with Item 402(c)(2)(x) affect compliance costs, particularly as compared to requiring registrants to calculate total compensation in accordance with Item 402(c)(2)(x) for all employees to identify the median? Comparisons of the costs of each approach would be particularly helpful. Would allowing for alternative approaches retain the benefits of Section 953(b)? If not, please provide specific information or data on what benefits would not be achieved under the proposed rules.

64. What are the transition costs that will be imposed on registrants as a result of the proposals, if adopted? Please be detailed and provide quantitative data or support, as practicable. Where applicable, please also distinguish between costs that are initial, non-recurring implementation costs and the costs of ongoing compliance.

65. What impact would the proposed rules have on the incentives of boards, senior executives and shareholders? Would the proposed rules be likely to change the behavior of registrants, investors or other market participants? Should we alter the proposed requirements to address that impact? If so, describe any changes that would address that impact and discuss any related costs and benefits that would arise from such a change.

66. What impact would the proposed rules have on competition? Would the expected compliance costs put registrants subject to the rule at a competitive disadvantage? Are there particular industries or types of registrants that would be more likely to be impacted? If so, what changes to the proposed requirements could mitigate the impact?

67. What impact would the proposed rules have on market efficiency? Are there any positive or negative effects of the proposed rules on efficiency that we may have overlooked? How could the rules be changed to promote any positive effect or to mitigate any negative effect on efficiency, while still satisfying the mandate of Section 953(b)?

[222] *See, e.g.,* Section 102(a)(1)(B) (providing such a transition for say-on-pay compliance).

68. Could a registrant's competitors infer proprietary or sensitive information about the registrant's business operations, strategy or labor cost-structure from the proposed pay ratio disclosure? If so, please tell us what type of information could be inferred and how that could be determined. Please also tell us what changes to the proposed requirements could mitigate that concern?

69. What impact would the proposed rules have on capital formation? How could the rules be changed to promote capital formation or to mitigate any negative effect on capital formation resulting from the rules, while still satisfying the mandate of Section 953(b)?

V. Paperwork Reduction Act

A. Background

Certain provisions of the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (the ''PRA''). [223] We are submitting the proposed amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[224] The titles for the collection of information are:

- ''Regulation S–K'' (OMB Control No. 3235–0071); [225]
- ''Form 10–K'' (OMB Control No. 3235–0063);
- ''Regulation 14A and Schedule 14A'' (OMB Control No. 3235–0059); [226]
- ''Regulation 14C and Schedule 14C'' (OMB Control No. 3235–0057); [227]
- ''Form 8–K'' (OMB Control No. 3235–0060);
- ''Form S–1'' (OMB Control No. 3235–0065); [228]
- ''Form S–4'' (OMB Control No. 3235–0324) [229]
- ''Form S–11'' (OMB Control No. 3235–0067); [230]
- ''Form 10'' (OMB Control No. 3235–0064); [231] and
- ''Form N–2'' (OMB Control No. 3235–0026).[232]

These regulations, schedules and forms were adopted under the Securities Act and the Exchange Act, and in the case of Form N–2,[233] the Investment Company Act of 1940.[234] They set forth the disclosure requirements for periodic and current reports, registration statements and proxy and information statements filed by companies to help investors make informed investment and voting decisions. The hours and costs associated with preparing, filing and sending each form or schedule constitute reporting and cost burdens imposed by each 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 proposals discussed in this release are intended to satisfy the requirements of Section 953(b) of the Dodd-Frank Act, which directs the Commission to amend Item 402 of Regulation S–K to add the pay ratio disclosure requirements specified by that provision. Compliance with the proposed requirements will be mandatory for affected registrants. Responses to the information collections will not be kept confidential, and there will be no mandatory retention period for the information disclosed.

B. Summary of Collection of Information Requirements

In order to satisfy the legislative mandate in Section 953(b), we are proposing to add new paragraph (u) to Item 402 of Regulation S–K. This new paragraph (u) would require registrants to disclose:

- The median of the annual total compensation of all employees of the registrant (excluding the principal executive officer),
- the annual total compensation of the registrant's principal executive officer, and
- the ratio between these two amounts.

For this purpose, Section 953(b) specifies that total compensation is to be determined in accordance with Item 402(c)(2)(x). Item 402 already requires registrants to disclose the annual total compensation of the principal executive officer in accordance with Item 402(c)(2)(x).[235] The median of the annual total compensation of all employees and the ratio would be new, incremental disclosure burdens and would require affected registrants to collect compensation information for employees that is not currently required to be disclosed.

Investors and other market participants interested in executive compensation disclosure have indicated that the proposed disclosure would be

[223] 44 U.S.C. 3501 *et seq.*

[224] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[225] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the disclosures in Regulation S–K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience, we estimate the burdens imposed by Regulation S–K to be a total of one hour.

[226] As described below, our estimates for Form 10–K take into account the burden that would be incurred by including the proposed disclosure in the annual report directly or incorporating by reference from a proxy or information statement. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for proxy statements on Schedule 14A.

[227] As described below, our estimates for Form 10–K take into account the burden that would be incurred by including the proposed disclosure in the annual report directly or incorporating by reference from a proxy or information statement. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for information statements on 14C.

[228] As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10–K rather than Forms S–1, S–4, S–11 or N–2 as applicable (because registrants would incorporate the disclosure from Form 10–K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form S–1.

[229] As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10–K rather than Forms S–1, S–4, S–11 or N–2 as applicable (because registrants would incorporate the disclosure from Form 10–K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form S–4.

[230] As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10–K rather than Forms S–1, S–11 or N–2 as applicable (because registrants would incorporate the disclosure from Form 10–K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form S–11.

[231] As described below, because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we estimate no annual incremental increase in the paperwork burden associated with Form 10 as a result of the proposed requirements.

[232] Only Forms N–2 filed by business development companies would be subject to the proposed disclosure requirements, because Form N–2 requires business development companies, and not other investment companies, to provide Item 402 disclosure. As described below, we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10–K rather than Forms S–1, S–11 or N–2 as applicable (because registrants would incorporate the disclosure from Form 10–K). To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, we estimate that the proposed disclosure would not impose an incremental burden for registration statements on Form N–2.

[233] 17 CFR 239.14 and 274.11a–1.

[234] 15 U.S.C. 80a–1 *et seq.*

[235] As of the date of this proposal, the requirements for the calculation of total compensation under Item 402(c)(2)(x) are the same as those in effect on July 20, 2010. Therefore, for purposes of this PRA analysis, we have assumed that registrants would not need to recalculate the annual total compensation for the principal executive officer in connection with the proposed pay ratio disclosure.

useful in informing investment and voting decisions, particularly for say-on-pay votes and in director elections.[236] In this regard, pay ratio information could be used by shareholders for purposes of evaluating the actions of the board of directors in fulfilling its responsibilities to the company and its shareholders.[237] Pay ratio information could also be used to enhance an investor's understanding of a registrant's compensation practices applicable to non-executive employees relative to the named executive officers.[238]

The proposed disclosure under new paragraph (u) of Item 402 would be required in registration statements and annual reports that require executive compensation information under Item 402 of Regulation S–K and in proxy and information statements relating to an annual meeting of shareholders or written consents in lieu of such a meeting.[239] In addition, the proposed requirements would allow certain new registrants to omit the disclosure otherwise required by Item 402(u) from filings made during a specified transition period.

Finally, in order to conform the proposed requirements to current rules for the disclosure of PEO compensation when certain elements are not yet known, the proposals include a conforming amendment to Item 5.02 of Form 8–K. This proposed amendment would require registrants that are disclosing PEO total compensation in accordance with Item 5.02 of Form 8–K to also provide in that filing the updated pay ratio disclosure required by Item 402(u). Because Item 5.02 of Form 8–K provides a delayed method of filing information that would otherwise be required in the registrant's proxy or information statement or annual report, the PRA analysis assumes that the burden and cost of compliance with proposed Item 402(u) would be associated primarily with those forms and schedules rather than Form 8–K.

C. Burden and Cost Estimates Related to the Proposed Amendments

We anticipate that the proposed amendments, if adopted, would increase the burdens and costs for registrants that are subject to the proposed disclosure requirements. For purposes of the PRA, we estimate that the total annual increase in the paperwork burden for all affected registrants to comply with the proposed collection of information requirements to be approximately 545,792 hours of company personnel time and total costs of approximately $72,772,200 for the services of outside professionals.[240] These estimates include the time and the cost of implementing data gathering systems and disclosure controls and procedures, compiling necessary data, preparing and reviewing disclosure, filing documents and retaining records.

In deriving these estimates, we have assumed that:

- Registrants subject to the proposed requirements would satisfy the proposed requirements by either including the information directly in annual reports on Form 10–K or incorporating the information by reference from a proxy statement on Schedule 14A or information statement on Schedule 14C. Our estimates assume that substantially all of the burden relating to the proposed disclosure requirements would be associated with Form 10–K;
- For registrants that would be permitted to provide their pay ratio disclosure in a filing made in accordance with Item 5.02 of Form 8–K, rather than in Form 10–K, the burden relating to the proposed disclosure requirements would be associated primarily with Form 10–K rather than Form 8–K;[241]
- 100% of new registrants would use the proposed transition provisions allowing them to omit the proposed disclosure from their filings and, for follow-on offerings by these registrants, the burden relating to the proposed disclosure requirements would be associated primarily with Form 10–K rather than Forms S–1, S–11 or N–2 as applicable (because registrants would incorporate the disclosure from Form 10–K); and
- For Form 10–K and Form 8–K, 75% of the burden would be carried by the company internally and that 25% of the burden would be carried by outside professionals retained by the company at an average cost of $400 per hour.[242]

As discussed above in this release, we understand from commenters that the costs of compliance will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations, the nature of their operations, the nature of their workforce, the location of their operations, and, significantly, the extent that their existing payroll systems collect the information necessary to identify the median of the annual total compensation of their employees (including whether a single, centralized computer system covers all employees of the registrant and whether the company's benefits and cash compensation records reside in the same system). Because the proposed requirements would allow registrants some flexibility in identifying the median and the annual total compensation of employees, the actual burden could be lower if the methodology used is able to reduce the effort needed to collect the data or if the registrant is able to use information that it uses for other purposes.[243] We believe that the actual burdens will likely vary significantly among individual companies based on these factors.[244] Our estimates reflect average burdens, and, therefore, some companies may experience costs in excess of our estimates and some companies may experience costs that are lower than our estimates.[245]

[236] *See, e.g.,* letters from CtW Investment Group and S. Towns.

[237] *See, e.g.,* letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

[238] *See, e.g.,* letters from CtW Investment Group and UAW Retiree Medical Benefits Trust.

[239] Consistent with the scope of Section 953(b), the proposed requirements would not apply to the annual reports and proxy and information statements of emerging growth companies, smaller reporting companies or foreign private issuers. In addition, consistent with the instructions J and I of Form 10–K, the proposed requirements would not apply to the annual reports of issuers of asset-backed securities or to wholly-owned subsidiary registrants.

[240] We describe how we derived the three-year average hour and cost burdens per response below. For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest hundred.

[241] Our PRA estimates for Form 8–K include an estimated one hour burden to account for the inclusion of the proposed pay ratio disclosure.

[242] The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours. We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis we estimate that such costs would be an average of $400 per hour. This is the rate we typically estimate for outside legal services used in connection with public company reporting.

[243] *See* Section II of this release for a discussion of the proposed requirements.

[244] We also note that companies could address these factors in a variety of ways. For example, some companies might perform the data collection and consolidation manually, while others may incur the cost of implementing an information technology solution for collecting the data. In addition, some companies might outsource some of the burden hours to consultants or third party payroll management providers, which could increase the costs to the registrant while decreasing the burden hours of company personnel.

[245] Although we received some information from commenters and stakeholders regarding the time and costs to comply with Section 953(b), in light of the limitations of that information described above in Section IV of this release, we did not that information as the basis for our PRA estimates. We

We have derived our burden estimates by estimating the average number of hours it would take a registrant to prepare and submit the required data. In determining these estimates, we considered the burden estimates for similar disclosure requirements. We believe the burden hours associated with the preparation of the proposed pay ratio disclosure may be comparable to a registrant's preparation of the summary compensation table and other executive compensation disclosures required by the 2006 amendments to Item 402.[246] We recognize that, in this proposal, the burden reflects the compilation of data covering the entire workforce rather than only the named executive officers. We note that the proposal allows for a broad use of any consistently applied compensation measure and statistical sampling and the use of other reasonable estimates to identify the median. As noted above, the actual burden will vary depending on factors including the size of the company, the number of employees and how many are located outside of the United States. For a company with a medium-sized workforce, located primarily in the United States, that is able to identify a median employee from a sample of its employee population using a consistently applied compensation measure, the burden hours could be less than the estimated burden hours for the 2006 amendments to Item 402.[247] In contrast, for a large, multi-national registrant with hundreds of thousands of employees, the burden hours could be more than the estimated burden hours for the 2006 amendments to Item 402.[248] We believe, therefore, that it is reasonable to assume that the burden hours will be a multiple of the average burden hours associated with the 2006 amendments to Item 402. We also expect that, similar to the 2006 amendments, the proposed rules' burden would be greatest during the first year of their effectiveness and diminish in subsequent years. Accordingly, to derive our estimates, we multiplied the average burden estimate for the 2006 amendments by two, yielding an estimated burden of 340 hours in year one, 160 hours in year two and 70 hours in year three and thereafter, for a three-year average burden of 190 hours.

We used this three-year average hour burden to estimate the cost and hour burden for each collection of information as follows:

1. Regulation S–K

While the proposed amendments would make revisions to Regulation S–K, the collection of information requirements for that regulation are reflected in the burden hours estimated for the forms and schedules listed below. The rules in Regulation S–K do not impose any separate burden. Consistent with historical practice, we are proposing to retain an estimate of one burden hour to Regulation S–K for administrative convenience.

2. Form 10–K

Only Forms 10–K that are filed by registrants that are not smaller reporting companies or emerging growth companies would be required to include the proposed disclosure. For purposes of our PRA estimates, we have assumed that 100% of asset-backed securities issuers would omit Item 402 disclosure from Form 10–K pursuant to Instruction J of Form 10–K and 100% of wholly-owned subsidiary registrants would omit Item 402 disclosure from Form 10–K pursuant to Instruction I of Form 10–K, and, accordingly, these registrants would also not be subject to the proposed disclosure requirements. Based on a review of EDGAR filings in calendar year 2011, we estimate that of the approximately 8,870 annual reports filed in that year, approximately 3,830 annual reports are filed by registrants that would be subject to the proposed disclosure requirements.[249] We estimate that the proposed disclosure requirements would add an average of 190 burden hours to the total burden hours required to produce each Form 10–K that is subject to the proposed requirements (143 hours in-house personnel time and a cost of approximately $19,000 for outside professionals).

We estimate that the preparation of annual reports currently results in a total annual compliance burden of 21,430,988 hours and an annual cost of outside professionals of $2,857,465,000. If the proposals were adopted, we estimate that the incremental cost of outside professionals for annual reports would be approximately $72,770,000 per year and the incremental company burden would be approximately 545,775 hours per year.

3. Form 8–K

As described in this release, we are proposing to require a registrant that is filing its PEO total compensation on a delayed basis due to the unavailability of certain components of compensation on Form 8–K (in accordance with Instruction 1 to Items 402(c)(2)(iii) and (iv) of Regulation S–K and Item 5.02(f) of Form 8–K) to provide the proposed pay ratio disclosure at the same time. We have proposed a conforming amendment to Item 5.02 of Form 8–K that would require a registrant to include updated pay ratio disclosure in the Form 8–K that it files to disclose its PEO total compensation information.[250] We estimate that the burden for adding the pay ratio disclosure to that Form 8–K filing would be one hour per registrant.[251] We also estimate that the proposed Form 8–K amendment would not result in additional Form 8–K filings because registrants who omit disclosure in reliance on Instruction 1 to Items 402(c)(2)(iii) and (iv) are already required to file a Form 8–K. The proposed amendments would, however, add pay ratio disclosure requirements to that Form 8–K filing.

Based on a review of EDGAR filings for calendar years 2011 and 2012, we estimate that approximately 29 Forms

received various hours estimates, including estimates of approximately 201 to 500 hours, and another estimate of 4,000 hours (based on 50 hours per country where employees are located). We received four cost estimates, including $7.6 million, $6.5 million, $4.725 million and $350,000 per registrant. We note that all of these estimates are estimates based on the commenter's initial reading and interpretation of the statute and do not reflect the discretionary choices we have made in the proposed rule implementing the statute. For instance these estimates do not take into account the ability to use statistical sampling. We also note that the estimates do not represent the full breadth of the registrant population. As noted in our economic analysis section, we anticipate that the PRA estimates will be revised in light of further information we receive on estimated costs.

[246] *See* 2006 Adopting Release, *supra* note 14, at 53215 (which we estimated to be a three-year average of 95 hours, based on 170 hours in year one, 80 hours in year two and 35 hours in year three and thereafter).

[247] We expect that such a company would be determining total compensation under Item 402(c)(2)(x) for only one additional employee.

[248] For these companies, we considered the estimated burden of other international reporting regimes, such as the Commission's rules implementing Section 1502 of the Dodd-Frank Act. *See* Conflict Minerals, Release No. 34–67716 (Aug. 22, 2012) [77 FR 56273] (which we estimated to be a three year average of 495 hours). In that regard, we assume this proposal would be less burdensome because the underlying information would be under the control of the registrant rather than data that must be gathered from unrelated third parties in the registrant's supply chain.

[249] Based on a review of EDGAR filings in 2011, approximately 3,750 annual reports were filed by smaller reporting companies, approximately 290 were filed by ABS issuers and approximately 100 were filed by wholly-owned subsidiaries of other registrants. We have also reduced the total number of Form 10–K filings by 900 to reflect the approximate number of emerging growth companies that have identified themselves as such in their EDGAR filings as of May 2013.

[250] *See* Section II.C.7.b. above.

[251] As noted above, we have assumed that the burden relating to the proposed pay ratio requirements would remain associated with the registrant's proxy or information statement or annual report, and, therefore, our PRA estimates for those forms reflect that burden.

8–K are filed pursuant to Item 5.02(f) annually and approximately 75% of these relate to disclosure of PEO compensation. As a result, we estimate that 22 of the Forms 8–K filed in a given year would spend 1 additional hour preparing the disclosure required by the amendments (0.75 hours of internal personnel time and a cost of approximately $100 for professional services), in addition to the total burden hours required to produce each Form 8–K. We estimate that the preparation of current reports on Form 8–K currently results in a total annual compliance burden of 507,665 hours and an annual cost of outside professionals of $67,688,700. If the proposals were adopted, we estimate that the incremental company burden would be approximately 16.5 hours per year and approximately $2,200 in the incremental cost of outside professionals for current reports on Form 8–K.

4. Proxy Statements on Schedule 14A

Only proxy statements on Schedule 14A that are required to include Item 402 information, and that are not filed by smaller reporting companies or emerging growth companies, would be required to include the proposed pay ratio disclosure. For purposes of our PRA estimates, consistent with past amendments to Item 402,[252] we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10–K, even if registrants include the proposed disclosure required in Form 10–K by incorporating that disclosure by reference from a proxy statement on Schedule 14A.

5. Information Statements on Schedule 14C

Only information statements on Schedule 14C that are required to include Item 402 information, and that are not filed by smaller reporting companies or emerging growth companies, would be required to include the proposed pay ratio disclosure. For purposes of our PRA estimates, consistent with past amendments to Item 402, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10–K, even if registrants include the proposed disclosure required in Form 10–K by incorporating that disclosure by reference from an information statement on Schedule 14C.

6. Form S–1

Because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we estimate that approximately 70 registration statements on Form S–1 would be required to include the proposed disclosure.[253] In addition, because we assume that all of these Forms S–1 will incorporate by reference the registrant's disclosure from its annual report, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10–K.

7. Form S–4

We have assumed that registrants filing on Form S–4 for whom executive compensation information under Item 402 is required pursuant to Items 18 or 19 of Form S–4 will incorporate by reference the pay ratio disclosure contained in the registrant's annual report. Thus, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10–K.

8. Form S–11

Because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we have assumed that five registration statements on Form S–11 would be required to include the proposed disclosure.[254] In addition, because we assume that these Forms S–11 will incorporate by reference the registrant's pay ratio disclosure contained in its annual report, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10–K.

9. Form N–2

Only Forms N–2 filed by business development companies would be subject to the proposed disclosure requirements. Based on a review of EDGAR filings for calendar year 2011, our best estimate of the total number of business development companies is 41 and that 28 of these have no employees.[255] Therefore, of the 205 Forms N–2 that are filed annually, we estimate that approximately 41 are filed by business development companies and approximately 13 of these business development companies have employees. In addition, because we assume that all of these Forms N–2 will incorporate by reference the registrant's disclosure in its annual report, we have assumed that all of the burden relating to the proposed disclosure requirements would be associated with Form 10–K.

10. Form 10

Because we have assumed that all new registrants would take advantage of the transition period afforded to them under the proposed requirements, we estimate no annual incremental increase in the paperwork burden associated with Form 10 as a result of the proposed requirements.

D. Summary of Proposed Changes to Annual Compliance Burden in Collection of Information

Tables 1 and 2 below illustrate the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments for annual reports on Form 10–K and current reports on Form 8–K under the Exchange Act. The burden estimates were calculated by multiplying the estimated number of annual responses by the estimated average number of hours it would take a company to prepare and review the proposed disclosure. We recognize that some registrants may need to include the pay ratio disclosure in more than one filing covering the same period, accordingly actual numbers may be lower than our estimates.

As discussed above, there is no change to the estimated burden of the collection of information under Forms S–1, S–4, S–11 or N–2 or under Schedule 14A and 14C because we have assumed that the burden relating to the proposed disclosure requirements would be associated primarily with Form 10–K. In addition, there is no change to the estimated burden of the collection of information under Form 10, because we have assumed that all new registrants would take advantage of the proposed transition period. There is no change to the estimated burden of the collection of information under Regulation S–K because the burdens that Regulation S–K imposes are

[252] We took a similar approach in connection with the rules for Summary Compensation Table disclosure required by the 2006 amendments to Item 402. *See* 2006 Adopting Release, *supra* note 14.

[253] Based on a review of EDGAR filings for calendar year 2012, we estimate that approximately 70 Forms S–1 would be filed in connection with follow-on offerings (rather than initial public offerings) by companies that are not emerging growth companies or smaller reporting companies.

[254] Based on a review of EDGAR filings for calendar year 2012, we estimate that approximately five Forms S–11 would be filed in connection with follow-on offerings by registrants that are not emerging growth companies.

[255] As discussed in this release, the proposed requirements for identifying the median apply to workers who are employees of the registrant. Business development companies are often externally managed rather than having their own employees.

reflected in our revised estimates for the forms.

TABLE 1—CALCULATION OF INCREASES IN BURDEN ESTIMATES DUE TO THE RULE PROPOSAL

	Estimated annual responses subject to proposed requirements (A)	Estimated hour burden per response (B)	Estimated aggregate incremental hour burden (C) = (A) * (B)	75% Company (hours) (D) = (C) * 0.75	25% Outside professional (hours) (E) = C * 0.25	Estimated aggregate cost of outside professions in connection with proposed requirements (F) = (E) * $400
Form 10–K	3,830	190	898,700	545,775	181,925	$72,770,000
Form 8–K	22	1	22	16.5	5.5	2,200
Total	3,852	191	898,722	545,792	181,931	72,772,200

TABLE 2—CALCULATION OF TOTAL PRA BURDEN ESTIMATES

	Current annual responses (A)	Proposed annual responses (B)	Current burden hours (C)	Increase in burden hours (D)[256]	Proposed burden hours (E) = C + D	Current professional costs (F)	Increase in professional costs (G)	Proposed professional costs = F + G
Form 10–K	14,296	14,296	21,430,988	545,775	22,105,013	$2,857,465,000	$72,770,000	$2,930,235,000
Form 8–K	118,387	118,387	507,665	16.5	507,681.5	67,688,700	2,200	67,690,900
Total	132,683	132,683	21,938,653	545,792	22,612,694	2,925,153,700	72,772,200	2,997,925,900

E. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy of our estimates 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 would 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 desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and send a copy of the comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–07–13. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–07–13 and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549–2736. Because the 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 the OMB receives them within 30 days of publication.

VI. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[257] we solicit data to determine whether the proposed amendments constitute 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.

Commenters should provide comment and empirical data on (a) the potential annual effect on the U.S. economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

VII. Regulatory Flexibility Act Certification

The Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the amendments contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed amendments would provide that a registrant (other than a smaller reporting company or an emerging growth company) would be required to disclose a pay ratio (showing the median of the

[256] The increase in burden hours reflected in the table is based on the aggregate incremental burden hours per form multiplied by the annual responses that would be required to include additional disclosure under our rules as proposed. As explained in the discussion above, for purposes of determining the total increase in burden hours, we have reduced the current number of annual responses to reflect that the proposed disclosure requirements will not apply to all forms filed. *See* Table 1 for estimates per response.

[257] Public Law 104–121, tit. II, 110 Stat. 857 (1996).

annual total compensation of all employees of the registrant and its subsidiaries to the annual total compensation of the principal executive officer of the registrant) in filings that are required to include executive compensation information pursuant to Item 402 of Regulation S–K. Section 953(b) does not apply to smaller reporting companies and does not apply to emerging growth companies, and, consistent with Section 953(b), the proposed requirements would not apply to smaller reporting companies or emerging growth companies. Because smaller reporting companies and emerging growth companies are not subject to the proposed requirements, we believe the proposed rules would not have a significant economic impact on a substantial number of small entities.

VIII. Statutory Authority and Text of Amendments

The amendments contained herein are being proposed pursuant to Sections 7, 10 and 19(a) of the Securities Act, Sections 3(b), 12, 13, 14, 15(d) and 23(a) of the Exchange Act, Section 953(b) of the Dodd-Frank Act, as amended, and Section 102(a)(3) of the JOBS Act.

List of Subjects

17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of Proposed Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations, is proposed to be amended as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934—REGULATION S–K

■ 1. The general authority citation for part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l,* 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78 mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11 and 7201 *et seq.;* 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904; and Sec. 102(a)(3) Pub. L. 112–106, 126 Stat. 309, unless otherwise noted.

■ 2. Amend § 229.402 by:

■ a. In paragraph (*l*) removing ''(k) and (s)'' and adding in its place ''(k), (s) and (u)''; and

■ b. Adding paragraph (u) directly after the Instructions to Item 402(t).

The addition reads as follows:

§ 229.402 (Item 402) Executive Compensation.

* * * * *

(u) *Pay ratio disclosure.* (1) Disclose:

(i) The median of the annual total compensation of all employees of the registrant, except the PEO of the registrant;

(ii) The annual total compensation of the PEO of the registrant; and

(iii) The ratio of the amount in paragraph (u)(1)(i) of this Item to the amount in paragraph (u)(1)(ii) of this Item. For purposes of the ratio required by this paragraph (u)(1)(iii), the amount in paragraph (u)(1)(i) of this Item shall equal one, or, alternatively, the ratio may be expressed narratively as the multiple that the amount in paragraph (u)(1)(ii) of this Item bears to the amount in in paragraph (u)(1)(i) of this Item.

(2) (i) For purposes of this paragraph (u), the *total compensation* of employees of the registrant (including the PEO of the registrant) shall be determined in accordance with paragraph (c)(2)(x) of this Item 402. In determining the total compensation, all references to ''named executive officer'' in this Item 402 and the instructions thereto may be deemed to refer instead, as applicable, to ''employee'' and, for non-salaried employees, references to ''base salary'' and ''salary'' in this Item 402 and the instructions thereto may be deemed to refer instead, as applicable, to ''wages plus overtime.''

(ii) For purposes of this paragraph (u), *annual total compensation* means total compensation for the registrant's last completed fiscal year.

(3) For purposes of this paragraph (u), *employee* or *employee of the registrant* means an individual employed by the registrant or any of its subsidiaries as of the last day of the registrant's last completed fiscal year. This includes any full-time, part-time, seasonal or temporary worker employed by the registrant or any of its subsidiaries on that day (including officers other than the PEO).

Instruction 1 to Item 402(u)—Updating for the last completed fiscal year. Pay ratio information (*i.e.,* the disclosure called for by paragraph (u)(1) of this Item) with respect to the registrant's last completed fiscal year is not required to be disclosed until the filing of its annual report on Form 10–K for that last completed fiscal year or, if later, the filing of a definitive proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such fiscal year; *provided that,* the required pay ratio information must, in any event, be filed as provided in General Instruction G(3) of Form 10–K (17 CFR 249.310) not later than 120 days after the end of such fiscal year. In any filing made by a registrant after the end of its last completed fiscal year and before the filing of such Form 10–K or proxy or information statement, as applicable, a registrant that was subject to the requirements of paragraph (u) of this Item for the fiscal year prior to the last completed fiscal year shall include or incorporate by reference the information required by paragraph (u) of this Item for that prior fiscal year.

Instruction 2 to Item 402(u)—Methodology and use of estimates. (i) Registrants may use (A) a methodology that uses reasonable estimates to identify the median and (B) reasonable estimates to calculate the annual total compensation or any elements of total compensation for employees other than the PEO.

(ii) In determining the employees from which the median is identified, a registrant may use (A) its employee population or (B) statistical sampling or other reasonable methods.

(iii) A registrant may identify the median employee using (A) annual total compensation or (B) any other compensation measure that is consistently applied to all employees included in the calculation, such as amounts derived from the registrant's payroll or tax records. In using a compensation measure other than annual total compensation to identify the median employee, if that measure is recorded on a basis other than the registrant's fiscal year (such as payroll or tax information), the registrant may use the same annual period that is used to derive those amounts. Where a compensation measure other than annual total compensation is used to identify the median employee, the registrant must (A) disclose the compensation measure used and (B) calculate and disclose the annual total compensation for that median employee.

(iv) Registrants must briefly disclose and consistently apply any methodology used to identify the median and any material assumptions, adjustments or estimates used to identify the median or to determine total compensation or any elements of total compensation, and registrants must clearly identify any estimated amount. This disclosure should be a brief overview; it is not

necessary to provide technical analyses or formulas. If a registrant changes methodology or material assumptions, adjustments or estimates from those used in its pay ratio disclosure for the prior fiscal year, and if the effects of any such change are material, the registrant shall briefly describe the change and the reasons for the change, and shall provide an estimate of the impact of the change on the median and the ratio.

Instruction 3 to Item 402(u)—Permitted annualizing adjustments. A registrant may annualize the total compensation for all permanent employees (other than those in temporary or seasonal positions) that were employed by the registrant for less than the full fiscal year (such as newly hired employees or permanent employees on an unpaid leave of absence during the period).

Instruction 4 to Item 402(u)—PEO compensation not available. A registrant that is relying on Instruction 1 to Item 402(c)(2)(iii) and (iv) in connection with the salary or bonus of the PEO for the last completed fiscal year, shall disclose that the pay ratio required by paragraph (u) of this Item is not calculable until the PEO salary or bonus, as applicable, is determined and shall disclose the date that the PEO's actual total compensation is expected to be determined. The disclosure required by paragraph (u) of this Item must then be disclosed in the filing under Item 5.02(f) of Form 8–K (17 CFR 249.308) that discloses the PEO's salary or bonus in accordance with Instruction 1 to Item 402(c)(2)(iii) and (iv).

Instruction 5 to Item 402(u)—Transition period. A registrant must comply with paragraph (u) of this Item with respect to compensation for the first fiscal year commencing on or after the date the registrant first becomes subject to the requirements of Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d), and may omit such pay ratio disclosure from any filing until it the filing of its annual report on Form 10–K for such fiscal year or, if later, the filing of a proxy or information statement relating to its next annual meeting of shareholders (or written consents in lieu of such a meeting) following the end of such year, *provided that,* such pay ratio disclosure must, in any event, be filed as provided in General Instruction G(3) of Form 10–K (17 CFR 249.310) not later than 120 days after the end of such fiscal year.

Instruction 6 to Item 402(u)—Emerging growth companies. A registrant is not required to comply with paragraph (u) of this Item if it is an emerging growth company as defined in Section 3(a) of the Exchange Act (15 U.S.C. 78c(a)).

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The general authority citation for part 249 is revised to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904; and Sec. 102(a)(3) Pub. L. 112–106, 126 Stat. 309, unless otherwise noted.

* * * * *

■ 4. Form 8–K (referenced in § 249.308) is amended by revising paragraph (f) of Item 5.02, designating paragraph (f) as (f)(1) and adding paragraph (2).

The revisions and additions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

* * * * *

(f)(1) * * *

(2) As specified in Instruction 4 to Item 402(u) of Regulation S–K (17 CFR 229.402(u)), disclosure under this Item 5.02(f) with respect to the salary or bonus of a principal executive officer shall include pay ratio disclosure pursuant to Item 402(u) of Regulation S–K calculated using the new total compensation figure for the principal executive officer. Pay ratio disclosure is not required under this Item 5.02(f) until the omitted salary or bonus amounts for such principal executive officer become calculable in whole.

* * * * *

Dated: September 18, 2013.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–23073 Filed 9–30–13; 8:45 am]

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Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Species Status for *Echinomastus erectocentrus* var. *acunensis* (Acuña Cactus) and *Pediocactus peeblesianus* var. *fickeiseniae* (Fickeisen Plains Cactus) Throughout Their Ranges; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2012–0061; 4500030113]

RIN 1018–AY51

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Echinomastus erectocentrus var. acunensis (Acuña Cactus) and Pediocactus peeblesianus var. fickeiseniae (Fickeisen Plains Cactus) Throughout Their Ranges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine that *Echinomastus erectocentrus* var. *acunensis* (acuña cactus) and *Pediocactus peeblesianus* var. *fickeiseniae* (Fickeisen plains cactus) meet the definition of endangered species under the Endangered Species Act of 1973, as amended. This final rule implements the Federal protections provided by the Act for these species. The effect of this regulation will be to add these species to the List of Endangered and Threatened Wildlife and Plants under the Endangered Species Act.

DATES: This rule becomes effective October 31, 2013.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov,* Docket No. FWS–R2–ES–2012–0061. Comments and materials we received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection at *http://www.regulations.gov.* All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 2321 West Royal Palm Rd., Suite 103, Phoenix, AZ 85021; by telephone 602–242–0210; or by facsimile 602–242–2513.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021; by telephone (602) 242–0210; or by facsimile (602) 242–2513. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

This document consists of a final rule to list as endangered *Echinomastus erectocentrus* var. *acunensis* (acuña cactus) and *Pediocactus peeblesianus* var. *fickeiseniae* (Fickeisen plains cactus) under the Act. For the remainder of this document, these species will be referred to by their common names.

Why we need to publish a rule. On October 3, 2012 (77 FR 60509), we published proposed rules to list acuña cactus and Fickeisen plains cactus as endangered species and to designate critical habitat for both species. In this document, we finalize our determinations as endangered species for these species under the Act. The Act requires that a final rule be published within one year of a proposed rule in order to add species to the lists of endangered and threatened plants to provide protections under the Act. We have determined that critical habitat for the acuña cactus and the Fickeisen plains cactus is prudent and determinable in the proposed rule and will soon publish in the **Federal Register** our final determination designating critical habitat for both cacti. The final critical habitat designation and supporting documents will publish under Docket No. FWS–R2–ES–2013–0025, and can also be found at the above locations.

The Endangered Species Act provides basis for our action. Under the Endangered Species Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

For the acuña cactus, the threats to the species and its habitat result from the effects of drought and climate change (Factor A) in combination with predation by native insect and small mammal predators (Factor C). Threats also result from habitat destruction, modification, and degradation from United States-Mexico border activities (Factor A) and nonnative, invasive plant species issues (Factor A). In addition, the existing regulatory mechanisms in place do not directly address the threats to the species.

For the Fickeisen plains cactus, the threats to the species and its habitat result from habitat destruction, modification, and degradation from livestock grazing (Factor A) in combination with predation by small mammals (Factor C) and natural environmental variability and the effects of climate such as drought. When combined with the above mentioned threats, small population size (Factor E) likely exacerbates the effects of these threats on the Fickeisen plains cactus. In addition, the existing regulatory mechanisms are not ameliorating threats to the species.

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We obtained peer reviews from two knowledgeable individuals for the acuña cactus and two knowledgeable individuals for the Fickeisen plains cactus, all with scientific expertise to review our technical assumptions, analysis, and whether or not we had used the best available information for both plants. These peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated in this final revised designation. We also considered all comments and information received during the comment period.

Organization of Document

The layout of this rule is as follows: the final listing determination of the acuña cactus and the final listing determination for the Fickeisen plains cactus.

Previous Federal Actions

Please refer to the proposed listing rule for the acuña cactus and Fickeisen plains cactus (77 FR 60509; October 3, 2012) for a detailed description of previous Federal actions concerning these species.

Summary of Changes From Proposed Rule

Since the publication of the October 3, 2012 (77 FR 60509), proposed rule to list and designate critical habitat for the acuña cactus and Fickeisen plains cactus, we have made the following changes in this final rule:

(1) Based on information received from public comments, we reevaluated the threat of nonnative, invasive plants on the acuña cactus. As a result, we

determined that nonnative, invasive plants currently occur in the vicinity of several populations of acuña cactus, including the largest known population, and will become a threat to the acuña cactus in the near future. Therefore, we conclude nonnative, invasive species pose a threat to the acuña cactus and its habitat.

(2) Based on information received from public comments that both affirmed and refuted the threat of nonnative, invasive plants on the Fickeisen plains cactus, we reevaluated this threat. We conducted a thorough review of available information and reassessed the distribution of nonnative, invasive species to Fickeisen plains cactus populations, including their risk of exposure and potential population-level outcomes. We conclude that nonnative, invasive species are stressors on the landscape within the range of the Fickeisen plains cactus, but at this time, we lack site-specific information on which species are present; their abundance, density, and distribution relative to Fickeisen plains cactus populations; and evidence that the cactus is negatively affected by nonnative invasive plants. Therefore, we conclude that there is insufficient evidence that nonnative, invasive species are a threat to the Fickeisen plains cactus at this time.

(3) We have added a discussion concerning the occupancy of the Fickeisen plains cactus on the Kaibab National Forest at South Canyon in House Rock Valley. The South Canyon population is now the only known Fickeisen plains cactus occurrence on National Forest Service Lands. Please see *Abundance and Trends* for more information.

(4) Based on questions raised from a public comment, we reviewed our discussion of *Factor D: Inadequacy of Existing Regulatory Mechanisms.* We acknowledged in the October 3, 2012, proposed rule that there were adequate existing regulatory mechanisms in place for the Fickeisen plains cactus, as mechanisms appear to provide adequate protection to the cacti and its habitat in the manner they were intended to provide. We have furthered this conclusion by noting that the existing regulatory mechanisms in place do not ameliorate the threats to the Fickeisen plains cactus.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed listing and designation of critical habitat for the acuña cactus and the Fickeisen plains cactus during two comment periods. The first comment period, associated with the publication of the proposed rule (77 FR 60509), opened on October 3, 2012, and closed on December 3, 2012. We requested written comments on the proposed listing and critical habitat rule and the associated draft economic analyses during a comment period that opened on March 28, 2013, and closed on April 29, 2013, (78 FR 18938). We contacted all appropriate Federal, State, tribal, and local agencies; scientific organizations; and other interested parties and invited them to comment. Newspaper notices concerning the proposed rule and inviting the general public to comment were published by two local newspapers. We did not receive any requests for a public hearing, and thus, none were held.

During the comment periods for the proposed rule, we received 16 comment letters, including four from peer reviewers, directly addressing the proposed listing of the acuña cactus and the Fickeisen plains cactus with endangered status. All substantive information provided during the comment periods has either been incorporated directly into this final determination or addressed below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from three knowledgeable individuals on the acuña cactus and six on the Fickeisen plains cactus having scientific expertise that included familiarity with the respected taxon and its habitat, biological needs, and threats. We received responses from two of the peer reviewers for the acuña cactus and two for the Fickeisen plains cactus.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the listing of the acuña cactus and the Fickeisen plains cactus. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* Two peer reviewers commented that Flora of North America, Volume 4 (2003) presents a more recent taxonomic treatment of *Pediocactus* species than Benson (1982). It recognizes nine species of plants in the genera *Pediocactus,* not seven as stated in the proposed rule. Additionally, one peer reviewer commented that Flora of North America considers the Fickeisen plains cactus a subspecies of *Pediocactus peeblesianus.* The peer reviewer pointed out that we stated that the variety *fickeiseniae* was never validly published; therefore, we should use the current taxonomy.

Our Response: We have corrected our statement in the rule (see ''Taxonomy'' under ''*Species Description*'') that there are nine recognized species of *Pediocactus* in the United States, eight of which are endemic to the Colorado Plateau. We have referred to the Fickeisen plains cactus (*Pediocactus peeblesianus* var. *fickeiseniae*) as a variety since it was categorized as a candidate species in 1980 based on Benson (1969) and Heil *et al.* (1981). In regard to the current taxonomic treatment of the Fickeisen plains cactus, we are aware that Flora of North America considers the cactus a subspecies of *Pediocactus peeblesianus.* Other taxonomic organizations (e.g., Integrated Taxonomic Information System), however, treat the cactus as a variety and continue to use the name *Pediocactus peeblesianus* var. *fickeiseniae.* We recognize that revising the taxonomy of the cactus should be addressed. In the future, we will inquire into the reasons these organizations differentiate the cactus as a subspecies versus a variety for species management. Under the Act and in regard to plants, we treat variety and subspecies equally (43 FR 17912) in that we do not differentiate between a variety and subspecies when assigning priority classifications to species for listing, delisting, reclassification, or recovery actions (43 FR 43103). We continue to treat the Fickeisen plains cactus as a variety until there is broad acceptance among the botanical community that the cactus should be recognized as subspecies *fickeiseniae.*

(2) *Comment:* One peer reviewer requested a discussion in the final listing rule about the possibility of hybridization between *Pediocactus* species whose ranges converge or overlap with the Fickeisen plains cactus on the Arizona Strip.

Our Response: Three other species of *Pediocactus* occur near the Fickeisen plains cactus: *Pediocactus sileri* (Siler's pincushion cactus), *Pediocactus paradinei* (Kaibab plains cactus), and *Pediocactus bradyi* (Brady pincushion cactus). Phillips *et al.* (1982, p. 8) considered the possibility of hybridization from two nearby *Pediocactus* species in their status report for the Fickeisen plains cactus but did not find evidence of hybridization occurring. Porter (2002,

unpublished report) conducted DNA sequencing between *Pediocactus* species to investigate phylogenic relationships. Although he did not necessarily investigate hybridization among the species, his study would have illuminated any potential hybridization in that evolutionary lineages would be unclear. In our review of the Fickeisen plains cactus, we did not receive information of a discovery of a population having a high degree of variation among individuals that are similar in character to the Fickeisen plains cactus and another *Pediocactus* species. While the potential for hybridization exists, we are not aware of this possibility being apparent.

(3) *Comment:* Two peer reviewers suggested further discussion of the damaged Fickeisen plains cactus with orange-red material observed on the Navajo Nation, and which may be an infestation of the cactus borer beetle (*Moneilema semipuctatum*). One reviewer stated that larva from this beetle have been documented in *Pediocactus despainii* as well as *Sclerocactus wrightiae* in Capitol Reef National Park where the mortality of *Sclerocactus* plants have increased following drought years. The other reviewer stated that the cactus borer beetle impacts can be difficult to detect and are often misidentified as drought mortalities.

Our Response: We have added a discussion of the cactus borer beetle under *Factor C: Disease and Predation.* Based on the information provided by the peer reviewer, infestation by the cactus borer beetle on other cacti species has resulted in mortality. Other than information presented by the Navajo Nation in 1994 of suspected damage to a Fickeisen plains cactus by a cactus borer beetle, we are not aware of any other individuals being affected. As stated in the proposed rule, the Navajo Nation noted no insect or disease reported for the Salt Trail Canyon population in their 2006–2008 report.

(4) *Comment:* One peer reviewer commented that cheatgrass (*Bromus tectorum*) is ubiquitous throughout the American West, noting that, while densities vary from year to year depending on rainfall, the plant has been documented on substrates on which the Fickeisen plains cacti grow and has been identified as a future problem in close proximity to the habitat of this cactus. The reviewer further added that any annual invasive species would have similar impacts of competition with respect to Fickeisen plains cactus seedling germination and establishment and requested further discussion of the impacts of invasive annual species.

Our Response: The impact of nonnative species on the Fickeisen plains cactus and its habitat is unclear. Several species of exotics occur across its range with cheatgrass being the most widespread followed by red brome and redstem filaree. The past and present Navajo Nation botanists have opposing views on the effect of exotics. The current position of the Navajo Nation is that more research is required to fully understand if a negative relationship exists between exotic species and the cactus, and if abundance of exotics is contributing to declines in cactus numbers or preventing the successful germination and establishment of seedlings. We acknowledge that densities of cheatgrass may vary depending on rainfall: In years of above-average precipitation, cheatgrass densities may be high creating a fine fuel source that could increase the fire risk and fire frequency of an area. Following a fire, cheatgrass can quickly spread across the landscape and become a dominant species effectively promoting recurrent fires in the future. However, habitat across the range of the Fickeisen plains cactus is not contiguous in that plants occur in more grassland habitat in Mohave County then in Coconino County where vegetation is sparser. We agree with the peer reviewer that invasive species would increase the risk of fire to native plants and can directly and indirectly compete for soil moisture, nutrients, space, and light. At this time, we do not have sufficient information to determine the distribution of exotic annual species in relation to Fickeisen plains cactus habitat. We also lack information describing direct and indirect effects exotics that have on the plant and its habitat.

(5) *Comment:* One peer reviewer questioned why we stated we did not have sufficient information to evaluate whether the presence of nonnative, invasive species would facilitate the spread of wildfire into the habitat of the Fickeisen plains cactus.

Our Response: Most of the habitat of the Fickeisen plains cactus in Coconino County consists of open areas with sparse vegetation and gravelly soil. The habitat in Mohave County that supports the Fickeisen plains cactus occurs in dense grass where there may be a potential fire risk from exotic annual grasses. As we previously stated, densities of cheatgrass vary across the range of the Fickeisen plains cactus, in addition to densities of other nonnative, invasive species or noxious weeds. If already existing within Fickeisen plains cactus habitat, densities of the nonnative, invasive species may increase in response to rainfall amounts and frequencies, thereby competing with the cactus for soil moisture, nutrients, space, and light. The nonnative, invasive species may also create fuels during the dry summer months and make the habitat prone to a wildfire. Given the diminutive size of the Fickeisen plains cactus, it would likely be killed by a wildfire. With sufficient information to support that high densities of exotics occur in Fickeisen plains cactus habitat, we would consider fire a significant threat. No evidence, however, leads us to believe that densities of cheatgrass or other exotic annual species near Fickeisen plains cactus habitat present a significant threat. No new information concerning the effects of fire and invasive species on the taxon was provided to us during the comment periods.

(6) *Comment:* One peer reviewer expressed concern about the level of protection afforded the Fickeisen plains cactus from the Northern Arizona 20-year Mineral Withdrawal (Public Land Order Number (PLO) 7787) on public lands in the vicinity of Grand Canyon National Park. The peer reviewer noted that not all populations would be protected based on their location near canyon rims and the entire habitat has not been surveyed. The peer reviewer also questioned the finality of PLO 7787 and whether it may be overturned in future political elections. The peer reviewer also thought that a 20-year ban on uranium mining may not be adequate to protect the cactus and its habitat with respect to recovery.

Our Response: We relied on the best scientific and commercial data available at the time of our proposed rule to determine whether uranium mining is a significant threat to the Fickeisen plains cactus across its range. As of the date of publication, PLO 7787 remains in effect and our analysis of the impact of that Order is unchanged. No new information was provided during the comment periods on the threat of uranium mining to the Fickeisen plains cactus or its habitat. If new information becomes available in the future indicating that uranium mining is a significant threat to the Fickeisen plains cactus and its habitat, we will incorporate those findings and reconsider our conclusion in any future recovery planning efforts or 5-year reviews of the taxon.

(7) *Comment:* One peer reviewer acknowledged that off-road vehicle (ORV) use, road construction, and recreational uses within the habitat of

the Fickeisen plains cactus are increasing. The peer reviewer suggests however, that, without scientific documentation, the Service cannot fully quantify the current impacts to the species.

Our Response: We agree with the peer reviewer that ORV use and its impact to the cactus and its habitat has not been investigated. We have very little evidence (three observations) over a 23-year period of cacti being damaged by ORV use or roadwork on lands managed by the Bureau of Land Management (BLM) and Navajo Nation. Because of the scarcity of information we cannot quantify the effects nor can we say that these actions rise to the level of significance such that they result in local or rangewide population declines.

(8) *Comment:* One peer reviewer stated that development on the Navajo Nation is imminent and possibly may be ongoing. The reviewer suggests the Service reconsider the determination that development is not impending.

Our Response: We are aware that the Navajo Nation may be interested in developing areas along the rims of the Colorado River and/or Little Colorado River to increase tourism opportunities. We did not receive information describing a timeframe, commitment, or specifics related to commercial development projects on tribal lands and any potential impacts they may have on the Fickeisen plains cactus. We relied on the best available scientific and commercial data available at the time to determine whether commercial development was a threat to the Fickeisen plains cactus and its habitat. Information we received indicated potential future development was too speculative, and, therefore, we do not consider it to be a threat to the cactus at this time.

(9) *Comment:* One peer reviewer asked for clarification on *Factor D: Inadequacy of Existing Regulatory Mechanisms* and the rationale for our conclusion for the Fickeisen plains cactus. The reviewer pointed to the first paragraph in this section of the proposed rule (77 FR 60509, p. 60544) stating that there are no existing laws or regulations that address the threats to the cactus but the second paragraph states that legal and regulatory mechanisms which are in place appear to be adequate to protect the plant. The reviewer notes that, if conservation measures are largely voluntary throughout the range of the species, then it appears that the existing regulatory mechanisms are likely inadequate to protect the species.

Our Response: The basis for Factor D is to review the existing regulatory mechanisms that apply to the acuña cactus and Fickeisen plains cactus. These mechanisms are then evaluated to assess whether they address any of the threats identified for each plant. For instance if the regulatory mechanism protects individual plant species, but does nothing to protect the habitat, then that mechanism does not address the threats, if there are threats to the habitat. We have clarified our discussion under Factor D in this final rule.

(10) *Comment:* One peer reviewer is concerned that information is lacking regarding threats from illegal collection of the Fickeisen plains cactus and feels that the Service is making a determination about the impacts of collection on this species prematurely.

Our Response: As discussed in the rule, there have been no reported instances of illegal collection, nor have there been documented cases. We, therefore, relied on the best scientific and commercial data available at the time of listing, which indicated that illegal collection on the Fickeisen plains cactus is not a threat at this time. However, if information suggests that collection becomes a threat in the future, we will take that into account during recovery planning for the Fickeisen plains cactus.

(11) *Comment:* One peer reviewer commented that the distribution and range estimates for the Fickeisen plains cactus by NatureServe and Benson are too different and do not provide meaningful information. The reviewer suggested basing the range on current information of population distribution and habitat.

Our Response: There have been two estimates of range: One by NatureServe in 2011, the other by Benson in 1982. As stated in the rule, we do not have certainty that these estimates delineate the range where the Fickeisen plains cactus is distributed. We conclude, however, that the current and historic distributions are very similar as no documentation suggests that additional populations occur outside of its known range. We, therefore, provided an estimate of range that includes the currently known populations.

Public Comments

(12) *Comment:* The U.S. Forest Service provided information clarifying the status of the Fickeisen plains cactus in areas that were considered to be occupied by the plant. They also provided information describing the attributes of occupied habitat.

Our Response: The information demonstrated that one of the locations thought to be occupied by the Fickeisen plains cactus was erroneous. That site, Snake Gulch, located along the western boundary of the Forest is now considered to be unoccupied. We have included this information regarding the status of the population near the eastern boundary into the rule.

(13) *Comment:* A land management agency and a member of the public commented about a statement made in the proposed rule under Factor A—Livestock Grazing in regard to the increases and decreases of the North Canyon Fickeisen plains cactus plot on the Arizona Strip (77 FR 60509, p. 60536). The Federal agency stated that the proposed rule states that grazing has likely diminished the quality of suitable habitat on the Sunshine Ridge and North Canyon plots. This conclusion is based on population fluctuations and the absence of grazing on the North Canyon plot between 2001 and 2008, during which time the population increased. It is important to note that the population increased similarly between 1986 and 1991 while grazing was present in the area. It is, therefore, speculation to conclude without supporting data that grazing is causing population fluctuations or hindering population recovery.

Our Response: During both wet and dry years, the BLM recorded increases in some populations. No weather data was recorded at the sites during these studies, and nearby weather station data is inadequate to draw conclusions. The monitoring was not designed to separate the effects of weather and cattle impacts to the plants; therefore, conclusions cannot be drawn. We agree with the commenter that we do not fully understand what contributed to the increase in plants in the North Canyon plot.

(14) *Comment:* We received comments indicating there are questions regarding the taxonomic validity of *Echinomastus erectocentrus* var. *acunensis.* In particular, there is concern that the variety *acunensis* may be subsumed into the more widespread species *E. johnsonii.* One comment suggests a need for further study, while the second requests justification for choosing one scientific name over another.

Our Response: As stated in the proposed rule, the Cactaceae treatment in the Flora of North America (Zimmerman and Parfitt 2003, pp. 194–195) recognizes the entity as *E. erectocentrus* var. *acunensis.* A 2007 study by Baker indicated that all *Echinomastus* populations could be placed under a single taxon circumscribing an enormous amount of morphological variation, or they could be recognized as infraspecific taxa

under a single species. Baker's 2012 *Echinomastus* treatment in the Intermountain Flora notes that further study is needed in order to properly circumscribe subspecific taxa. To date, no peer-reviewed publications state that *E. erectocentrus* var. *acunensis* should not be considered as a valid taxon; therefore, the Service accepts this nomenclature.

(15) *Comment:* One commenter suggested that the Service relied upon insufficient evidence of a threat to either cacti species and selectively overlooked uncertainties and data gaps, as well as evidence of increases in populations of these species. Specifically, they commented that listing is unwarranted because we do not have sufficient information on the abundance and health of either species, surveys vary by methodology and accuracy, and data is old and incomplete.

Our Response: The Act requires that we use the best scientific and commercial data available regardless of the age of the information. In the proposed rule, we solicited the public for any new information on these species; while we received information clarifying what was published in the rule, no new population information was received. In some cases, the best available data is derived from different species with similar habitat requirements. We have used the best available scientific and commercial data, including results of numerous surveys, peer-reviewed literature, unpublished reports by scientists and biological consultants, and expert opinion from biologists with extensive experience with the species. We acknowledge that additional surveys and continued monitoring of existing plots would be valuable and should be considered as a recovery action for these species.

Based on our review of the best available scientific and commercial data, we have determined that both species warrant listing as endangered because they are in danger of extinction throughout all or a significant portion of their ranges. We determine whether any species is an endangered or a threatened species based on a five-factor threat analysis. For the acuña cactus, the threats to the species and its habitat result from the effects of drought and climate change; predation by native insect and small mammal predators; habitat destruction, modification, and degradation from United States-Mexico border activities (Factor A); and nonnative, invasive plant species issues (Factor A). In addition, the existing regulatory mechanisms in place do not directly address the threats to the species. For the Fickeisen plains cactus, the threats to the species and its habitat result from habitat destruction, modification, and degradation from livestock grazing (Factor A) in combination with predation by small mammals (Factor C) and natural environmental variability and the effects of climate such as drought. When combined with the above-mentioned threats, small population size (Factor E) likely exacerbates the effects of these threats on the Fickeisen plains cactus. In addition, the existing regulatory mechanisms are not ameliorating threats to the species. Please refer to the Summary of Factors Affecting the Acuña Cactus and Summary of Factors Affecting the Fickeisen Plains Cactus for more detailed information.

(16) *Comment:* One commenter believes the Service is attributing population decline in both species due to drought and speculates this drought is caused by climate change that may happen in the future.

Our Response: As is the case with all models, there is uncertainty associated with climate change projections due to assumptions and scale used and other features of the models. Projected future drought would increase an already existing impact of long-term drought on these species. The Service finds that drought over the past 30 years within the region has negatively impacted seedling recruitment and adult survivorship. In addition, projections of future climate in the region include continued drought and warming winters. Therefore, the continued effects on seedling recruitment and adult survivorship are likely to continue into the future. The Service will continue to follow and assess the science behind climate change and update our summaries as new information is published.

(17) *Comment:* One commenter is concerned that should either plant be listed, the final listing rule could be misused to impose undue burdens on American industries or activities that produce greenhouse gas emissions because the proposed rule identified the future effects of climate change as a threat to both species. The commenter requested that, if listing occurs at all, these cacti should be listed as threatened and a special rule should be created under section 4(d) of the Act establishing limits on the application of section 9 take prohibitions similar to the special rule for the polar bear under section 4(d) of the Act (December 16, 2008; 73 FR 76249).

Our Response: While the Service may find that the effects of climate change are threats to species, regulation of greenhouse gas emissions is beyond the scope of the Act. The term ''threatened species'' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Alternatively, the term ''endangered species'' means any species which is in danger of extinction throughout all or a significant portion of its range. We have determined both acuña cactus and Fickeisen plains cactus are in danger of extinction throughout all or a significant portion of their range and, therefore, meet the definition of endangered species under the Act.

Listing either species as threatened is not the appropriate determination because the threats described are severe enough to create the immediate risk of extinction. As described in the Determination for the Acuña Cactus, the combination of declining rainfall, ongoing drought conditions, and the effects of climate change is expected to continue the documented trend of mortality exceeding recruitment across all populations of the acuña cactus. When mortality exceeds recruitment in a population, the result is often a declining population. Given this, we consider none of the populations to be stable or secure. The factors significantly threatening the species are not expected to be abated in the foreseeable future, and some populations may have decreased to levels where they are no longer viable. For these reasons, we have determined the acuña cactus meets the definition of an endangered species under the Act. Similarly, as described in the Determination for the Fickeisen Plains Cactus, the effects from climate change are expected to continue the documented trend of mortality exceeding recruitment across all populations. This, in combination with the other factors significantly threatening the species, leads us to conclude that the threat of extinction is high and immediate for the Fickeisen plains cactus, thus warranting a determination of endangered species status rather than threatened species status for the Fickeisen plains cactus.

If a species were listed as threatened, the Secretary can issue a special rule under section 4(d) of the Act if deemed necessary and advisable to provide for the conservation of the species. A section 4(d) rule is designed to provide for conservation of species through allowing take of listed species under certain allowable activities. That is, take, as defined under the Act, if it occurs under an allowable activity, would not be a violation of the Act. In the case of these two cacti, the Service

is not able to issue a 4(d) rule since we have determined both meet the definition of an endangered species.

(18) *Comment:* One commenter suggested the proposed rule underestimates the extent of the range of the acuña cactus, noting in particular the population of *Echinomastus* species found in 2009 in the Bighorn and Littlehorn Mountains, which was not included in analysis for the acuña cactus.

Our Response: We are aware of the populations of acuña cactus in the Bighorn and Littlehorn Mountains. Morphometric analysis of Baker (2007, p. 11) suggests that, while individuals among these populations share many characters in common with *E. erectocentrus* var. *acunensis,* they also show characteristics of var. *lutescens.* Therefore, as the identity of these populations has not been verified, we did not include these populations in our evaluation of the status of the species.

(19) *Comment:* One commenter is concerned that the Service relied on only a few of the known populations of acuña cactus to derive data for decline and used inconsistent monitoring efforts and a lack of statistically robust methods to estimate total abundances and changes in abundance over time. The commenter feels that information is lacking, and a decision to list the acuña cactus as endangered is premature. The commenter provided four examples of population decline data used in this rule and which they dispute: (1) Rigorous sampling of the overall population at OPCNM is needed and prior estimates of population numbers are speculative; (2) sampling at the Coffeepot Mountain population has been inconsistent and no meaningful conclusion regarding this population can be drawn; (3) the Mineral Mountains population counts from the 1990s do not indicate type of sampling or area covered and, therefore, should not be compared with 2011 sampling; and (4) upon their own visit to the population at Indian Village Hill, they found 33 individuals, as compared to the Service visit of 2011 which found just 8 individuals, illustrating that individuals were being missed in surveys. The commenter acknowledges there appears to be a decline in some of the monitored populations of acuña cactus, but suggests there is also evidence that small populations are viable and relatively stable.

Our Response: We have used the best scientific and commercial data available; while these references may include varying survey and monitoring methodologies, they nonetheless provide important data upon which we can base our analysis. We acknowledge that additional surveys and continued monitoring of existing plots would be valuable and should be considered as a recovery action for these species. We address the commenter's examples here: (1) In addition to overall population estimates, monitoring plots within Organ Pipe Cactus National Monument (OPCNM) show a pronounced decline in acuña cactus numbers which outweighs recruitment and is a serious concern for park managers (NPS 2012, p. 1; Holm 2006, p. 2–2). (2) We received public comments during the first comment period which indicated that the Coffeepot Mountain acuña cactus population was revisited by OPCNM staff in 2008. The population was censused in 1987 and again in 2008, and total living plants at that location decreased from 310 to 77. (3) The same BLM botanist was involved in the 1990s, 2002, 2008, and 2011 acuña cactus survey of the same ridgelines in the Mineral Mountains. Original surveys indicated more than 100 individuals present; in 2011 these and a fourth new population on a nearby ridgeline totaled 33 living plants (Service 2008a, entire; Service 2011b, p. 1). (4) At Indian Village Hill, researchers found 102 individuals in 1996. The Service acknowledges that it should not have utilized the 2011 Service report indicating current population numbers at this location. The Service report indicated that approximately 8 individuals were noted at this site (Service 2011a, p. 1); however, a full census was not conducted. Nevertheless, the 2013 census of the commenter found 33 individuals, clearly fewer than 102 found in 1996. These and other examples (refer to the ''Abundance and Trends'' of the acuña cactus section of the rule) all illustrate a marked decline in the number of individuals censused over time. There is also evidence that recruitment (the number of juveniles seen) is not keeping up with the number of dead plants counted in any location.

Background

In the proposed listing rule, we provided a description of each species, their life history, and their habitat; an evaluation of listing factors for each species; and our finding for the species. In this final listing rule, we include only those sections that have been revised as a result of the public comments we received and to reflect the best scientific and commercial data available.

Acuña Cactus

It is our intent to discuss below only those topics directly relevant to the listing of the acuña cactus as an endangered species in this section of the final rule. The biology and habitat sections remain unchanged since publication of the proposed rule. Please refer to the proposed listing rule for the acuña cactus and Fickeisen plains cactus (77 FR 60509; October 3, 2012) for a detailed description of the biology and habitat of the acuña cactus. We have updated the ''Species Description'', ''Taxonomy'', ''Distribution and Range'', and ''Abundance and Trends'' sections below as a result of information received from the public during the public comment periods.

Species Description

The acuña cactus is a small, spherical cactus, usually single-stemmed, that can be up to 40 centimeters (cm) (16 inches (in)) tall and 9 cm (3.5 in) wide (Arizona Rare Plant Guide Committee 2001, unpaginated; Zimmerman and Parfitt 2003, pp. 194–195). The acuña cactus has 11 to 15 radial spines up to 2.5 cm (1.0 in) long and 3 to 4 mauve-colored, up-turned central spines up to 3.5 cm (1.4 in) long (Arizona Rare Plant Guide Committee 2001, unpaginated; Zimmerman and Parfitt 2003, pp. 194–195). Rose, pink, or lavender flowers 3.6 to 6 by 4 to 9 cm (1.4 to 2.3 by 1.6 to 3.5 in) are produced in March (Arizona Rare Plant Guide Committee 2001, unpaginated; Zimmerman and Parfitt 2003, pp. 194–195). The fruits, which are held in place by a tight mesh of spines, are pale green, are 1.25 cm (0.5 in) long, and contain small, nearly black seeds (Felger 2000, p. 208). The fruits ripen in April (Arizona Rare Plant Guide Committee 2001, unpaginated) and as they dry, they split longitudinally, exposing the seeds (Morawe 2012, pers. comm.).

Taxonomy

This species was originally described in 1953 by W.T. Marshall as *Echinomastus acunensis* (Marshall 1953, pp. 33–34). It is known by many synonyms, including *Sclerocactus erectocentrus* var. *acunensis* (Coulter) Taylor and *Neolloydia erectocentra* (W.T. Marshall) var. *acunensis* L. Benson (Arizona Game and Fish Department (AGFD) 2004, p. 1). The Cactaceae treatment in the Flora of North America (Zimmerman and Parfitt 2003, pp. 194–195) recognizes the entity as *E. erectocentrus* var. *acunensis.* The other variety, *E. erectocentrus* var. *erectocentrus* (needle-spine cactus), is also recognized as a valid taxon in the Flora of North America. The two varieties are generally considered to be morphologically distinct and

geographically isolated, but there have been questions regarding the morphology of some individuals (AGFD 2004, p. 6). To address those concerns, the Service funded a project to analyze the morphological distinctness of the two varieties, which was completed in January 2007. The results of this study suggest that there are four distinct taxonomic groups, including the separation of variety *acunensis* and variety *erectocentrus* (Baker 2007, pp. 19–21). Baker (2007, p. 20) recommended nomenclatural changes, based on the International Rules of Botanical nomenclature, but formal name changes were not proposed in his study. Since that time, Baker collected additional morphology data from other *Echinomastus* populations and concluded in his 2012 Intermountain Flora *Echinomastus* treatment, that all varieties of *Echinomastus* be combined into a single species *E. johnsonii* (Baker 2012, p. 445). In this treatment, however, Baker notes that further study is needed in order to determine if separating the species into varieties may be warranted (Baker 2012, p. 446). To date, there are no peer-reviewed publications stating that *E. erectocentrus* var. *acunensis* should not be considered as a valid taxon. Therefore, we accept Baker's 2007 work and the Flora of North America, which separate the acuña cactus from the needle-spine cactus as valid and distinct taxa separated morphologically and geographically.

Distribution and Range

The acuña cactus populations are known from Maricopa, Pima, and Pinal Counties in Arizona and from Sonora, Mexico (AGFD 2004, p. 2). In western Pima County, plants are known from the Puerto Blanco Mountains and adjacent Aguajita Wash on National Park Service (NPS) lands within OPCNM; from the Sauceda Mountains on Bureau of Land Management (BLM) and Tohono O'odham Nation lands; from Department of Defense military lands on the Barry M. Goldwater Gunnery Range (BMGR); and from private lands near Ajo. In Maricopa County, the acuña cactus is known from the Sand Tank Mountains on BLM lands within the Sonoran Desert National Monument. In Pinal County, plants are known from Mineral Mountain on BLM, State, and private lands. In Sonora, Mexico, the acuña cactus occurs on Reserva de la Biosfera El Pinacate y Gran Desierto de Altar (Pinacate Biosphere Reserve), communal ejido lands, and private ranches. Available information indicates that the current range of this species does not differ from the historical range, with the exception that the current Ajo populations likely had been part of a larger population that occurred before mining activity began there (Rutman 1996b, pers. comm.; Rutman 2007, p. 7). However, there are no survey records for this species in the area prior to mining activity.

Abundance and Trends

As the number of dead individuals documented within acuña cactus populations has increased greatly since study began in the 1970s, it is important to track the number of healthy, unhealthy, and dead individuals. This not only allows us to document trends in total plant numbers, but also can help in our understanding of the cause and extent of mortality. A discussion of abundance and trends of acuña cactus populations on Federal, State, and private lands, along with lands in Sonora, Mexico, is presented below.

Federal Land—National Park Service

Organ Pipe Cactus National Monument—There is one large area of approximately 1,326 ha (3,277 ac) within OPCNM that contains as many as 2,000 acuña cactus individuals (Rutman 2011, pers. comm.; AGFD 2011, entire). In 1981, this population was estimated to contain 10,000 individuals (Buskirk 1981, p. 3). Within this area, two 20-by-50-m (66-by-164-ft) permanent monitoring plots were established in 1977, with the aim of investigating growth, mortality, and recruitment of this species. Between 1977 and 1981, mortality reached 31 percent in the plots (Phillips and Buskirk 1982, p. 2). Two more plots were added in 1983, and two more in 1988. From 1988 through 1991, the population was thought to be stable or increasing (Johnson *et al.* 1993, p. 172), with 446 individuals found in the 6 plots by 1991 (Holm 2006, p. 6). From 1993 through 2012, annual mortality was variable, but exceeded recruitment in most years (NPS 2012, p. 2). In 2012, the total number of individuals recorded in the 6 plots was 38 adults and 15 juveniles (NPS 2012, entire).

In order to verify the identification and location of plants, specimens are collected, pressed, and placed on sheets that are stored in herbaria. A 1952 herbarium collection from a second location within OPCNM is evidence that a second disjunct population of the acuña cactus occurred historically within OPCNM. The information associated with this collection states the plants were located south of Dripping Spring within 3 m (10 ft) of the U.S.-Mexico border; an exact location was not provided. Although staff at OPCNM were unaware of this herbarium collection, they state that the general area of its collection has been visited during surveys for sensitive cultural and natural resources, as well as for buffelgrass; no acuña cactus plants were noted (Morawe 2012, pers. comm.). We do not know if the population or a seedbank exists at this location; however, we do know that lands immediately adjacent to the border have changed significantly in recent decades with the creation of border fencing, vehicle barriers, and Border Patrol service roads. Although this population likely once supported enough individuals to warrant collection for herbaria, it is likely this population no longer exists at this location. During a public comment period, we requested any information about the status of the acuña cactus at this location; no additional information on the cactus was received.

Federal Land—Bureau of Land Management

Sauceda Mountains—Within the Coffeepot Area of Critical Environmental Concern (ACEC), there are several small acuña cactus populations, each on less than 2 ha (5 ac) of land.

In 1982, the BLM (Phoenix District) established three 20-by-50-m (66-by-16-ft) monitoring plots on Coffeepot Mountain. These plots were visited, and data were collected periodically between 1982 and 1992. In 1982, researchers found 157 living and 3 dead plants within the plots. Over the years of study, many new recruits were found; however, there was also ongoing mortality with newly dead individuals documented each year. BLM staff reported a precipitous decline of this population in 1989 (Johnson 1989, p. 1). A note to the file in 1991 stated that many individual plants were missing, dead, or dying, and that there appeared to be little regeneration in this population (BLM 1991, p. 1). By the monitoring visit in 1992, researchers recorded 150 plants dead, 22 plants missing and presumed dead, and 150 plants within the plots that were either healthy or in some stage of decline (Butterwick 1982–1992, entire). The plots have not been formally measured since 1992, but the BLM has visited this site 21 times since then to assess general health and threats to the population. Field notes indicate that few juveniles were seen in 2008, and no juveniles were seen in 2009; no mention of juveniles was made in 2010 or 2011 (Anderson 2011, p. 2). The site was not visited in 2012.

A complete census of individual acuña cacti from both within and nearby the Coffeepot Mountain plots in 1987 found 310 living and 332 dead plants (Rutman *et al.* 1987, p. 2). In 2008, staff of OPCNM censused the number of individuals from both within and nearby the plots and found 77 living and 80 dead plants (Morawe 2012, pers. comm.). The loss of 252 dead plants during this time is also of interest, as it shows that the cage-like spinal remains of acuña cacti do not persist in the environment for extended periods.

In 2006, a second population, estimated to be between 50 and 100 individuals, was located 1.2 kilometers (km) (0.75 miles (mi)) northwest of the Coffeepot Mountain monitoring plots in Ryans Canyon (Rutman 2006, p. 2). Rutman (2006, entire) did not mention size class or health of this population. This site has not been revisited. In 2006, a third population was discovered 1.4 km (0.87 mi) to the northeast of the Coffeepot Mountain monitoring plots. Approximately 30 acuña cacti were noted there at the time; 25 percent mortality was reported 1 year later (Anderson 2011, p. 1). An October 2011 site visit by Service and BLM botanists revealed 23 adult and 2 juvenile living and 15 dead plants at this location (Service 2011a, p. 3). A fourth population was discovered in March 2011, in a location near the third population; 10 plants were noted. No indications were given as to the age class structure or health of this population (Anderson 2011, entire).

At an acuña cactus site the BLM calls Little Ajo Mountains, southeast of the New Cornelia Mine on less than 0.4 ha (1 ac), the population has fluctuated from 5 plants in 1997, to 7 plants in 2001, to 7 plants in 2006, to 11 plants in 2007, to 7 plants in 2008, and finally to 12 plants (including 5 very small plants) in 2011 (Rutman 2006, p. 2; Anderson 2011, entire; Service 2011a, p. 1). In 2013, the site was visited and 12 plants were located, 5 of which were reported to be uprooted and 2 were juvenile (Westland Resources 2013, p. 3). Westland Resources noted that the five individuals that were uprooted were lying on their side and may have been the target of herbivory or may have been knocked over by a passing animal (2013, p. 3).

Sonoran Desert National Monument—In 2006, approximately 200 individuals were reported from the Sand Tank Mountains in an area less than 25 ha (61.8 ac) in size. In 2007, the site was revisited, and 4 groups of individuals accounting for 125 of the approximately 200 individuals were mapped (Anderson 2012b, pers. comm.; Anderson 2011, p. 2). No indications were given as to the age class, structure, or health of this population (Anderson 2011, entire). This site has not been revisited.

Mineral Mountain—There are 3 individual acuña cacti growing on BLM land adjacent to 30 living plants and 22 dead plants on Arizona State Trust lands (State land). This population is discussed collectively below under ''State Land''.

Federal Land—Department of Defense

Barry M. Goldwater Gunnery Range—In 1997, a single adult individual was reported from just north and outside of the populations in the Coffeepot ACEC (Geraghty *et al.* 1997, p. 5) within Department of Defense (DOD) managed lands on the BMGR. This site was revisited in 2012, but no plants were located (Whittle 2012a, pers. comm.). It is unknown if the one previously located individual has been extirpated or was missed during the survey, nor is it known if a seedbank persists at this location.

State Land

Mineral Mountain—Plants were collected by S. Hart in 1992, from the population straddling BLM and State land east of Florence (University of Arizona Herbarium 2011, entire). There were no details of the number of individuals seen, just a map with three locations. In the 1990s, the BLM revisited this site and estimated 100 individuals were scattered across 3 ridgelines (Service 2008a, p. 1). In 2008, the Service and BLM searched this area finding fewer than 20 living and many dead plants; no young plants were seen. In 2011, the Service and BLM botanists revisited the location and found 33 living and 22 dead plants scattered across 4 adjacent ridgelines on less than 5 ha (12.4 ac) of land; no juveniles were found (Service 2011b, p. 1).

Ninety-Six Hills—This population is in the vicinity of Florence on less than 1 ha (2.47 ac) of land. Parfit (1977, p. 1) noted that plants here were common, but very localized. Many plants of various ages and sizes were noted, as well as many dead plants. Engard (1977, p. 1) noted many seedlings and mature plants and also that the plants were abundant locally. Rutman and Krausman (1988, p. 1) found 29 live plants and 6 dead plants in a 2-hour survey in the same general area. Breslin (2008, pp. 3–5) reported that in over 60 hours of survey effort in the area he had located 45 plants, 1 seedling, and 17 dead plants. On March 20, 2008, the Service plant ecologist found 11 live plants and 10 dead plants in a 3-hour survey. In the same general area, C. Butterworth (2008, pers. comm.) found 32 live plants, of various sizes, except seedlings. He noted that seedlings were very noticeably absent. A 2011 2-hour survey by three Service and BLM botanists revealed no living and two dead adults in this same general area (Service 2011b, p. 3). Because this population was not mapped with Geographic Information Systems, it is impossible to know if survey efforts in 1977, 1988, 2008, and 2011 were all conducted in the exact same location within this general area. Therefore, it is not possible to conclude that this population has been extirpated.

Private Land

Ajo Area—The combined area of these multiple sites is less than 0.4 ha (1 ac) (Rutman 2007, p. 1).

An isolated population near Darby Wells was first reported by Heil and Melton (1994, p. 14). Fewer than 10 plants were found at this site in 2007 (Rutman 2007, p. 4). There is no record if juveniles were among the plants found. The site has not been revisited.

On Indian Village Hill, there were 102 plants in 1996, when the population was first recorded (Rutman 1996b, pers. comm.). In 2006, 30 living and 33 dead plants were found; in 2007, fewer than 40 plants were found (Rutman 2006, p. 1; Rutman 2007, p. 4). There is no record if juveniles were among the plants found in either year. In 2011, Service and BLM botanists counted eight living and seven dead plants in a small area that was surveyed; no juveniles were found (Service 2011a, p. 1). In 2013, biologists from Westland Resources did a complete survey of the area and found 33 live and 8 dead individuals (Westland Resources 2013, p. 3). During this survey, they also discovered a single individual growing nearby across the road.

There were 16 live and 19 dead acuña cacti on Weather Tower Hill in 2006 (Rutman 2006, p. 1). There is no record if juveniles were among the plants found. The site was revisited in 2013 by Westland Resources biologists; 17 living and 26 dead individuals were located (Westland Resources 2013, p. 2). During this survey, they also discovered a separate subpopulation 200 m (656 ft) from the known population containing 10 living (including 1 juvenile) and 5 dead individuals (Westland Resources 2013, p. 2).

Florence Area—Roadside populations occur on less than 0.4 ha (1 ac) collectively; any additional populations that may be present on private land occur on an unknown quantity of land.

Roadside Population One—The 2011 site visit revealed nine living and two dead individuals; no juveniles were found, though all nine were young healthy individuals (Service 2011b, p. 2).

Roadside Population Two—The 2011 site visit revealed two living and two dead individuals; no juveniles were found (Service 2011b, p. 2).

There may be other locations on private lands unknown to Service or BLM botanists.

Sonora, Mexico

Felger (2000, p. 208) noted the occurrence of the acuña cactus between 3 and 18 km (2 and 11 mi) southwest of Sonoyta along the Peñasco highway; no population estimates were made. Surveys of 7 acuña cactus populations from an area from 2009 through 2010 revealed 659 living and 942 dead plants growing on approximately 1,700 ha (4,200 ac) (Pate 2011, pers. comm.; Pate 2011, map 1 and map 2). Pate (2012a, pers. comm.) noted seeing a few small seedlings among these plants. From 2012 to 2013, researchers located 18 additional populations of acuña cactus in the vicinity of, but not within, those censused in 2009–2010 (Van Devender 2012, pers. comm.; Van Denvender 2013, pers. comm.). In these surveys, an additional 371 living and 801 dead individuals were counted; a few small living plants were noted (Van Devender 2012, pers. comm.; Van Devender 2013, pers. comm.). The total land area of the general region containing all 25 known populations in Sonora is roughly 6,900 ha (17,050 ac).

Summary

Presented below is the total estimate of living, dead, and juvenile acuña cactus plants in populations visited over multiple years, including census results from 2011 through 2013, and from previous years if sites have not been revisited or population estimates not updated. Notable trends are the large amount of mortality within the populations that have been visited more than once, high numbers of dead individuals within many populations visited once, and the low numbers of juvenile plants in all populations.

- NPS—2,000 plants, or 55.4 percent of known individuals; estimated in 2011 by OPCNM staff. This population estimate is down from 10,000 individuals estimated at this location in 1981. Within the OPCNM plots, the number of recorded individuals peaked in 1991, with 165 adult and 281 juveniles counted. In 2012, researchers noted 38 adult individuals and 15 juveniles within these plots (NPS 2012, p. 1).
- Sonora, Mexico—1,030 plants or 28.5 percent of known individuals; estimated from 2009 to 2010 and 2012 to 2013 surveys. During surveys of these plants, an additional 1,743 dead plants were located among the living. There are no previous estimates from these populations. A few juvenile plants were noted during both survey periods.
- BLM—422 plants, or 11.7 percent of known individuals; estimated from 2011 and other recent surveys. At Coffeepot Mountain within the largest BLM population, 310 living and 332 dead individuals were recorded from both within and nearby established plots in 1987. By 2008, this population was reduced to 77 living and 80 dead plants noted within and nearby established plots. No juveniles were noted since 2008, when a few were seen.
- Private Land—81 plants (70 near Ajo and 11 near Florence), or 2.2 percent of known individuals; estimated from 2013 and other recent surveys. A single population that was revisited on several occasions showed a total population of 102 individuals in 1996; in 2006, 30 living and 33 dead plants were found. In 2013, researchers recorded 33 plants from this population.
- State Land—75 plants, or 2.1 percent of known individuals; estimated from 2011 surveys. At one location in the 1990s, the population was estimated to be 100 individuals; in 2008, only 20 living and many dead plants were found with no juveniles seen. In 2011, researchers recorded 30 living plants, including a new subpopulation previously not recorded. No juvenile plants were located in 2011. At a second location, in 1977, plants were considered common but localized, and the site supported many plants of various ages and sizes. Surveys of this area in 2008 resulted in the location of 45 adult plants with no juveniles found. In 2011, no living plants and two carcasses were located in this same area, though surveys were not as thorough as in 2008; we use the 2008 number of 45 individuals for population estimates herein.
- Military BMGR—1 plant, or less than 0.03 percent of known individuals in 1997; this individual was not relocated in 2012.

Summary of Factors Affecting the Acuña Cactus

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal List of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Based on the habitat characteristics described above, potential factors that may affect the habitat or range of the acuña cactus are: (1) Urban development and site degradation; (2) livestock grazing; (3) border activities; (4) nonnative, invasive plant species issues; (5) mining; and (6) drought and climate change.

Urban Development and Site Degradation

The immediate threats from urban development include the direct loss of individuals and habitat. Indirect impacts of urban development include fragmentation of acuña cactus and associated pollinator populations, which can reduce genetic vigor of the cactus and result in degradation and fragmentation of habitat adjacent to development. When development occurs, there is also an increased use of habitat for recreational activity, which may also deplete habitat and result in mortality of individuals. The acuña cactus populations in OPCNM and the Sonoran Desert National Monument are protected from the immediate threats associated with urban development due to their National Monument status. National Monuments are lands set aside and managed to protect the natural and cultural resources within; development is minimal, though some site degradation may still occur.

To meet the country's energy demands, there has been a recent emphasis by the Federal Government to use BLM lands for development of renewable energy. Currently, there are no planned solar or wind energy projects on or near populations of the acuña cactus in the Sauceda, Sand Tank, or Mineral Mountains (Werner 2011, pers. comm.). However, a solar field has recently been constructed on patented mine lands in the Ajo area (Morawe 2012, pers. comm.). Most populations on BLM lands are remotely

located and relatively inaccessible; therefore, we do not anticipate development in these areas.

As Arizona's population is expected to continue to grow in the future, both Pinal County and the State Land Department are promoting urban development in the vicinity of Florence (Pinal County 2009, pp. 4, 60, 94; Guthrie *et al.* 2011, p. 1). When the housing market rebounds, it is likely that additional State land in this area will be sold for urban development (Pinal County 2009, p. 42; Guthrie *et al.* 2011, p. 2). In the vicinity of Florence, there are no current plans for development of State land known to support acuña cacti. Private lands near Florence containing acuña cacti populations have been for sale as subdivided 16.2-ha (40-ac) parcels for many years. With the recent economic downturn, it is unlikely this land will be sold in the near future. The only known private land populations where access is readily available are at 3 sites near Ajo, totaling less than 0.4 ha (1 ac) and supporting fewer than 40 individuals in total (Rutman 2006, p. 1; Rutman 2007, pp. 1, 4; Service 2011a, p. 1). In most of the privately owned locations, the sites are littered with broken glass, bottles, and trash; however, plants appear little impacted by this habitat degradation (Service 2011a, p. 1; Service 2011b, p. 2).

Indirect urbanization effects to the areas that support the acuña cactus include ORV activity, which has been reported on BLM lands near both Ajo and Florence. These reports, however, showed no impact to the acuña cactus populations in 1994 (Heil and Melton 1994, pp. 15–16), although habitat degradation and direct loss of individuals is possible from this activity. In 1989, the BLM closed the Coffeepot ACEC to recreational ORV use (BLM 2012a, p. 2–195). In 2002, the BLM prohibited ORV use on the Sonoran Desert National Monument, and, in 2005, affirmed a restriction to designated, established, routes in the Sand Tank Mountains area (BLM 2012a, p. 2–181). In 2012, the BLM Lower Sonoran Field Office released Resource Management Plans (RMPs) for the Sonoran Desert National Monument and the Lower Sonoran Decision Area (BLM 2012b, c, entire).

The Lower Sonoran Decision Area encompasses approximately 930,200 acres of BLM-administered land in south-central Arizona, mostly south and west of Phoenix, and extends south to the United States-Mexico border, west to the Yuma County line, and as far east as the town of Globe. On the Sonoran Desert National Monument, motorized vehicle use is limited to designated roads or primitive roads (BLM 2012c, p. 2–78). Throughout the Lower Sonoran Decision Area, including the Coffeepot ACEC, travel is limited to existing roads and trails (based on current BLM route inventories) until route designations are completed. When designations are completed, travel will be restricted to designated roads, primitive roads, and trails (BLM 2012b, p. 2–113). These new RMPs for the Lower Sonoran Decision Area and the Sonoran Desert National Monument will remain in effect for the next 15 to 20 years (Foreman 2011, pers. comm.). The impacts of ORV activity on State or private lands are unknown; for ORV activity within the border region, see the discussion below of border activities.

In Sonora, Mexico, scattered populations of the acuña cactus occur within 10 km (6.2 mi) of the town of Sonoyta. Although the area is reported to be little-used and unoccupied except by drug and human smugglers (Pate 2011, pers. comm.), in recent decades and as a result of human demand, the Sonoyta region has been heavily impacted by *Olneya tesota* (ironwood) and *Prosopis velutina* (mesquite) woodcutting for coal production, brick foundries, and tourist crafts, and the lands' subsequent conversion to exotic grasslands for cattle grazing (Suzán *et al.* 1997, pp. 950, 955). This activity has affected more than 193,000 ha (478,000 ac) of lands in the Sonoyta region (Nabhan and Suzán 1994, p. 64). In a study of ironwood extraction in northern Mexico, the Sonoyta study sites exhibited the highest number of damaged and dead trees and had the lowest associated plant diversity (Suzán *et al.* 1996, p. 642). It is likely that habitat parameters for the acuña cactus populations in Sonora are impacted by this activity, particularly because ironwood is considered a dominant associate of the acuña cactus (Phillips *et al.* 1982, p. 5) and may serve as a nurse plant for a variety of cacti (Suzán *et al.* 1996, p. 635).

In addition, the actions of harvesting, burning, loading, and transporting wood and charcoal can result in running over individual acuña cactus and causing injury or mortality of plants, if such actions occur in areas supporting the acuña cactus. Also, human population growth and development in the border region between the United States and Mexico has risen in recent decades (Brown and Caldwell 2008, pp. 1–6); it is reasonable to conclude that the direct and indirect effects of urbanization are likely to increase threats to the acuña cactus populations in this region. The acuña cactus populations are currently split by a major highway, Interstate 8, and a power transmission line; many plants occur within 200 m (660 ft) of these corridors (Pate 2011, map 1 and map 2).

In summary, the direct and indirect effects of urbanization are threats to a portion of the known populations of the acuña cactus. However, these effects are currently limited to the acuña cactus populations in the vicinity of Ajo and Florence in the United States and in the immediate border region of Sonora, Mexico. These areas collectively make up roughly 31 percent of known living acuña cactus individuals across the range of the acuña cactus, including Mexico. The majority of the range in the United States is protected from urban development because populations are on Federal lands, where little or no development will take place. In addition, most populations of the acuña cactus are relatively remote or otherwise protected from the effects of urbanization. We conclude that urban development and site degradation is not currently a threat to any entire population of the acuña cactus. As a result, based on our review of the available information, we conclude that the direct and indirect effects associated with urbanization are not threats to the acuña cactus and its habitat.

Livestock Grazing

In general, grazing practices can change vegetation composition and abundance and cause soil erosion and compaction, reduced water infiltration rates, and increased runoff (Klemmedson 1956, p. 137; Ellison 1960, p. 24; Arndt 1966, p. 170; Gifford and Hawkins 1978, p. 305; Waser and Price 1981, p. 407; Robinson and Bolen 1989, p. 186; Holechek *et al.* 1998, pp. 191–195, 216; and Loftin *et al.* 2000, pp. 57–58). These anticipated effects leave less water available for plant production (Dadkhah and Gifford 1980, p. 979). In addition, livestock can step on or knock over individual acuña cactus. Although other species of cacti may be good survival forage for livestock (Vega-Villasante *et al.* 2002, p. 499), herbivory of the acuña cactus has not been reported. Livestock grazing levels and habitat condition vary greatly between populations due to varied land ownership and management. A discussion of livestock grazing practices within the acuña cactus range on Federal, State, and private lands, along with lands in Sonora, Mexico, is presented below.

Federal Land—National Park Service

Organ Pipe Cactus National Monument—Beginning in the early

1900s and continuing through the 1970s, lands within OPCNM were grazed heavily, with as many as 3,000 head of cattle and hundreds of burros present at a time when carrying capacity was estimated to be 314 cattle per year (Rutman 1997, p. 364; NPS 2011b, entire). Grazing by domestic animals was halted per NPS policy and has not occurred within OPCNM since 1976 (NPS 1997, p. 33). Lands here continue to recover slowly after loss of soils and vegetation and may take many decades or centuries to recover fully (NPS 2001, pp. 27, 124). Currently, OPCNM supports the largest population of the acuña cactus (55.4 percent of known living acuña cactus individuals), and we are not aware of historical effects to the population as a result of past livestock grazing.

Federal Land—Bureau of Land Management

Sauceda Mountains—All four populations of the acuña cactus on BLM lands in the Sauceda Mountains have been managed since 1988 in the Coffeepot ACEC, which attempts to apply grazing management practices to ensure perpetuation of botanical diversity within the area and prohibits the development of livestock facilities that would serve to increase livestock use within the area (BLM 2011, p. 141). Collectively these four populations make up 5.9 percent of known living acuña cactus individuals. In 1987, when speaking of the then proposed Coffeepot ACEC, Olwell (1987, p. 1) noted relatively pristine conditions with no immediate threat to the acuña cactus plants. At that time, however, the population of acuña cactus within the Coffeepot ACEC in the vicinity of permanent monitoring plots was reported to have substantial animal activity from cattle, javelina, and jackrabbits, with browsing, grazing, and soil disturbance noted (Rutman *et al.* 1987, p. 2). Anderson (2011, entire) noted no habitat impacts from grazing in this population during yearly visits from 1994–2011. This population is the farthest population from a single cattle tank (see below) within the ACEC and, therefore, is less subjected to livestock pressure.

On BLM land south of Ajo, five individuals were noted to be uprooted and lying on their side (Westland Resources 2013, p. 3). It was speculated these individuals were either predated upon or had been knocked over by a passing animal. It is unknown if cattle were responsible for these losses.

Sonoran Desert National Monument—In 1970, a cattle tank named Conley Reservoir was established within the Coffeepot ACEC boundary prior to the ACEC designation and remains today (Foreman 2012, pers. com.). A population of acuña cactus very near this tank was visited by the BLM botanist in 2010, who found abundant prickly pear (*Opuntia* spp.), which are known to increase with disturbance and are often cited as an indicator of poor range condition (Johnson 2000, entire; Anderson 2011, p. 2). A site visit in 2011 by Service and BLM botanists found habitat impacts such as soil disturbance from both cattle and feral burros; however, no acuña cactus plants appeared to be directly impacted by these animals (Service 2011a, p. 3). Feral burros also impact vegetation on neighboring military lands (see *Barry M. Goldwater Gunnery Range* section below).

The BLM's 2012 Lower Sonoran Decision Area RMP allocates all of the land within the Childs Allotment, within which the Coffeepot ACEC lies, as available for livestock grazing (BLM 2012b, p. 2–82). According to this document, past grazing levels (3,802 animal unit months/317 cows yearlong) and type of use (perennial/ephemeral) will remain the same, and livestock facilities that would increase livestock use within an area of known or newly discovered populations of acuña cactus will not be developed (BLM 2012b, p. 2–124). This management plan will remain in effect for 15 to 20 years (Foreman 2011, pers. comm.).

Sonoran Desert National Monument—In 2001, Presidential Proclamation 7397 (Clinton 2001, entire) created the Sonoran Desert National Monument; one population of acuña cactus containing 5.5 percent of known living acuña cacti occur in the Sand Tank Mountains. This area was designated for military purposes in 1941, and has had no livestock grazing for more than 60 years (Clinton 2001, p. 2). During a site visit in 2006, no habitat impacts from livestock were reported from this location (Anderson 2011, p. 2). The livestock management regime of no livestock being permitted within the Sonoran Desert National Monument Sand Tank Mountains acuña cactus population will be maintained for at least the next 15 to 20 years (BLM 2012c, p. 2–63; Foreman 2011, pers. comm.).

Mineral Mountain—This population is discussed collectively below under ''State Land''.

Federal Land—Department of Defense

Barry M. Goldwater Gunnery Range (BMGR)—A single acuña cactus plant was found on BMGR approximately 1 km (0.62 m) to the north of a known population within the BLM Coffeepot ACEC (Geraghty *et al.* 1997, p. 5). This individual was not relocated in a 2012 survey (Whittle 2012a, pers. comm.); however, this plant or its seedbank may remain. Livestock grazing is not authorized on the BMGR, though some trespass cattle do occur (Whittle 2012b, pers. comm.). Feral burros on BMGR are a concern, however, and BMGR managers plan to implement a burro trapping program in the future, in an attempt to reduce damage to vegetation (Whittle 2012b, pers. comm.).

State Land

Mineral Mountains—Populations of acuña cactus on State land in the Mineral Mountains are subject to grazing; two land sections containing this species are collectively part of a larger 6,118 ha (15,118 ac) grazing lease with a total carrying capacity of 118 animal units (Sommers 2012, pers. comm.). Three individual acuña cacti from this group of populations overlap onto adjacent BLM land. This BLM land, which is not fenced from adjacent State land, has a total permitted number of cattle of 1,224, though the lessee did not run the full amount of animals in the past few years due to drought conditions (Tersey 2013, pers. comm.). During a 2011 site visit, the habitat appeared unaltered by livestock, and no cattle were seen (Service 2011b, p. 1).

Ninety-Six Hills—Three additional land sections near Box O Wash containing this species are collectively part of a lease of 12,369 ha (30,565 ac) with a total carrying capacity of 236 animal units (Sommers 2012, pers. comm.). Both leases incorporate State and BLM lands, although in this area the species has been found on State lands and not the associated BLM lands. No livestock were seen during the November 2011 site visit to this population (Service 2011b, p. 3). Only 2 dead individual acuña cacti were found, and neither appeared to have been knocked over by cattle (Service 2011b, p. 3). In the past, Rutman and Krausman (1988, p. 1) recommended that this State land habitat could benefit from improved livestock management, as cattle trails there were numerous during a 1988 site visit. In a 2008 site visit, it was noted that quite a few of the dead acuña cactus plants may have been knocked over by livestock (Service 2008b, p. 1). It is unknown what the grazing lease or animal units were for this period of time. In 2011, several individuals were noted to have grown additional arms following the loss of the growing tip (Service 2011b, pp. 3–4). This was possibly due to injury caused by cattle, a beneficial adaptation to

disturbance noted previously by Phillips *et al.* (1982, p. 6). The populations on State land represent 2.1 percent of known living acuña cactus individuals. Although livestock grazing on State lands may benefit from improved management, the impacts to the acuña cacti are small.

Private Land

Ajo—Populations of the acuña cactus on private lands near the town of Ajo were noted to occur in degraded habitat with low species richness; these sites were suspected to have had a grazing history of severe use (Rutman 1995, p. 1).

Florence—Those acuña cacti on private lands near Florence are in an unknown condition, as they are not typically visited by Service staff. Two roadside populations visited in 2011 had 4 dead plants and 13 healthy plants collectively; all dead plants seemed to have died from drought or insect attack, although 1 population did contain evidence (feces) of cattle use (Service 2011b, p. 2). Private lands account for 2.2 percent of known living acuña cactus individuals.

Sonora, Mexico

In Mexico, researchers report livestock grazing in parts of the Sonora range (Stoleson *et al.* 2005, p. 60), but mostly the habitat remains little-used and unoccupied land (Pate 2011, pers. comm.). Sonora maintains 28.5 percent of the known acuña cactus individuals across the range; their recent decline, as evidenced by 1,743 dead plants counted since 2010, has not been attributed to livestock.

In summary, 61 percent of acuña cactus individuals occur within lands protected from cattle grazing either by NPS or BLM National Monument status. In areas occupied by the acuña cactus where livestock grazing does occur, impacts from livestock do not appear to be a consistent or significant threat to populations. Based on our review of the available information, we conclude that, although there is evidence that grazing impacts to the acuña cactus do occur, we do not believe that these effects occur to such an extent that livestock grazing is a threat to the acuña cactus and its habitat.

Border Activities

Over the past decade or more, tens of thousands of people illegally attempt crossings of the U.S.-Mexico border into Arizona annually (cross-border violators) (Service 2011c, p. 14). As a result of increased U.S. Customs and Border Protection (CBP) activity in the Douglas, Arizona, area, and in San Diego and southeastern California, cross-border violator traffic has shifted into remote desert areas such as OPCNM (Service 2011c, p. 14). For example, in 2001, an estimated 150,000 people entered OPCNM illegally from Mexico (Service 2011c, p. 14). With the increase in technology, border fencing, and manpower between 2001 and 2012, these numbers are down considerably, with 6,218 arrests of cross-border violators from OPCNM in the year 2011 (Oliver 2012, pers. comm.). Although the number of arrests does not represent all those who attempted to enter OPCNM illegally, this number is suspected to be considerably less than reported in 2001. Despite the fact that these numbers are down due to enforcement and deterrence efforts by the CBP, the thousands of people crossing through the border area illegally still represent a substantial impact to the landscape.

More than 84 percent of the known living acuña cactus individuals occur within 16.5 km (10.25 mi) of the border in either OPCNM or Sonora, Mexico. Cross-border violators, CBP, and NPS law enforcement activity in this area may degrade acuña cactus habitat by creating new roads and trails, disturbing vegetation and soils, and moving exotic plant seeds or plant parts, leading to their spread into unoccupied areas (Duncan *et al.* 2010, p. 124). At OPCNM, the acuña cactus occurs in an area that is closed to visitors due to dangers of drug and human smuggling. Significant impacts may occur when travel moves off existing roads causing vegetation destruction, soil compaction (Duncan *et al.* 2010 p. 125), and, potentially, direct mortality of the acuña cactus by running over individuals, although no direct impacts to acuña cactus have been observed. Staff at OPCNM note that, in 2010, two vehicle tracks and associated articles of clothing from cross-border violators were found within one of the six 20-by-50-m (66-by-164-ft) acuña cactus long-term monitoring plots (Holm 2012a, pers. comm.). Although no individual plants were reported to have been run over in this instance, the occurrence of the activity within this proximity to acuña cactus individuals supports our conclusion that impacts from cross-border violators and border enforcement may negatively impact the species and could be a threat.

The NPS constructed a vehicle barrier along the U.S.-Mexico border at OPCNM in 2006 (Morawe 2012, pers. comm.). After the construction of the vehicle barrier, the general consensus of the OPCNM staff was that cross-boundary vehicle traffic had been reduced by 90 to 95 percent (Morawe 2012, pers. comm.). In 2008, the Department of Homeland Security completed an 8.4-km (5.2-mi) stretch of pedestrian fence, approximately centered on the border town of Lukeville. Some cross-border traffic continues to occur, but the majority of the remaining cross-country traffic in OPCNM is due to law enforcement activities (Morawe 2012, pers. comm.).

The Biological Opinion for the Ajo Forward Operating Base Expansion reported personal observations by NPS and Service employees that the number of off-road tracks and new roads continues to increase (Service 2011c, p. 19). These new off-road tracks and roads are believed to be the result of CBP response by vehicle, horseback, and foot to cross-border violators, whom are travelling primarily on foot (Service 2011c, p. 19). By 2011, OPCNM personnel had mapped thousands of miles of unauthorized off-road impacts from cross-border violators, CBP, and law enforcement activities (Service 2011c, p. 18). Staff at OPCNM has been compiling data on off-road traffic and mapping unauthorized roads on OPCNM for a report. This report was not available to us by the time of writing the final rule. Although most of the unauthorized roads were created prior to construction of vehicle barriers and pedestrian fences along the U.S.-Mexico border, it is not known if the additional roads were created after the construction of the border fences. In 2011, NPS staff noted no new heavily utilized routes due to off-road travel by vehicles, but staff did state that single vehicles drive across habitat and individual acuña cactus plants may be driven over. There is no evidence that acuña cacti have been harmed, but damage to larger plants has been documented due to similar activity (Rutman 2011, pers. comm.). In cooperation with Service staff, CBP has begun efforts to educate Border Patrol agents on the locations and appearance of acuña cactus so that the areas that support the plant can be avoided to the maximum extent possible. A road atlas has been printed and distributed to CBP agents working in the area, though acuña cactus habitat is not indicated on this map (Morawe 2012, pers. comm.).

A system of sensors and communication towers is currently in place and is being expanded within the border region; this technology improves deterrence, detection, and apprehension of cross-border violators entering or attempting to enter the United States illegally (Service 2009, p. 5). It is expected that, with increased communication and sensor tower technology, the need for CBP agents to

patrol the area will be reduced, thus reducing circumstances requiring vehicles to drive off authorized roads (Service 2009, p. 16). CBP agents on foot or on horseback may conduct off-road pursuit of suspected cross-border violators at any time, including in areas designated or recommended as wilderness (Service 2009, p. 17). Where such motorized pursuits are necessary, CBP has committed to using the least intrusive or least damaging vehicle readily available, without compromising officer or agency safety.

No existing or proposed communication towers are near any acuña cactus populations within OPCNM; however, human traffic patterns have changed since the installation of towers in and near OPCNM. These towers have been effective at reducing foot traffic through acuña cactus habitat (Morawe 2012, pers. comm.). When communication and sensor towers and associated tactical infrastructure require maintenance and repair, the acuña cactus could be directly affected by repair and maintenance of this infrastructure if maintenance vehicles traveled off approved access routes. The CBP has committed to use only approved access routes for these maintenance activities, and OPCNM staff report that CBP has kept their agreement in this regard. Because towers are effective at helping CBP see illegal activity, however, enforcement-related off-road vehicle activity has increased (Morawe 2012, pers. comm.). When walking into an area to do fieldwork, including acuña cactus annual monitoring, OPCNM staff understand that their footprints into sensitive habitat may be tracked by CBP agents (Morawe 2012, pers. comm.). In addition, if these maintenance and repair activities occur in undisturbed areas in the habitat of listed plant species, a survey must be conducted and a sufficient buffer created to protect any plants found (HDR 2012, pp. 4–3).

Illegal drug and human smuggling also adversely affects the area of the Coffeepot ACEC, but the area is less impacted than other border areas (BLM 2011, p. 344). This is likely the case with the other populations on private and BLM lands near Ajo. Within BMGR, cross-border violators and associated activities represent a significant threat to natural and cultural resources within the BMGR, including having widespread and adverse effects on soil and hydrology (U.S. Departments of the Air Force and Navy 2007, pp. 3–11). We are aware of no instances of illegal activity or law enforcement activity impacting the populations near Florence. The Service (2008b, p. 1) noted that little to no human activity, including ORV use, was observed during a 2008 site visit to these populations.

The acuña cactus populations across the border from OPCNM, in Mexico, occur on land that is little used, unoccupied, and subject to heavy traffic by drug and human smugglers (Pate 2011, pers. comm.). This area was reported to be unsafe, and warnings were given to Service personnel not to travel to this location alone (Larios 2012, pers. comm.). In 1993, the Mexican Government established Pinacate Biosphere Reserve, a 7.7-million ha (1.9-million-ac) reserve for the region's flora, fauna, geology, and archeology preservation. A portion of the acuña cactus individuals in Sonora occur within the Pinacate Biosphere Reserve. It is unknown what, if any, protection this designation provides the acuña cactus.

In summary, the two areas containing the largest number of living acuña cactus (84 percent of the known living acuña cactus individuals) occur along the U.S.-Mexico border (in OPCNM and Sonora, Mexico). Within populations, acuña cacti are typically spaced within 3 m (9.8 ft) of each other, and vehicle traffic through any population could potentially impact many individuals. This area is heavily impacted by cross-border violators, CBP, and law enforcement activity, as evidenced by the tremendous increase in illegal roads and trails documented by agencies along the border. To date, no individual acuña cactus plants are reported to have been lost to these activities; however, reporting from this area is inconsistent. With anticipated continued border activity in the area, it remains possible that acuña cactus individuals and their habitat will be impacted. These impacts include: Creation of new roads and trails; disturbance of associated vegetation including nurse plants and microclimates; compaction or erosion of soils; movement of nonnative, invasive plant seeds and plant parts; and the potential to cause direct mortality to individuals by running over plants with vehicles. Therefore, based on our review of the available information, we conclude that cross-border violators, CBP, and law enforcement off-road activities are a threat to the acuña cactus and its habitat.

Nonnative, Invasive Plant Species

Throughout the Sonoran Desert ecosystem, invasions of the introduced *Pennisetum ciliare* (buffelgrass), *Bromus rubens* (red brome), *Eragrostis lehmanniana* (Lehmann lovegrass), *Schismus barbatus* (Mediterranean grass), and *Pennisetum setaceum* (fountaingrass) have altered nutrient regimes; species composition and structure through competition for open space; microclimates; and fire frequency, duration, intensity, and magnitude (Brooks and Pyke 2001, p. 5). Although most of these species were intentionally introduced as forage for livestock, as erosion control, or as ornamentals, each is now considered invasive and a threat to this ecosystem (Búrquez-Montijo *et al.* 2002, entire). Species such as buffelgrass are expected to increase their range even with continued and predicted drought events (Ward *et al.* 2006, p. 724). It is generally thought that invasion by exotic annual grasses will continue unchecked in the Sonoran Desert ecosystem in the future, reducing native biodiversity through direct competition and alteration of nutrient and disturbance regimes (Franklin and Molina-Freaner 2010, p. 1671).

Herbarium sheets contain labels that give information regarding where a specimen was collected, by whom, when the collection was made, and additional information such as what plant species were found in association with the collected specimen. There are no exotic species noted as associates on 39 of the 40 acuña cactus specimen herbarium sheets located at the Arizona State University, University of Arizona, or San Juan College Herbarium collections (ARIZ 2011, entire). These collections cover the range of the acuña cactus and date from 1952 through 2009. One specimen collected in 1982 has exotic annual red brome grass listed as an associate. Although fountaingrass found on nearby property was reported to be a possible threat to the acuña cactus near Ajo (Falk 2005, pers. comm.), no exotic grasses were noted within the Ajo, Little Ajo Mountains, or Coffeepot ACEC habitats during field surveys in October 2011 (Service 2011, p. 4). One researcher familiar with all known populations of the acuña cactus noted no associated threats from exotic plant species in any population (Baker 2011, pers. comm.). However, according to a peer-review comment received regarding this rule, buffelgrass is reported to be abundant and rapidly expanding in the Ajo region, the Sauceda Mountains, and the Sikort Chuapo Mountains, which lie between these two areas (Morawe 2012, pers. comm.). This reviewer also noted that buffelgrass is increasing distribution within ORCNM such that it now surrounds the entirety of acuña cactus habitat (Morawe 2012, pers. comm.).

Two of our peer reviewers feel that, although no acuña cactus populations are currently known to harbor buffelgrass, given the current rate of expansion and lack of management programs in many areas, buffelgrass could appear in acuña cactus populations within 5 to 20 years.

In summary, we have reviewed the available information on the effects of and occurrence of nonnative, invasive plants in or near populations of the acuña cactus in southern Arizona and Sonora, Mexico. Known populations of the acuña cactus are well distributed across southern Arizona and northern Sonora and occur in areas subject to effects from nonnative, invasive plant species. Although no populations of the acuña cactus currently show evidence of effects from nonnative, invasive species, reports indicate that buffelgrass is currently in close proximity and could expand into acuña populations within the near future. Therefore, our review of the best scientific and commercial data available indicates that, while nonnative species do not co-occur with the acuña cactus presently, there is potential for the invasion of at least one troublesome invasive plant, buffelgrass, within the near future. Therefore, we conclude nonnative, invasive species pose a threat to the acuña cactus and its habitat.

Mining

The immediate threats from mining activity include the direct loss of individuals and habitat. Indirect impacts of mining activity include fragmentation of acuña cactus and associated pollinator populations, which can reduce genetic vigor of the cactus and result in degradation and fragmentation of habitat and dusting of individual cacti adjacent to mines and associated roads.

The acuña cactus populations in OPCNM and the Sonoran Desert National Monument are protected from the immediate threats associated with mining due to their National Monument status (NPS 1997, pp. s–iii; BLM 2012c, p. 2–69). The 2012 BLM Sonoran Desert National Monument RMP continues the mining closure within the boundaries of the National Monument (BLM 2012c, p. 2–69). Authorized surface-disturbing activities within occupied acuña cactus habitat areas within the Coffeepot ACEC will be minimized, mitigated, or avoided to ensure stable populations (BLM 2012b, p. 2–32). The ACEC is closed to saleable minerals (e.g., sand and gravel; BLM 2012b, p. 2–88, Map 14), open with special mitigation to leasable minerals (e.g., oil and gas; BLM 2012b, p. 2–88, Map 13), and open, subject to mitigation to maintain resource values, for locatable minerals (hard rock mining; BLM 2012b, p. 2–87). No known mining activities are planned on BLM properties, though a BLM parcel adjacent to populations on State lands near Florence may host a gravel mining operation in the future (Service 2011b, p. 1). Verified mining threats near Florence, as well as within Mexico, are unknown.

Mining activity on private land near Ajo has a long history; the New Cornelia copper mine was one of the first open pit mines in Arizona dating to 1854 (Arizona Mining Association 2011, entire). This mine was closed in 1985, and a 2008 investigation by company owners determined the mine would not be reopened due to current economic conditions (Ajo Copper News Oct 29, 2008). As of 2013, the mine remains closed.

The small populations of the acuña cactus that remain in Ajo may have been part of a much larger population that occurred before mining activity began, but there are no survey records for this species in the area prior to mining activity. As a result, it is unclear to what extent the acuña cactus and associated habitat were removed due to historical mining in this area, but there was certainly some loss of individual acuña cactus and habitat. Rutman (1995, p. 1) noted that on the east side of the Ajo rock dump, roads, wells, prospecting holes, rock piles marking mining claims, and past use of explosives occurred immediately adjacent to the acuña cactus plants. Rutman (2006, p. 1) noted that habitat was lost when Indian Hill Village Road was built and occupied habitat may also have been lost where the following buildings and infrastructure now occur: Assembly of God Indian Mission, New Cornelia mine, parking lot for the mine lookout, baseball diamond, and the large informal parking lot to the north of the hill. It is possible that these populations were at one time connected with the few plants to the southeast of the open pit mine on BLM land. There is little doubt that the historical size and range of the Ajo area populations of acuña cactus have been reduced.

We are aware of no acuña cactus populations that are currently impacted by active mining. It is reasonable to project that some mining will occur in the future that could affect acuña cactus populations near Florence, Ajo, and in the Coffeepot ACEC. However, these effects will occur in limited areas that do not support a majority of known individual acuña cactus. The acuña cactus populations will remain well distributed across their range even if future mining activities affect a few populations. Therefore, based on our review of the available information, we conclude that current mining activity and mining in the near future are not threats to the acuña cactus and its habitat.

Drought and Climate Change

Our analyses under the Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). Thus, the term ''climate change'' refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy 2005, pp. 325–326). The synergistic implications of climate change and habitat fragmentation are the most threatening facet of climate change for biodiversity (Hannah *et al.* 2005, p. 4). Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Seager *et al.* 2007, p. 1181). Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, pp. 6072–6074; Cook *et al.* 2004, p. 1015).

The current prognosis for climate change impacts in the American Southwest includes fewer frost days; warmer temperatures; greater water demand by plants, animals, and people; and an increased frequency of extreme weather events (heat waves, droughts, and floods) (Weiss and Overpeck 2005, p. 2074; Archer and Predick 2008, p. 24). How climate change will affect summer precipitation is less certain because precipitation predictions are based on continental-scale general circulation models that do not yet account for land use and land cover effects or regional phenomena, such as those that control monsoonal rainfall in the Southwest (Weiss and Overpeck 2005, p. 2075; Archer and Predick 2008, pp. 23–24). Some models predict dramatic changes in southwestern vegetation communities as a result of climate change (Weiss and Overpeck 2005, p. 2074; Archer and Predick 2008, p. 24), especially as wildfires carried by nonnative plants (e.g., buffelgrass) potentially become more frequent, promoting the presence of invasive, exotic species over native ones (Weiss and Overpeck 2005, p. 2075). The Sonoran Desert has experienced drought conditions since 1998 (Bowers 2005, p. 421; Western Region Climate Center (WRCC) 2012, entire). Recent trends for the region predict that climate of the region will become much drier in the next 2 to 3 decades (Schwinning *et al.* 2008, pp. 14–15). The impact of current and future drought, which may be long-term and severe (Seager *et al.* 2007, pp. 1183–1184; Archer and Predick 2008, entire), will continue to affect the acuña cactus and its habitat throughout its range.

Climate change is likely to affect the long-term survival and distribution of native plant species, such as the acuña cactus, through changes in temperature and precipitation. Over the past 40 to 50 years, the United States has experienced more extreme weather events, heat waves, and regional droughts than in previous decades (Karl *et al.* 2009, p. 27). The southwestern United States has experienced the greatest temperature increase in the continental United States; average temperatures increased approximately 0.8 degrees Celsius (°C) (1.5 degrees Fahrenheit (°F)) compared to a 1960 to 1979 baseline (Karl *et al.* 2009, p. 129). By the end of this century, temperatures averaged across the Southwest region are expected to warm a total of 2 to 5 °C (4 to 10 °F) above the historic baseline period of 1960–1979 (Karl *et al.* 2009, p. 129). The frequency and intensity of high temperature extremes will increase, and heat waves currently considered rare will become more common (Karl *et al.* 2009, pp. 33–34). This region has experienced drought conditions since 1998 (Bowers 2005, p. 421; WRCC 2012, entire). Annual mean precipitation levels are expected to decrease in western North America and especially the southwestern States by midcentury (IPCC 2007, p. 8; Seager *et al.* 2007, p. 1181; Girvetz *et al.* 2009, entire). The current trend in the Southwest of less frequent, but more intense, precipitation events leading to overall drier conditions is predicted to continue (Karl *et al.* 2009, p. 24). The levels of aridity of recent drought conditions and perhaps those of the 1950s drought years will become the new climatology for the southwestern United States (Seager *et al.* 2007, p. 1181). In summary, the drought the southwestern United States has been experiencing since the late 1990s is the worst in more than 100 years and is being exacerbated by record warming (Karl *et al.* 2009, p. 130).

Heat stress in adult cacti is minimal compared to other plant species as they are able to survive heat stress due to both morphology and metabolism (Smith *et al.* 1984, pp. 647, 650; Wahid *et al.* 2007, p. 199). In a study of Sonoran Desert cacti, Smith *et al.* (1984, pp. 647, 650) found that short cacti (such as the acuña cactus) and massive cacti had higher heat tolerance than most other cacti species studied, and more than vascular plants overall. They also found heat tolerance varied with stem orientation, stem diameter, and location on the landscape including a portion of the species' range (Smith *et al.* 1984, p. 649). Extreme temperatures can, however, negatively impact seedling survival in many Sonoran Desert plants, and drought coupled with high temperatures lessens temperature tolerance in seedlings (Nobel 1984, pp. 310, 316). We found no additional information on projections for cacti in general, or the acuña cactus in particular, indicating the impacts of increased heat stress combined with increasing drought stress as climate models project. We do know, however, that drought or high temperatures alone can damage non-cacti species, and the combination causes more detrimental interactive effects on these plants than either stressor independently (Huang and Jiang 2002, p. 288).

We are aware of several reports of drought stress apparent on individual acuña cactus. In cacti and other succulents, stem swelling and shrinking is typical with rain-drought cycles (Mauseth 2000, p. 1107). At OPCNM, monitored acuña cactus individuals were reported to have shrunk in size from 1 year to the next, and researchers noted shrinking individuals may be dying (Ruffner 1989, p. 1). In addition, 1986 datasheets from monitoring plots at OPCNM categorized cacti based on health of the individual; one category from the time was ''desiccated'' (dried out) (Buskirk 1986, pers. comm.). Although such descriptive categories have not been in use in monitoring for some time, OPCNM staff note their importance and would like to reinstate them in future monitoring (Holm 2012b, pers. comm.). In addition, plants already stressed from prolonged drought are more susceptible to insect attack and disease (Mattson and Haack 1987, p. 110), and such attack is prevalent in all acuña cactus populations across their range (see discussion in *Factor C. Disease or Predation*). Mortality in measured plots at OPCNM was most severe in 1993, when 40 adults were lost, and again in 1997, when 53 adults were lost (NPS 2011a, p. 2); both of these were years with dry summers (WRCC 2012, entire). Between 2001 and 2011, 78 adults were lost in these plots, and 25 of these losses occurred in the very dry year of 2007 (NPS 2011a, p. 2; WRCC 2012, entire). During this same 10-year period, 31 new adults were recorded as additions to the population through recruitment (NPS 2011a, p. 2).

In addition to the health of adult individuals, drought is directly related to acuña cactus population health with regard to reproduction and establishment. In his 3-year study of the reproductive ecology of the acuña cactus, Johnson (1992, pp. 403, 405) concluded that the positive association of rainfall and annual variation in the number of flowers produced indicates that water availability limits flower production in this species. Although Johnson cites yearly precipitation in relation to flower production, it seems more likely that winter precipitation is the driving factor, as flowers are produced early in the spring following winter precipitation events. Within monitoring plots established by Buskirk in 1977 (Buskirk 1981, p. 1), total flowers counted peaked at 902 in 1992 (Holm 2006, p. 10); corresponding precipitation during the winter of 1992–1993 was 29.7 cm (11.66 in) (WRCC 2012, entire). By comparison, in the last 10 years of measurement, the average number of flowers counted in these plots was 198 (Holm 2006, p. 10); the corresponding average winter precipitation during these years was 9.7 cm (3.8 in) (WRCC 2012, entire).

Resource limitation may affect the acuña cactus seed set through ovule abortion (Johnson 1989, p. 11). Because

flowering commences in early March and fruiting commences in late April (Johnson 1989, pp. 5, 8), it is likely also that winter precipitation is correlated with fruit set. Fruit production was monitored at the OPCNM plots beginning in 2004, and has shown considerable variation since that time with a low of 29 fruits produced in 2007, when total winter precipitation was 6.8 cm (2.69 in), and a high of 361 fruits produced in 2005, when winter precipitation was 16.4 cm (6.47 in) (NPS 2011a, p. 1; WRCC 2012, entire).

Johnson (1989, pp. 5, 12) determined that acuña cactus seedling survival was dependent on summer precipitation and that soil moisture availability limits the distribution of the species. Rice (2001, pers. comm.) noted that in greenhouse trials of the acuña cactus, seedlings and new recruits were primarily lost due to desiccation; emphasizing that establishment is the most critical and limiting phase of the acuña cactus life cycle. Throughout the species' range, rainfall has been declining, and drought conditions have been dominant since 1998 (Bowers 2005, p. 421; WRCC 2012, entire); this has likely influenced seedling survivorship (Holm 2006, p. 2–1—2–13; NPS 2011a, p. 1). For example, in the measured plots at OPCNM, the recruitment rate peaked in 1992, coinciding with consecutive seasons with near to above average rainfall (NPS 2011a, p. 1; WRCC 2012, entire). In the Coffeepot Mountain BLM monitoring plots, seedling or juvenile plants were observed in all years when plots were measured; however, the number of dead plants far exceeded recruitment in any year (Butterwick 1982–1992, entire). In many site visits throughout the region over the past 10 years, there have been reports of low or no recruitment (Service 2008a, p. 1; Service 2008c, p. 1; Anderson, 2011, p. 2; Service 2011a, entire; Service 2011b, p. 3; Westland Resources 2013, p. 4).

In summary, since the late 1990s, the southwestern United States has been experiencing drought conditions and increasing high temperatures. Climatic predictions suggest continued less frequent, but perhaps more intense, summer precipitation, reduced winter precipitation; and increasing temperatures in this region (Seager *et al.* 2007, p. 1181; Archer and Predick 2008, pp. 23–24; Karl *et al.* 2009, p. 24). Data from the acuña cactus monitoring plots at OPCNM and at Coffeepot Mountain, along with occasional surveys of these and most other populations, indicate major population declines have occurred across the acuña cactus range over the past 30 years. It appears that a combination of drought stress, warmer winters, and insect attack have reduced adult plant numbers, while heat stress, lack of precipitation, and seed predation have combined to reduce or halt reproduction (see *Factor C. Disease or Predation,* below). Because the current drought is occurring on a regional scale, and because climatic models predict future regional droughts, it is likely that all populations of the acuña cactus will continue to decline due to drought and the effects of climate change. In addition, it appears that drought and climate change in combination with insect damage and predation, as a combined effect, is the more likely scenario for rangewide level impacts to acuña cacti (see *Factor C. Disease or Predation,* below). Most, if not all, of the acuña cactus populations are impacted by drought and the effects of climate change, including effects to both individual cacti and to productivity and establishment. Therefore, based on our review of the best scientific and commercial data available, we conclude that drought and the effects of climate change are threats to the acuña cactus across its range. When combined with insect predation (see *Factor C. Disease or Predation,* below), the effects on acuña cactus populations are significant.

Summary of Factor A

In conclusion, based on our review of the best scientific and commercial data available, we have determined that individual plant loss, as well as fragmentation of acuña cactus and associated pollinator populations due to the effects of urbanization; livestock grazing; and mining do not impact the species at a population level and, therefore, are not threats to the acuña cactus. Currently, 84 percent of the known living acuña cactus individuals occur along the border near OPCNM. Cross-border violators and associated CBP and law enforcement off-road activities may be affecting individual acuña cactus plants and their habitat. If there is an increase in off-road activities in or near acuña cactus populations or habitat, the likelihood of loss of individuals or loss or modification of habitat also increases. In addition, while no populations of the acuña cactus currently show evidence of effects from nonnative, invasive species, reports indicate that buffelgrass is currently in close proximity and could expand into acuña populations within the near future. Finally, a large amount of mortality has been documented within all populations that have been visited more than once, relating to a combination of the intricately correlated increases in drought and heat stress, warmer winter temperatures, and insect attack (see *Factor C. Disease or Predation,* below). Thus, based on our review of the best scientific and commercial data available, we conclude that loss and degradation of habitat due to nonnative, invasive species; off-road border activities; and the effects of drought and climate change, are threats to the acuña cactus and its habitat.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Unauthorized collection has, in the past, been identified as a threat to the acuña cactus (Phillips *et al.* 1982, p. 9; Phillips and Buskirk 1982, p. 2; Rutman 1996a, pers. comm.; Rutman 2007, p. 6). At OPCNM, a large number of individuals are located adjacent to Puerto Blanco Drive, which was formerly a scenic loop drive. Although historically collection is suspected to have occurred in this population (Buskirk and Phillips 1983, pers. comm.; Rutman 1996a, pers. comm.), the significance of this past collection varies. Buskirk (1981, p. 5) noted that he did not believe collection was a significant source of mortality between 1977 and 1981, yet Phillips and Buskirk (1982, p. 2) noted three mapped roadside cacti lost to collectors, stating that collecting could be a significant cause of loss in OPCNM. Additionally, Rutman (1996a, p. 2) noted that along the scenic drive road at OPCNM, considerable collection of the largest size class of plants occurred. This road was closed to visitors in 2003; the staff of OPCNM hope to reopen this road in the future, though it will remain closed indefinitely while border issues continue, making it unlikely that collection will occur there in the near future (Rutman 2011, pers. comm.; Morawe 2012, pers. comm.; Pate 2012a, pers. comm.).

On BLM-administered lands, the acuña cactus plants occur in very remote locations, and no reports of collection are known. Rutman (1995, p. 2) noted collection did not appear to be a threat to the population surrounding the Coffeepot Mountain plots during annual visits between 1988 and 1990. Similarly, no evidence of collection was seen during 2011 Service and BLM site visits to nearby populations within the Coffeepot ACEC (Service 2011a, p. 4).

On State and private lands in the Florence area, Rutman (1995, p. 3) noted that population locations were published and, easy to access, and that, for many years, collectors have been taking plants. She also noted individual plants seen the previous year were missing, and no carcasses were found

upon revisiting (Rutman 1995, p. 3). No evidence of collection from visited sites was found during 2011 Service visits (Service 2011b, p. 1). Private lands in the Ajo area are also accessible, though we have no reports of collection there.

Buskirk and Phillips (1983, pers. comm.) refer to some acuña cactus collection, but refer to it as relatively uncommon and unsystematic at present. No documented cases of unauthorized collection (in violation of the Arizona Native Plant Law) of this cactus have been found in any of the known populations. Heil and Melton (1994, p. 15) note that the acuña cactus is easy to grow and raise from seed and that this species is rare in the gardens of cactus collectors. An investigator within the Office of Special Investigations of the Arizona Department of Agriculture stated that he does not believe collection of the acuña cactus is a threat to the species (Reimer 2011, pers. comm.). Therefore, based on our review of the best scientific and commercial data available, we conclude that, while there is evidence that unauthorized collection of the acuña cactus did occur in the past, there is little evidence that collection occurs to such an extent currently as to constitute a threat to the acuña cactus, nor do we expect collection to become a threat in the future.

Factor C. Disease or Predation

In general, cacti are susceptible to attacks from numerous types of insects, and the acuña cactus is no exception. The interior flesh of cacti provides both a nesting area and food source for beetles, weevils, and other insects. Once an infestation has occurred, cacti can die from the eating and tunneling activities or from the introduction of fungus or disease. In addition, drought may cause physiological stress responses in plants, such as limiting their photosynthesis and cell growth. Plants already stressed from prolonged drought are more susceptible to insect attack and disease (Mattson and Haack 1987, p. 110).

Four native species of insects have been documented to impact the acuña cactus. Of these, cactus weevils (*Gerstaeckeria* spp.) and cactus longhorn beetle (*Moneilema gigas*) are documented to be most responsible for the acuña cactus declines (Rutman 2007, p. 6; Johnson 1989, p. 10). Cactus weevils are stem-boring insects; the adults feed externally while the larvae feed internally (Burger and Louda 1995, p. 1560). Cactus longhorn beetle adults feed on pads or terminal buds of cacti; their larvae burrow into stems or roots causing the severing of root and stem, collapse, and death of plants (Kelly and Olsen 2011, p. 7; Johnson 1989, p. 10). Raske 1966 (p. 106) cites Dodd (1927) stating that the cactus longhorn beetle has one reproductive cycle per year; however, a noted cactus expert, Alan Zimmerman, believes that increased warming in recent decades facilitates longer breeding cycles and more reproduction in both the cactus longhorn beetle and cactus weevil (Rutman 2007, p. 6).

Other insects with lesser impact on the acuña cactus are snout moth (*Yosemitia graciella*) larvae and unknown ant species. Snout moth larvae are noted to feed internally on cacti (Simonsen and Brown 2009, entire) and on fruits, thus reducing seed set (Johnson 1992, p. 405). Johnson (1992, p. 405) noted snout moth predation accounted for a reduction in seed set of 35 percent in 50 monitored plants at OPCNM. Ants have been noted in greenhouse conditions and in the wild to consume and transport the acuña cactus seeds (Butterwick 1982–1992, entire; Rutman 1996b, pers. comm.; Rutman 2001, pers. comm., p. 1; Anderson 2011, p. 1). In a similar species, *Coryphantha robustispina* ssp. *robustispina* (Pima pineapple cactus), ants have been documented eating fruits and transporting seeds (Baker 2011, pp. ii, 23). While ants do consume seed, they also scatter seed away from the mother plant thereby reducing predation by small mammals (O'Dowd and Hay 1980, p. 536; Vander Wall *et al.* 2005, p. 802). Ants may also aid in reducing the seedbank of competing plant species (O'Dowd and Hay 1980, p. 539). All of the above-mentioned insects have been documented at OPCNM near or on acuña cactus individuals (Johnson 1989, p. 10; Johnson 1992, p. 405; Rutman 1996b, pers. comm.; Rutman 2001, pers. comm., p. 1), with ants documented at Coffeepot Mountain (Butterwick 1982–1992, entire). It is likely that insect depredation occurs in other populations as well, though studies have not been conducted, and insects have not been collected in these populations. No diseases have been documented in the acuña cactus, though plants are exceptionally susceptible to bacterial rot after minor stem damage (Rutman 2007, p. 3). In 2011 site visits across the species' range, a majority of living adult acuña cacti were in various stages of decline, with stems blackening from the base upward and resulting in eventual cactus death. The cause of this blackening is unknown; it could be natural aging of the plants or the result of stress, insect damage, or disease.

A variety of small mammals, such as native ground squirrels, pack rats, rabbits, and mice, can severely damage or kill both mature and young cacti during times of drought when free water is unavailable (Kelly and Olsen 2011, pp. 8–9). There have been reports of loss of the acuña cactus due to small mammal depredation evidenced by scattered spines and rooted bases at OPCNM (Buskirk 1981, p. 5; Buskirk and Phillips 1983, pers. comm.; Heil and Melton 1994, p. 15; Holm 2006, pp. 2–3). In general, plants that die of desiccation, insect damage, or disease leave erect carcasses, while those that die from small mammals leave only scattered remains of the cacti in the vicinity (Morawe 2012, pers. comm.). It is likely that small mammal depredation occurs in other populations outside of OPCNM as well, though studies have not been conducted and small mammal occurrence in these populations has not been documented.

In 2011, nearly all populations of the acuña cactus on BLM, State, and some private lands were visited by Service staff (Service 2011a, entire; Service 2011b, entire). In every population, some partially living and dead plants were found uprooted and toppled over. This was also noted in 2013 in a population near Ajo on BLM land (Westland Resources 2013, p. 3). In 1996, there was a high mortality event associated with many live, reproductive plants found uprooted and lying on the ground in the Coffeepot Mountain population and the populations around Ajo (Rutman 2007, p. 3). This episode has not been explained; however, various hypotheses include vandalism, thrashers (birds) digging them up, and javelinas uprooting the plants. Given the severing of stem from root that commences when plants are infested with cactus longhorn beetle, it is entirely possible that episodes of plants falling over occur following peak years for these insects, possibly in association with birds or other animals hearing and attempting to remove the insects within. There were above-average temperatures in Ajo the 2 years preceding the 1996 uprooting event; this uprooting may have been correlated to increased insect activity and uprooting. Above-average annual temperatures have been recorded at the Ajo Weather Station 15 times during 25 years of recordkeeping between 1975 and 2010 (WRCC 2012, entire). This trend is consistent both at OPCNM and in Florence, where 21 of 25 recent years and 19 of 25 recent years, respectively, had above-average temperatures (WRCC 2012, entire). The increased warming in recent decades is likely benefiting insects and stressing acuña cactus plants, resulting in

significantly increased mortality rangewide.

Between 1982 and 1992, both recruitment and mortality were recorded within and outside of the established BLM plots at the Coffeepot Mountain acuña cactus population. Field notes from throughout the 10-year period of study indicate insect damage to individual plants has been ongoing within this population. Field notes included the following comments: tubercles (knoblike projections on the main stem) with holes, damage on apex (top), exposed root, numerous ants, plant dying, insect damage to fruit, hollow inside, uprooted, chlorotic (yellowing), beetle wounds on side, unhealthy, damaged meristem (growing tip), appears dying at the base, base rotting, sickly, and not rooted (Butterwick 1982–1992, entire). In 1987, the BLM reported high mortality in this population with more dead plants observed (332) than living (310) (Rutman *et al.* 1987, p. 1). In 1989, the BLM reported a precipitous decline of this population (Johnson 1989, p. 18). In 2008, staff of OPCNM censused this population and found 77 living and 80 dead plants (Morawe 2012, pers. comm.) with low or no recruitment reported from the entire population during 21 site visits between 1992 and 2011 (Anderson 2011, entire). Within the monitoring plots at OPCNM, datasheets from 1986 categorized cacti as being: uprooted from the base, shell of spines, dead with upright carcass, stepped on, and missing, among others (Buskirk 1986, pers. comm.). Within these plots, adult recruitment has been observed in every year of monitoring since 1989; mortality has been observed in all but 2 years during this same period (NPS 2011a, p. 1). On average, the annual adult mortality within these plots is 12 percent, exceeding the annual recruitment of 7.7 percent (NPS 2011a, p. 1). The decrease in reproduction, increase in mortality, or a combination of both have resulted in the decline in plants within (NPS 2011a, p. 1) and outside of the plots at OPCNM. Across this population, the previous estimate of acuña cactus numbers were greater than 10,000 individuals (Buskirk 1981, p. 3); current estimates are between 1,000 and 2,000 plants total (Rutman 2011, pers. comm.).

At Coffeepot Mountain, population decline has been dramatic with at least two episodes of 50 percent reductions reported from individuals in and around monitoring plots (Butterwick 1982–1992, entire; Rutman *et al.* 1987, p. 2; Anderson 2011, p. 2; Anderson 2012b, pers. comm.; Morawe 2012, pers. comm.). At OPCNM, the number of individuals on all 6 monitoring plots has declined in all but 2 years since 1989 (NPS 2011a, p. 1; NPS 2012, p. 2), and in total population estimates between 1981 and 2011 (Buskirk 1981, p. 3; Rutman 2011, pers. comm.). In 2011, site visits to most of the remaining populations on BLM, State, and private lands indicated large proportions of the populations were dead with many plants uprooted, hollow plants, and many individuals in all size classes reported to be unhealthy or blackening from the base (Service 2011a, entire; Service 2011b, entire). Also, researchers in Mexico reported that 62.9 percent of the 2,773 total plants found were dead (Pate 2012b, pers. comm.; Van Devender 2013, pers. comm.).

In conclusion, uprooting and depredation have been ongoing for at least several decades at OPCNM, at Coffeepot Mountain, and in other populations. The pronounced decline in the acuña cactus numbers over the last 3 decades documented throughout the species' range on BLM, State, and private lands, as well as lands in Sonora, Mexico, is of serious concern. It appears that the combination of drought stress and insect attack have reduced adult plant numbers and that warmer winters may be increasing insect numbers attacking acuña cacti. Most, if not all, of the populations are significantly impacted by predation; predation, in the form of insect attacks, occurs throughout the range of the acuña cactus. We also believe that the extent to which this threat affects the acuña cactus populations is interactive with the occurrence of drought and other climatic variables such as warmer winters. The ability of the acuña cactus populations to recover from insect attacks depends on the successful germination and survival of seedlings. However, these populations are also experiencing decreased reproduction, which may render the populations unable to recover as they continue to lose mature individuals, with low levels of seedling recruitment and survival. Therefore, based on our review of the best scientific and commercial data available, we conclude that predation is a threat that is resulting in significant population impacts to the acuña cactus, and this threat is expected to continue into the future.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Under this factor, we examine whether existing regulatory mechanisms are inadequate to address the threats to the species discussed under the other factors. Section 4(b)(1)(A) of the Act requires the Service to take into account ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species. . . .'' We interpret this language to require the Service to consider relevant Federal, State, and tribal laws, plans, regulations, cooperative agreements, and other such mechanisms that may minimize any of the threats we describe in threat analyses under the other four factors, or otherwise enhance conservation of the species. We give strongest weight to statutes and their implementing regulations and management direction that stems from those laws and regulations. An example would be State governmental actions enforced under a State statute or constitution, or Federal action under statute.

Having evaluated the significance of the threat as mitigated by any such conservation efforts, we analyze under Factor D the extent to which existing regulatory mechanisms are inadequate to address the specific threats to the species. Regulatory mechanisms, if they exist, may reduce or eliminate the impacts from one or more identified threats. In this section, we review existing State and Federal regulatory mechanisms to determine whether they effectively reduce or remove threats to the acuña cactus.

Regarding the threat of unauthorized collection, the acuña cactus is protected by the Arizona Native Plant Law (Arizona Revised Statutes, Chapter 7, 2007, entire), which prohibits collection without obtaining a permit on all public lands and directs that plants may not be moved off private property without contacting the Arizona Department of Agriculture. Due to the difficulty in implementing this law, it has not been effective in reducing impacts from collection, nor does it protect habitat. However, no documented cases of unauthorized collection of this cactus have been found in any of the known populations in recent decades. There is little threat of collection on private lands due to restricted public access (see *Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*); the majority of the acuña cactus populations are on State and Federal lands. In addition, NPS regulations prohibit the collection or removal of the acuña cactus on NPS lands, where the largest known acuña cactus population occurs. The main road accessing the acuña cactus population in Acuña Valley in OPCNM is currently closed to the public, thus reducing impacts from collection to this population. Although the remoteness of many populations limits both visitation and enforcement of the existing

regulatory mechanisms, unauthorized collection is reported to result in a relatively minor impact to this species. We conclude that the regulations that exist to protect against the impacts from over collection of the species, primarily the NPS regulation prohibiting removal and the closure of the primary access route in OPCNM, are serving to reduce the impacts from collection.

No regulations in place address threats to acuña cactus and its habitat from site degradation or address the primary threats to acuña cactus of insect predation, drought, and the effects of climate change. Urban development, livestock grazing, unauthorized collection, and mining are not identified to occur at a level that is a threat to acuña cactus populations. However, without management of impacts from these activities, impacts could rise significantly. Special management prescriptions in place address some of these concerns on Federal lands. For example, the Sonoran Desert National Monument and OPCNM exclude livestock grazing and mining, promote the reduction of nonnative, invasive plant species, and are unlikely to support urban development. In Mexico, a portion of the known population is within the boundary of Pinacate Biosphere Reserve, which may afford some protections. While management prescriptions with regard to these stressors may be applied opportunistically across different land management agencies within the region, they do afford some protection and minimize impacts to the species and its habitat.

With respect to threats to the species caused by nonnative, invasive plant species, some land managers and private citizens implement invasive plant surveys, control, and monitoring, while others do not. Even with management, these species can be difficult to control without ample resources and time. Given that there are gaps in continuous geographic coverage regarding the management of nonnative, invasive species, populations of acuña cactus remain vulnerable to invasion.

With respect to threats to the species caused by activities along the U.S.-Mexico border, a number of documents such as Biological Opinions (e.g. Service 2009, 2011) dictate that certain actions be taken by CBP to reduce effects to resources in the U.S.-Mexico border region. These documents are primarily associated with habitat of the federally listed endangered Sonoran pronghorn antelope (*Antilocapra americana* ssp. *sonoriensis*) and off-road activity, specifically identifying sensitive areas to avoid. Such measures provide some relief from the threats caused to the species resulting from cross-border violators and CBP enforcement activities in the southern portion of the acuña cactus range. Likewise, CBP-sponsored projects, including the mapping of off-road tracks and revegetating unauthorized roads, may also benefit the acuña cactus (Holm 2012a, pers. comm.).

In cooperation with Service staff, CBP has begun efforts to educate Border Patrol agents on the locations and appearance of acuña cactus so that areas that support the species can be avoided to the maximum extent possible. A road atlas has been printed and distributed to CBP agents working in the area, although acuña cactus habitat is not indicated on this map (Morawe 2012, pers. comm.). In addition, the efforts of CBP to stop cross-border violators in recent years by means of traffic barriers and other infrastructure has greatly reduced cross-border violator activities and afforded some protection to the habitat. However, due to the difficulty and ever-changing status of border issues, compliance with these agreements has been difficult. Reports indicate a two-track road and associated cross-border violator clothing were found in 2010 within one of the six long-term monitoring plots at OPCNM. The cross-border violator activities are, by their very nature, in violation of the law and regulations. Therefore, regulations designed to protect the species and its habitat will be generally of little impact to alleviate the threats caused by activities of cross-border violators. As noted above, the interdiction efforts of the Border Patrol, including patrols, electronic surveillance, and fence construction have contributed to a significant reduction in cross-border violator off-road traffic that has benefited the acuña cactus and other species. However, we do not find regulatory mechanisms to be adequate to directly address these threats discussed in Factor A.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

We have evaluated the best scientific and commercial data available, and we did not find any indication of potential threats related to this factor. We considered such threats as small population size and overall rarity of the acuña cactus, but we did not find any indication that these are threats to the species. Therefore, we conclude that other natural or manmade factors are not threats to the acuña cactus.

Determination for the Acuña Cactus

We have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats to the acuña cactus. We find that the species is in danger of extinction due to the current and ongoing modification and destruction of its habitat and range (Factor A) from long-term drought; effects of climate change; ongoing and future border activities; and future nonnative, invasive species issues. The acuña cactus habitat is impacted across its range by long-term drought, warmer winters occurring in the past several decades and projected to continue with climate change, and insect predation. In addition, the majority of the acuña cactus individuals (84 percent) occur within 16.5 km (10.25 mi) of the border in either OPCNM or Sonora, Mexico. As described above, the complexities of addressing off-road excursions by cross-border violators result in unpredictable actions on the part of CBP and law enforcement and threatens acuña cactus and its habitat. Furthermore, nonnative, invasive species have been located in the vicinity of several populations of acuña cactus and are projected to invade these populations within the next 5 to 20 years (Morawe 2012, pers. comm.).

The primary threats to the species are due to the effects of drought and climate change, and insect predation. These threats are exacerbated at local scales by off-road excursions by cross-border violators and CBP and law enforcement response, and will be impacted by nonnative, invasive plants in the future. We find that unauthorized collection (Factor B) does not currently occur to such an extent to constitute a threat to the species. We find that predation (Factor C), in combination with drought and heat stress, exacerbates the threats to this species. Although mechanisms are in place that afford some protection to the species and its habitat with regard to potential stressors to the species, no regulations are in place to address insect predation, drought, and the effects of climate change. With regard to off-road border activity, although the interdiction efforts of CBP, including patrols, electronic surveillance, and fence construction, have contributed to a significant reduction in cross-border violator off-road traffic that has benefited the acuña cactus and other species, regulations have little impact to alleviate these threats. Therefore, we do not find regulatory mechanisms to be adequate to directly address these threats discussed in Factor A. Finally, we find other natural or manmade

factors are not threats to the acuña cactus (Factor E).

The elevated risk of extinction of the acuña cactus is a result of the cumulative stressors on the species and its habitat. Mortality of more than 84 percent of individuals has been documented over a 24-year period within long-term monitoring plots at OPCNM. Mortality of more than 75 percent of individuals has been documented over a 21-year period at Coffeepot Mountain. These two examples of loss that has occurred on protected lands with ongoing management efforts for the acuña cactus show both a rapid and a severe decline of the species. In the acuña cactus, water and heat stress reduce flower and seed production, and seedling survival is dependent on summer precipitation and soil moisture. Warmer and drier winters combined with increased insect attack negatively impacts the survivorship of reproductive adults. Of the remaining living individuals across the species' range, a large portion were in various stages of deteriorating health, primarily blackening from the base upward, when visited by a botanist in 2011. Across populations, minimal or no recruitment has been seen in recent years. Throughout the species' range, rainfall has been declining, and drought conditions have been dominant for several decades; climate change is anticipated to increase drought periods and warming winters. This combination is expected to continue the documented trend of mortality exceeding recruitment across all populations. When mortality exceeds recruitment in a population, the result is often a declining population. Given this, we consider none of the populations to be stable or secure. The factors significantly threatening the species are not expected to be abated in the foreseeable future, and some populations may have decreased to levels where they are no longer viable. All of the threats, combined with high levels of mortality and low recruitment in the populations, contribute to a substantial risk of extinction and lead to our finding that the acuña cactus is in danger of extinction throughout its range; therefore, the acuña cactus meets the definition of an endangered species under the Act.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the acuña cactus is presently in danger of extinction throughout its entire range based on rangewide documented rapid loss of individuals, decline in the health of many remaining individuals, little to no recruitment, and continuation of the threats, as described above. Therefore, on the basis of the best scientific and commercial data available, we are listing the acuña cactus as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Listing the acuña cactus as a threatened species is not the appropriate determination because the ongoing threats described above are severe enough to create the immediate risk of extinction. The continued loss of reproductive adults and juveniles poses a significant and immediate risk of extinction to the species throughout the species' range, and are not restricted to any particular significant portion of that range. All of these factors combined lead us to conclude that the threat of extinction is high and immediate; thus, we conclude that the acuña cactus meets the definition of an endangered species.

Under the Act and our implementing regulations, a species may warrant listing if it is an endangered or threatened species throughout all or a significant portion of its range. The threats to the survival of the species occur throughout the acuña cactus' range and are not restricted to any particular significant portion of that range. Accordingly, our assessment and final determination applies to the species throughout its entire range.

Fickeisen Plains Cactus

It is our intent to discuss below only those topics directly relevant to the listing of the Fickeisen plains cactus as endangered in this section of the final rule. As a result of public comments we received, we have updated the sections below as a result of information received during the public comment periods.

Species Description

The Fickeisen plains cactus is a small, unbranched to occasionally branched, globose (globular) cactus. At maturity, many plants are the size of a quarter making them difficult to locate even when their location is known. The stems of mature Fickeisen plains cactus are 2.5 to 6.5 cm (1.0 to 2.6 in) tall and up to 5.5 cm (2.2 in) in diameter (Heil and Porter 2003, p. 213; Arizona Rare Plant Guide Committee 2001, unpaginated); covered with tubercles (knoblike projections on the main stem) that form a spiral pattern around the plant (AGFD 2011a, p.1). Each tubercle has 6 to 7 radial spines per areole (tip where spines develop), 4 to 7 millimeters (mm) (0.15 to 0.27 in) in length, and 1 central spine (15 to 18 mm (0.59 to 0.70 in) long) that is straight to strongly curved. Spines are soft and corky (spongy) and white to pale gray in color. Flowers are 2.5 cm (0.98 in) in diameter, cream-yellow or yellowish-green in color, and produced on the apex (top) of the stem. Fruits are turbinate (top-shaped), and turn reddish-brown at maturity (AGFD 2011a, p. 1). The seeds are dark brown to black, 3 mm (0.11 in) long, and 2 mm (0.08 in) wide (AGFD 2011a, p. 1). The lifespan of the Fickeisen plains cactus is estimated to be between 10 to 15 years (Phillips *et al.* 1982, p. 9).

Taxonomy

The Fickeisen plains cactus was first discovered near Cameron, Arizona, in the late 1950s. It was originally described in the scientific literature by Benson (1969, pp. 23–24), then later by Heil *et al.* (1981, pp. 28–31), who recognized the name and taxon in a review of the genus *Pediocactus.* The Flora of North America treats the taxon as a subspecies of *Pediocactus peeblesianus,* finding that the name ''*Pediocactus peeblesianus* var. *fickeiseniae*'' was not validly published by Benson (Heil and Porter 2003, p. 213). The difference between a subspecies and a variety based on the International Code of Botanical Nomenclature is that a subspecies has a higher rank in nomenclature. Some botanist or other taxonomic organizations may use the terms subspecies and variety interchangeably. The Service considers *Pediocactus peeblesianus* var. *fickeiseniae* to be a valid taxon since it was classified as a candidate species in 1980. Under the Act and in regard to plants, we treat subspecies and varieties equally (43 FR 17912) in that we do not differentiate between a subspecies or variety when assigning priority classifications to species for listing, delisting, reclassification, or recovery actions (43 FR 43103). Our previous documentation referring to the Fickeisen plains cactus used the name ''*P. peeblesianus* var. *fickeiseniae*'', and we will continue to use this name. Other synonyms of *Pediocactus peeblesianus* var. *fickeiseniae* that have been used are *Navajoa fickeisenii* and *Toumeya fickeisenii* (Benson 1982, p. 955).

The genus *Pediocactus* contains nine species of cacti; eight of these are rare endemics of the Colorado Plateau region in Arizona, Colorado, New Mexico, and Utah (Heil and Porter 2003, p. 213). According to Benson (1982, p.750), the structural differences exhibited by

Pediocacti among various sites, coupled with a poor seed dispersal mechanism and specializations to specific geology or soil type, indicate that the existing plants are probably relicts of a once widespread genus with a distribution fractured by climatic conditions. Although there are great dissimilarities among plants in the genus *Pediocactus,* they are united by their unusual method of fruit dehiscence and deciduous floral remnant (Heil *et al.* 1981, p. 18). Within the species *Pediocactus peeblesianus* are two recognized varieties, variety *peeblesianus* (Peebles Navajo cactus) and variety *fickeiseniae.* The Fickeisen plains cactus is differentiated from the Peebles Navajo cactus by the presence of a central spine. The corky or spongy texture of the spines makes the species unique and separates it from other members in the genus (Heil *et al.* 1981, p. 21). Chloroplast DNA sequencing further provides strong support of the separation of these two varieties (Porter 2002, pp. 15–16).

Biology

The general biology of the Fickeisen plains cactus is similar to other species in the genus *Pediocactus.* The Fickeisen plains cactus is a cold-adapted plant with contractile roots that enables the plant to retract into the soil during the winter (cold) and summer (dry) seasons, as well as during periods of drought conditions. Plants may shrink down into the soil until the crown sits flush with the soil surface. Some individuals may become completely buried by soil litter or gravel thus limiting the time plants can be found (Phillips *et al.* 1982, p. 4). The general phenology is as follows: when ambient air temperatures rise in the spring and adequate rainfall occurs, plants emerge from beneath the soil surface to flower in mid-April. Flowers open in the mid-morning for 1 to 2 days. An entire population generally completes anthesis (the period when the flower is open and functional) in 7 to 14 days (Travis 1987, p. 6). Spring flowering is believed to be influenced by cold temperatures and precipitation from the preceding winter months (Brack 2012, pers. comm.), which enables moisture to accumulate in the soil during times when solar evaporation rates are low and may facilitate seedling germination. By June, plants will produce fruit then shrink back into the soil, losing one-half their height above ground. Plants generally remain retracted underground during the winter months; however, some individuals may re-emerge in the autumn following monsoonal rains. The length of time a plant remains retracted can vary between individual plants. Hughes (2000a, p. 2) has documented some plants remaining retracted underground for at least 3 years, but reported that a plant emerged after remaining retracted after 5 years (Hughes 2000, p.2). The Fickeisen plains cactus is also subject to root rot during very wet years and frost heaving during the winter season. Locating individuals of the Fickeisen plains cactus can be difficult, even when their exact location is known. Searches for individuals are best done during their flowering period.

Reproduction has not been specifically studied on the Fickeisen plains cactus. For other species in the genus *Pediocactus,* reproduction occurs through cross-pollination by native bees (Pimienta-Barrios and del Castillo 2002, p. 79). Insects observed visiting flowers of the Fickeisen plains cactus include species of hover flies (family Syrphidae) and bee flies (family Bombyliidae), mining bees (family Andrenidae), and sweat bees (family Halictidae) (Milne 1987, p. 21; Navajo Nation Heritage Program (NNHP) 1994, p. 3; Peach *et al.* 1993, pp. 312–314; Tepedino 2000, p. 7). Although flies may pollinate flowers of the Fickeisen plains cactus, the primary pollinators of the plant are believed to be halictid bees from the genera *Lasioglossum, Halictus,* and *Agapostemon,* based on several studied species of *Pediocactus* (Tepedino 2012, pers. comm.).

The mechanisms of seed dispersal in the Fickeisen plains cactus have not been investigated and are poorly understood. Most site visits to areas occupied by the Fickeisen plains cactus have observed seedlings established very close to the adult plant (Goodwin 2011a, p. 9; NNHP 1994, p. 4). The general shared belief is that most species of *Pediocactus,* including the Fickeisen plains cactus, lack a good mechanism for seed dispersal, which is a contributing factor to its endemism and isolated, localized populations (Benson 1982, p. 750; Milne 1987, p. 4).

Population monitoring of the Fickeisen plains cactus suggests that this variety has a low reproductive capacity. Hughes (1996a, p. 50) reported that significant episodes of recruitment within the BLM monitoring plots occurred 2 to 3 times over a 9-year period from 1986 to 1995. He found that 30 to 40 seeds are generally produced from a single fruit (Hughes 2011, pers. comm.), and believed that low seed production hinders substantial increases in plant abundance from occurring, even during favorable weather conditions that would support germination (Hughes 1996a, p. 50). During the monitoring period, Hughes (1996a, p. 50) found that flowering and fruiting in the Fickeisen plains cactus occurs once individual plants reach 16 mm (0.63 in) in diameter and as the diameter increases more fruit are produced. He documented individuals between 20 mm (0.79 in) and 20.9 mm (0.82 in) in diameter that produced 1.37 fruit on average (range of fruit produced 1 to 3) compared to individuals at 50 mm (1.97 in) and larger that produced 3.60 fruits on average (range of fruit produced 2 to 5).

The correlation between larger sized individuals and increased fruit production has also been found in other *Pediocactus* species (Phillips *et al.* 1989, p. 4; Hreha and Meyer 2001, p. 86), suggesting that larger, older individuals have a higher reproductive output and contribute more to the population growth rate by potentially having a greater influence on seed output than smaller, younger plants. In examining long-term monitoring information by the BLM, the majority of individuals observed tend to range between 20 mm (0.79 in) and 30 mm (1.18 in) in diameter, indicating at least 2 fruits should be produced per individual per year. Fruit production, however, occurred irregularly over a 22-year period with 35 percent, on average, of the total number of reproducing individuals. For comparison purposes, a population biology study on the *Pediocactus paradinei* (Kaibab plains cactus), which is similar in size to the Fickeisen plains cactus, summarized its population structure and found the following: plants between 11 to 20 mm diameters were pre-reproductive individuals that occasionally flowered but never fruited. Plants that were 21 to 30 mm were young reproductive individuals with lower reproductive effort than larger plants, and those 31 to 40 mm diameter and larger were older reproductive individuals with higher fruiting success (Warren *et al.* 1992; p. 134).

Episodic recruitment may play a role in increasing the threats to the species because adult mortality may continue at a high rate between periods of recruitment, lowering the reproductive potential of the population when conditions are favorable for seed germination.

Habitat

The Fickeisen plains cactus is a narrow endemic restricted to exposed layers of Kaibab limestone on the Colorado Plateau. Plants are found in shallow, well-draining, gravelly loam soils formed from alluvium, colluvium, or Aeolian deposits derived from limestone of the Harrisburg Member of

the Kaibab Formation and Toroweap Formation; Coconino Sandstone; and the Moenkopi Formation (Travis 1987, pp. 2–3; Arizona Geological Survey (AZGS) 2011; Natural Resources Conservation Service (NRCS) 2012). Most populations occur on the margins of canyon rims, flat terraces, limestone benches, or on the toe of well-drained hills. Plants are found primarily on slopes of 0 to 5 percent but some also occur on slopes up to 20 percent at elevations between 1,280 to 1,814 m (4,200 to 5,950 ft) (Arizona Rare Plant Guide Committee 2001, unpaginated; AGFD 2011b, entire; Hazelton 2012a, pers. comm.; United States Forest Service (USFS) 2013b, p. 2).

Habitat of the Fickeisen plains cactus is within the Plains and Great Basin grasslands and Great Basin desertscrub vegetation communities (Benson 1982, p. 764; NatureServe 2011). Dominant native plant species that are commonly associated with these biotic communities include: *Artemisia tridentata* (big sagebrush), *Atriplex canescens* (four-wing saltbush), *Atriplex confertifolia* (shadscale), *Bouteloua eriopoda* (black grama), *Bouteloua gracilis* (blue grama), *Bromus* spp. (brome), *Chrysothamnus* spp. (rabbit-bush), *Ephedra torreyana* (Mormon tea), *Krascheninikovia lanata* (winterfat), *Gutierrezia sarothrae* (broom snakeweed), *Pleuraphis jamesii* (James's galleta), *Achnatherum hymenoides* (Indian ricegrass), *Sphaeralcea* spp. (globe-mallow), and *Stipa* spp. (needlegrass). Other native cactus species that are commonly found include *Agave utahensis* (Utah agave) and *Echinocactus polycephalus* (cottontop cactus; Brown 1994, pp. 115–121; Turner 1994, pp. 145–155; Hughes 1996b, p. 2; Goodwin 2011a, p. 4; NatureServe 2011). The *Escobaria vivipara* var. *rosea* (spinystar) is typically found in close association with the Fickeisen plains cactus (Hughes 1996a, p. 47). In addition, biological soil crusts are found on the Colorado Plateau and occur within or near the Fickeisen plains cactus populations (NRCS 1997, p. 3; USFS 1999, entire; BLM 2007a, p. 3–15).

Biological soil crusts are formed by a community of living organisms that can include cyanobacteria, green algae, microfungi, mosses, liverworts, and lichens (Belnap 2006, pp. 361–362). A preliminary soil assessment within occupied Fickeisen plains cactus habitat on the Kaibab Nation Forest suggested there are good biotic soil crusts in the general vicinity of the population and the microsites where cacti occur may have elevated macro and micro nutrient levels (MacDonald 2013, p. 1) potentially due to the presence of the biological soil crusts. The biological soil crusts provide many positive benefits to the other native vegetation within the Plains and Great Basin grassland community by providing fixed carbon and nitrogen on sparsely vegetated soils, soil stabilization and erosion control, water infiltration, improved plant growth, and seedling germination (NRCS 1997, pp. 8–10; Floyd *et al.* 2003, p. 1704; Belnap 2006, entire).

The climate associated with the range of the Fickeisen plains cactus is highly variable and influenced by events in the tropical Pacific and northern Pacific Ocean (United States Geological Survey 2002, p. 2). Precipitation is bimodal, occurring in the winter (January to March) and summer (July to September) months. The average annual precipitation ranges from 15.2 to 35.5 cm (6 to 14 in) per year; snowfall accumulation averages 22.9 cm (9 in), primarily from January to February (WRCC 2012, entire). Winter precipitation is considered critical for the regional native plant community to ensure that soil moisture is recharged and a reliable spring growing season, which is particularly important for seedlings that do not have developed root systems (Travis 1987, p. 3; Comstock and Ehleringer 1992, pp. 196–199). Given the diversity of topography and elevation across the range of the cactus, the amount of precipitation received locally varies and is patchy in its distribution.

Distribution and Range

The Fickeisen plains cactus is endemic to the Colorado Plateau in Coconino and Mohave Counties of northern Arizona. Very little is known about its historical range. Heil *et al.* (1981, p. 31) described the plant as widespread along the ledges of the Little Colorado and Colorado Rivers to the hills of the lower House Rock Valley. Benson (1982, p. 765) described the range as northern Arizona from the hills in northeast Mohave County to the vicinity of the Colorado and Little Colorado rivers near the Grand Canyon National Park and southeast Coconino County. The current range of the Fickeisen plains cactus extends from Mainstreet Valley of the Arizona Strip (i.e., the area north of the Colorado River to the Arizona-Utah border) to House Rock Valley; along the canyon rims of the Colorado River and Little Colorado River; the area of Gray Mountain; and along the canyon rims of Cataract Canyon on the Coconino Plateau. The plant is known in approximately the same areas as those described by Heil *et al.* (1981, p.31) and Benson (1982, p. 765), including those found along Cataract Canyon. Benson had identified plants in this area as varieties of *Pediocactus peeblesianus.* Plants nearest the Grand Canyon National Park on the Coconino Plateau were known as variety *fickeiseniae,* while a population further south were considered to be variety *peeblesianus.* These were later verified as the variety *fickeiseniae* (Goodwin 2006, p. 4; Goodwin 2011a, pp. 5–6).

The Fickeisen plains cactus occurs in disjunct populations that are widely scattered over a broad range (Table 1). Populated areas are often separated by many miles and varying topography. Although there is abundant suitable habitat within its range, many areas are unoccupied by the plant for reasons unknown. Philips *et al.* (1982, p. 7) estimated that the plant's known range covered 200 linear km (125 mi) of land, and NatureServe (2011) estimated it to be 12,750 square kilometers (sq km) (4,922 square miles (sq mi)). Based on the current spatial distribution of the Fickeisen plains cactus, we estimate the current range is approximately 8,668 sq km (3,347 sq mi). In addition, its range converges with the range of the endangered *Pediocactus bradyi* (Brady pincushion cactus) in House Rock Valley, and overlaps with the range of the threatened *Pediocactus sileri* (Siler pincushion cactus), and the Kaibab plains cactus, which is protected by a conservation agreement (BLM 2011a, Figure 3.8–1).

Abundance and Trends

From 1962 to 2012, the Fickeisen plains cactus has been documented in approximately 33 populations (Table 1) (AGFD 2011b, entire; Goodwin 2011a, p. 19; NNHP 2011a, entire). Based on the collective information so far, the number of known Fickeisen plains cacti rangewide is about 1,132 individuals, but this does not represent a population estimate because only 6 of the 33 populations have recent information on their status. The majority of populations are small in numbers, some consisting of fewer than 10 individuals. Many of these populations have not been visited in over 18 years or visits have been infrequent and irregular, so that the status of the cactus is unknown. Of the 33 populations, 6 have been recently documented or regularly monitored and provide reliable information describing the status of the Fickeisen plains cactus. These 6 populations have a total of 466 individuals and represent some of the most abundant areas populated by the Fickeisen plains cactus. They are located on lands managed by the BLM (Arizona Strip District), Kaibab National

Forest, State of Arizona, and Navajo Nation, in addition to privately owned lands. Based on the number of documented individuals (number of plants per landowner by total documented plants), the breakout of populations by land owner is as follows: BLM (22 percent), Kaibab National Forest (5 percent), State of Arizona (14 percent), the Navajo Nation (45 percent), and privately owned lands (13 percent).

TABLE 1—NUMBER OF FICKEISEN PLAINS CACTUS REPORTED BY LOCATION, LANDOWNER, AND THE FIRST AND LAST DATE OBSERVED

[1962 to 2012]

Populations	Landowner	First visited	First count	Last visited	Last count
Beanhole Well	BLM	1979	3	1979	3
Marble Canyon	BLM	1979	8	1979	8
Gray Mountain (Mays Wash)	BLM	1981	30	1981	30
South Canyon	BLM	1979	41	1987	52
Toquer Tank	BLM	1986	8	1994	7
Navajo	BLM	1986	4	2001	10
Salaratus Draw I and II	BLM	1986	17	2001	0
Temple Trail	BLM	1986	7	2001	7
Ward	BLM	1986	12	2001	10
Sunshine Ridge II	BLM	1986	9	2004	35
Clayhole Ridge	BLM	1987	23	2012	38
Dutchman Draw	BLM	1986	167	2012	5
North Canyon	BLM	1987	16	2012	42
Sunshine Ridge	BLM	1987	12	2012	4
Kaibab National Forest	USFS	2004	Unknown	2013	62
Shinumo Wash	NN	1993	9	1993	9
Tiger Wash 2	NN	1993	11	1993	11
Little Colorado River Overlook.	NN	1956	Unknown	1997	15
Little Colorado River Gauging Station.	NN	1999	1 (survey out of season)	1999	1
29 mile Canyon	NN	2000	2	2000	2
Big Canyon	NN	2002	15	2002	15
West of Hellhole Bend	NN	2002	5	2002	5
Small Ridge	NN	2004	1 (survey out of season)	2004	1
Little Colorado River Gravel pit.	NN	1956	Unknown	2005	21
Shinumo Altar	NN	1991	Unknown	2012	6
Tiger Wash 1	NN	1993	30	2005	2
Gray Mountain (South of Cameron).	NN	1962	4	2009	3
Hellhole Bend	NN	2009	314	2009	314
Salt Trail Canyon	NN	2006	119	2011	70
Blue Spring	NN	2005	30	2005	30
Gray Mountain (Sewage Disposal Pond).	Private	1984	4	1986	7
Cataract Canyon	Private	2007	54	2011	146
Cataract Canyon	State	2007	98	2011	161
TOTAL					1, 132

Notes: Navajo Nation (NN), U.S. Forest Service (USFS). The increase in plant numbers at Cataract Canyon from 2006 to 2011 is due to new areas being surveyed each year resulting in new occupied sites being located (Goodwin 2012, p. 1). The total number shown does not represent a total population estimate but is to document the total number of individuals that have been observed over the reported time period.

Our knowledge of abundance and trend information was assessed from annual monitoring reports by the BLM (1986 to 2012) and Navajo Nation (2006 to 2011). Each agency has monitoring plans that are set up to track specific information in each of occupied sites on lands they manage. However, there are differences in data collection, and this inconsistency makes it difficult to compare trends across the landscape and between landowners. Therefore, results are presented for each landowner separately. No monitoring program has been established for the Fickeisen plains cactus on the Kaibab National Forest or on private lands. However, any pertinent information regarding abundance, reproduction, and recruitment from these populations were incorporated herein.

Bureau of Land Management Lands—The BLM manages habitat for 14 documented Fickeisen plains cactus populations (Table 1) that occupy an estimated 36.9-ha (91.3-ac) area (BLM 2007b, p. 67) on the Arizona Strip. The total known population on the Arizona Strip has declined roughly 72 percent in 21 years from 323 individuals in 1991 to 89 individuals in 2012 (Table 2).

TABLE 2—NUMBERS OF FICKEISEN PLAINS CACTI RECORDED IN BLM MONITORING PLOTS AND CLUSTER PLOTS
[1986 to 2012]

Year	Dutchman	Clayhole	Sunshine Ridge	North Canyon	Navajo	Sunshine Ridge II	Salaratus I and II	Temple Trail	Toquer Tank	Ward	Total
1986 Plants outside plots*.	167	8	9				17				201
1986	21		6	14	4	2		5	8	10	70
1987	107	23	12	16					7		165
1988	102	35		27					9		173
1989	185	31	8	28					9		261
1990	186	32	33	33					6		290
1991	194	37	43	36					13		323
1992	219	44	44	7					7		321
1993	168	34	32	13	0		13	1		0	261
1994	168	38	35	16			44		7		308
1995	188	30	25	11							254
1997	122	21	7	21							171
1998	49	16	6	26							97
1999	45	17	5	28							95
2000	37	20	Not Observed	22							79
2001	40	63	3	34	10	23	0	7	0	10	190
2002	30	60	12	24							126
2003	50	56	Not Observed	24							130
2004	45	59	7	40							151
2005	34	59	33	40							166
2006	36	48	26	32							142
2007	32	38	30	39							139
2008	23	40	23	33							119
2009	33	37	33	31							134
2011	12	42	34	39							127
2012	5	38	4	42							89

Notes: *BLM reported counts of Fickeisen plains cacti outside of established monitoring plots for 1986 only. No monitoring occurred in 1996 by the BLM due to dry conditions resulting in plants retracted underground. No monitoring reports were submitted to the Service for the years 2008 and 2010. Numbers in 2008 were obtained from Hughes 2009.

The Fickeisen plains cactus was first documented on the Arizona Strip in 1977 at Sunshine Ridge with the remaining populations discovered up through 1986 (Phillips 1979, entire; AGFD 2011b, entire). Occupied sites are widely separated from one another (roughly 31 km (19 mi) apart) in geographically disjunct locations. In Mohave County, populations have been documented in Mainstreet Valley near Dutchman Draw, in Hurricane Valley near Toquer Tank, in Lower Hurricane Valley near Temple Trail, in Salaratus Draw in the Hurricane Cliffs, on Clayhole Ridge, and on Sunshine Ridge. Populations have also been documented in Coconino County near the canyon rims of Marble Canyon, South Canyon, and North Canyon Wash in House Rock Valley. Searches for the Fickeisen plains cactus after 1987 have not located any additional populations despite the abundance of suitable habitat present (Hughes 1996a, p. 47; Hughes 2011, pers. comm.).

In 1986, the BLM established long-term monitoring at the Dutchman Draw, North Canyon Wash, Clayhole Ridge, and Sunshine Ridge populations (Hughes 1996a, p. 47). The monitoring plots were located in areas that contained the densest number of Fickeisen plains cacti and were easily accessible (Hughes 2009, p. 28; Hughes 2011, pers. comm.). The four plots were visited annually from 1986 to 2009, and from 2011 and 2012, to record information on abundance, reproduction (the percent of tagged plants flowering or fruiting), and mortality. Beginning in 1995, the BLM began recording recruitment (individuals 0 to 20 mm (0.78 in)) and, in 1998, recorded the number of missing or retracted plants. The BLM also classified plants into five size classes based on their measured width and recorded the information between 1987 and 1995. From 1997 to present, two size classes were used to reflect the juvenile (0 to 15 mm (0.6 in)) and adult (16 to 31 mm and greater (0.63 to 1.22 in)) size classes. The changes to the size classes prevent comparing the data among years; however, it does provide some information regarding the proportion of individuals in the small and larger size classes that can be used to describe the number of seedlings or juveniles versus aging, mature adults. In addition to the four plots, BLM established seven cluster plots: Navajo, Ward, Salaratus Draw 1, Salaratus Draw 2, Sunshine Ridge 2, Temple Trail, and Toquer Tank. Cluster plots consist of rebar centered among a small number of scattered individuals. These are visited once every 5 to 10 years for the purpose of recording presence/absence.

Dutchman Draw—The Dutchman Draw plot is the largest plot, situated within tall, dense grass in Mainstreet Valley. Up until 1999, the number of Fickeisen plains cacti in the plot accounted for the majority of total plants (64 to 74 percent) reported from all Arizona Strip populations. Beginning in 1986, cacti numbers inside the plot increased from 21 individuals to a high of 219 plants in 1992. Also in 1986, there were 167 individuals counted outside the plot. These plants were not mentioned or included in subsequent monitoring reports, and their status is unknown. As of 2012, there were 5 plants observed in the plot (Hughes 2012, p. 1).

From 1989 to 1992, the plot experienced its highest number of seedlings based on the number of plants recorded in the smallest size class. Only one other seedling was detected in 1994. Between 1997 and 2005, the small and large size classes were relatively equal; however, after 2007, the larger size class showed an upward trend while a significant drop occurred in the smaller size class. This gap between the two size classes has continued through 2012, in which all of the individuals are mature adult plants.

A total of 111 plants were reported as recruitment (e.g., plants with a diameter less than 20 mm (0.79 in)) since the BLM began tracking recruitment in 1994, with an average of 7 individuals per year; 94 percent of those were reported from 1994 to 2004. Fruit production has been low within this population. On average, 44 percent of

tagged plants fruited in 6 of the 23 years this information was recorded. From 2001 to 2012, researchers reported 182 plants missing or retracted (average 35 plants per year). Mortality totaled 257 plants over a 15-year period from 1987 to 2012 with 144 of those occurring in the year 2000. The BLM stated that the 144 mortalities included tagged plants that were previously counted as retracted plants, but, because they had not been seen since the late nineties, they were assumed to be dead (Hughes 2000a, p. 2).

In summary, the number of Fickeisen plains cacti within this plot has declined roughly 98 percent from the highest recorded count to the present (2012). Mortality and the number of plants missing or retracted have been higher than the number of new recruits. Although many plants are within reproductive age, little to no reproduction occurred in the years from 1998 to 2012. With only 5 plants located in 2012, we believe this plot will become extirpated in the near future.

Clayhole Ridge—The Clayhole Ridge plot occurs on top of a limestone ridge (BLM 2007b, p. 67) in Clayhole Valley. Plant numbers in the plot have experienced several periods of increase followed by decreases between 1987 and 2012. The lowest number occurred in 1998 with 16 individuals, and the numbers peaked in 2001 with 63 individuals. Since 2001, plant numbers have declined by roughly 40 percent with 38 plants occurring there as of 2012 (Hughes 2012, p. 1).

From 1987 to 1995, 76 percent of the individuals found within this plot were greater than 20.1 mm (0.79 in) in diameter, while 9 percent were between 5 to 10 mm (0.2 to 0.39 in) in diameter. No seedlings were recorded during this time. The gap between the small and larger size classes has continued through 2012, with 84 percent of the individuals in the larger size class. Hughes (1996b, p. 17) attributed this division to the lack of intensive surveys for seedlings.

This plot had the highest percent of cactus producing fruit, and in the most years, compared to the other plots. Fruit production occurred in 21 of the 23 years reported with an average of 36 percent of tagged cacti fruiting (with a range of 6 to 85 percent of tagged cacti fruiting) each year. A total of 36 plants (average of 2 per year) were recorded as recruits in 12 of the 17 years information was collected. A total of 41 mortalities occurred between 1988 and 2012, and 251 plants were reported missing or retracted from 1998 to 2009 (average of 21 plants per year).

In summary, abundance has varied in this plot but plant numbers have averaged about 38 annually. After reaching its highest number in 2001, the plot has been in a downward trajectory since then, declining by 40 percent. Despite the majority of individuals fruiting and considering that larger individuals produced multiple fruit, recruitment has been poor. Mortalities, in combination with the number of plants missing or retracted, are substantially high compared to total abundance. The years between 2000 and 2001 are the exception, when plant numbers increased from 20 to 63. Reasons attributed for the sharp increase are unknown and do not appear to be correlated to weather. The average precipitation amounts for winter and spring of 2000 was very dry (Hughes 2000a, p. 1) and the spring of 2001 was just below-average, which would suggest low plant numbers rather than an increase.

Sunshine Ridge—The Sunshine Ridge plot is located along a ridgeline and downslope on a bench next to Toroweap Road (Hughes 1996b, p. 17). This plot has also experienced considerable variations in abundance. Monitoring began with 6 plants in 1986, and then numbers fluctuated eventually reaching a high of 44 in 1992 to none being observed in 2000, because they were either retracted or dead (Hughes 2000a, p. 1; Hughes 2005a, pers. comm.), possibly in response to below-average precipitation that year. Only four individuals were recorded in 2012 (Hughes 2012, p. 2). The plot had two distinct periods of relatively high numbers: From 1990 to 1995, with an average of 35 plants, and from 2005 to 2011, with an average of 29 plants. The worst years occurred in between these peaks for reasons unknown. The plot was vandalized in 1996, which may have contributed to the significant decline, although plants were not observed to have been damaged by the vandalism (Hughes 2005a, pers. comm.).

From 1987 to 1995 in this plot, 77 percent of individuals were greater than 10.1 mm (0.40 in) in diameter, while only 2 seedlings were observed during that period. From 1997 through 2012, the majority of the plants were in the larger size class, which currently includes 75 percent of individuals.

Fruit production occurred in 10 of the 22 years, with an average of 34 percent of tagged cacti fruiting (with a range of 16 to 79 percent of tagged cacti fruiting). A total of 26 individuals were reported as new recruits (average 1.7 per year) in 7 of the 17 years information was collected. Mortality from 1986 to 2012 totaled 43 plants, with 74 percent of those occurring from 1989 to 1995. Despite low numbers of deaths, 73 plants were reported as missing or retracted (average of 7 per year) from 1988 to 2012, with 89 percent of these reports occurring in the last 6 years.

In summary, this plot has experienced wide fluctuations in numbers over the 24 years it was monitored. Reasons for the variability have not been investigated but can likely be attributed to large numbers of individuals reported missing or retracted and poor reproduction. Moreover, despite a third of the individuals fruiting on average, annually, only two seedlings have been documented over a 16-year period. Compared to the other plots where decreases are gradual, changes in abundance in this plot have been more abrupt. Thus, the status of the species in the plot appears to be unstable and trending toward decline.

North Canyon—The North Canyon Plot occurs in House Rock Valley on two small hills near North Canyon wash. Plant numbers have also varied, but the reasons causing abundance to fluctuate have not been investigated. From 1986 to 1991, plant numbers increased from 14 to 36 individuals then fell to 7 in 1992. The sharp decline was attributed to a high number of plants lost from rodent predation in 1992 (Tonne 2012, p. 17). Post-1992, plant numbers gradually increased to a high of 40 in 2004 and 2005. As of 2012, there are 42 individuals in the plot (Hughes 2012, p. 2).

From 1987 to 1995, researchers found 85 percent of plants were greater than 10.1 mm (0.40 in) in diameter. No seedlings were found during these years. From 1997 through 2002, the size class distribution was relatively equal with 59 percent in the 0 to 15 mm (0.16 in) size class and 41 percent in the 16 to 30 mm (0.63 to 1.22 in) size class. After 2002, the size classes shifted to an average of 19 percent of plants in the smaller class and 81 percent in the larger class. As of 2012, researchers found 74 percent of plants in the larger size class.

Fruit production in this plot occurred in 11 of the 22 years reported, with an average of 35 percent tagged cacti fruiting annually (with a range of 8 to 64 percent of tagged cactus fruiting). Researchers found 35 new recruits (average of 2 plants per year) in 10 of 17 years reported and a total of 37 mortalities, with 26 deaths occurring in 1992. A total of 76 plants were reported missing or retracted (about 5 plants per year); 62 percent of those occurred from 2002 to 2005, when the plot also increased in numbers.

In summary, it is unclear what is occurring in this plot as increased abundance has occurred at the same time of high mortality. In the last 7 years, it has maintained an average of 37 individuals (range 32 to 42 cacti). During this time, fruiting occurred in 3 of the 7 years followed by a total of 9 new recruits; no mortalities occurred, but 28 plants were reported as missing or retracted. Very few small plants were documented between 1986 and 1995. After 1997, the plot's size structure distribution is skewed toward larger individuals indicating it is dominated by aging adults, while smaller plants are either moving into the larger size class as they grow or are deceased, missing, or retracted. Despite the appearance that numbers are relatively stable, reproduction is poor. There is also little evidence of recruitment to the extent younger plants would offset the number of missing or retracted plants. All of this information suggests that the plot is trending toward decline in the near future.

Cluster Plots—Information collected on the seven cluster plots was reported in BLM's 2001 annual monitoring report and is limited to count data (Roaque 2012, pers. comm.). The Navajo and Ward clusters plots are located in proximity to the Dutchman Draw population. In 1986, researchers found 4 plants at Navajo and 12 at Ward. Visits to these sites in 1993 reported zero plants in both plots. These sites were last visited in 2001, and 10 plants were found in each plot. No information describing the 1993 visit was provided in the monitoring report. Reported numbers for Salaratus Draw 1 and Salaratus Draw 2 were 5 and 12, respectively, in 1986 (BLM 1986, p. 2) and 2 and 11 plants, respectively, in 1993. In 1994, the Service visited Salaratus Draw sites and counted 14 plants in Salaratus Draw I and 30 plants in Salaratus Draw II (Service 1995, p. 1). Both of these sites were last visited in 2001, and zero plants were reported (Roaque 2012, pers. comm.). We do not have locations of these sites, in relation to the others, on file. Because the BLM referred to these sites as simply Salaratus Draw in their 1986 annual monitoring report, we do the same in this document unless we need to differentiate the two sites for specific reasons. The Sunshine Ridge II cluster plot had 9 plants in 1986 and 23 plants in 2001. The Temple Trail cluster plot had five plants in 1986, one plant in 1993, and seven plants in 2001.

The Toquer Tank cluster plot was visited regularly from 1986 to 1991. The reported number of plants found during that time ranged from 8 in 1986, up to 13 in 1991, to 7 in 1994 (Table 2) (Roaque 2012, pers. comm.; AGFD 2011b, entire). Information from BLM's annual monitoring reports for the years 1995 through 2000 noted ''no observations'' for the Toquer Tank cluster plot but did not provide an explanation for what this meant. We do not know if this signifies that the cluster plot was not visited or whether a visit did occur but no Fickeisen plains cacti were observed at the time. Subsequently, the BLM no longer included Toquer Tank in their monitoring reports.

Despite the confusion with Toquer Tank and the length of time since the Salaratus Draw cluster plots were last visited, we believe these areas may still be occupied by the species. When Hughes last visited Salaratus Draw I and II in 2001, he noted that both sites were very dry (Roaque 2012, pers. comm.) and plants may have been retracted at the time. Hughes further noted that the cluster plots are located in areas with dense grass in which the plants are difficult to find if they are not in bloom. We do not have any additional information to describe the conditions at the Toquer Tank cluster plot; however, a visit to the area is warranted. During the public comment period for the proposed rule, we requested any information about the status of the Fickeisen plains cactus at these three areas, specifically information to describe abundance, health, and age-class diversity of the plants. We also requested information describing the status of its habitat and any land use activities occurring within occupied areas. No additional information on the cactus at these sites was received.

House Rock Valley—The Fickeisen plains cactus has been documented in three additional areas in House Rock Valley, excluding those at North Canyon wash. These areas have not been visited in more than 18 years, and information about them is very limited. The Fickeisen plains cactus is documented at Beanhole Well, and along the rims of the Colorado River near Marble Canyon and South Canyon at the North Rim of the Grand Canyon National Park on BLM land. The Beanhole Well population is located just south of Highway 89A near the Vermillion Cliffs. This area has a small number of individuals, containing only three plants that were discovered in 1979 (Anderson and Gierisch 1979, p. 1; AGFD 2011b, entire). Field notes described the plants as healthy, scarce, and with several size classes present. The site had been revisited by Hughes, and while occupied habitat was observed, no plant numbers were reported to us (Calico 2012, pers. comm.).

The Marble Canyon population was visited in 1979, and 8 plants were observed within a 100-by-100-m area (0.06-by-0.06-mi) (Phillips 1979, p. 3). No other information is known. The third is located near the canyon rim of South Canyon. A total of 41 plants among three occupied sites were observed in 1979 within a 1,000-by-200-m (0.62-by-0.12-mi) area. In 1987, researchers observed 52 plants there during a soil study (AGFD 2011b, entire). Travis (1987, p. 4) observed animal burrows in areas occupied by Fickeisen plains cactus at the South Canyon with individual cacti found in the disturbed ground. A monitoring plot was established from 1982 until 1989 with approximately 59 plants total (Phillips *et al.* 1982, p. 7; Phillips *et al.* 1990, p. 5). At the last reading in May of 1989, Phillips *et al.* (1990, p. 5) documented 50 plants, 17 of which flowered and set fruit. However, many of the plants were found to be below the soil surface. A warm and dry winter in 1988 to 1989 was attributed to the plot's poor recruitment and numerous retracted plants (Phillips *et al.* 1990, pp. 8–10). The plot was last visited in 1993 by Hughes (Roaque 2012, pers. comm.), who had observed several Fickeisen plains cacti but did not provide specific information on plant numbers.

Due to the limited information available on these sites, and the fact that none have been visited in more than 18 years, we requested any information about the status of the Fickeisen plains cactus at this site during the public comment period for the proposed rule. We received no additional information on the cactus at these sites.

Navajo Nation Lands—There are 15 known populations of the Fickeisen plains cactus on the Navajo Nation (NNHP 2011a, p. 1). Eleven populations contain fewer than 20 plants, while 3 and possibly 5 populations contain only 2 to 3 individuals (Table 1). In 2009, researchers discovered a single population containing 314 plants. Only 6 of the 15 populations have been visited more than one time by the Navajo Nation Heritage Program staff (NNHP 2011a, p. 1; Navajo Nation Department of Fish and Wildlife (NNDFW) 2012, pp. 8–9). Substantial decreases in plant numbers were recorded during the most recent visits to two of these occupied sites. At one population, the cause of the decline is unknown. The suspected cause of the decline in the second population is discussed below for Salt Trail Canyon. The other four populations appeared stable. Several of the occupied sites

consist of a few individuals. This is partly due to surveys occurring outside of the spring survey season, and the sites never having been revisited thereafter for a more intensive effort (NNDFW 2012, pp. 8–9). Some populations were surveyed in the spring, and plants were found in extremely low densities; the Salt Trail Canyon and Hellhole Bend populations are the exception with high density and large abundance of plants found. The Navajo Nation suspects that there are vast amounts of potential suitable habitat for the Fickeisen plains cactus on their land and additional occupied sites likely exist but have not been discovered (NNDFW 2012, pp. 8–9).

Prior to 1991, the Fickeisen plains cactus was known at two to three sites along the south rim of the Little Colorado River from Cameron to Hellhole Bend. In the spring of 1991, a botanist with the Navajo Nation located a new population near Shinumo Altar and documented 21 Fickeisen plains cacti (NNHP 1994, p. 4). Surveys were conducted in 1993 and 1994. Those efforts located 280 Fickeisen plains cacti at 6 sites, including occupied sites discovered in 1991 (NNHP 1994, p. 3). Re-surveys of known populations between 2004 and 2005 resulted in only half of the 15 populations being located and substantially fewer plant numbers than those reported in 1994 (Roth 2005, pers. comm.). In 2006, a monitoring plot was established at Salt Trail Canyon, one of the Navajo Nation's largest populations (Roth 2007, p. 3). A monitoring plot was also established at Hellhole Bend in 2012, but monitoring information for this plot is not yet available.

With the exception of 2010, the Salt Trail Canyon plot has been monitored annually since 2006 to estimate trends and record reproductive efforts for the Fickeisen plains cactus. In 2006, researchers recorded 119 Fickeisen plains cacti. Plant numbers increased to 143 individuals in 2007, but this rise was primarily due to increased survey efforts that year (Roth 2008, p. 6). Since 2007, plant numbers have declined by 49 percent, with 70 plants relocated as of 2011 (NNHP 2011b, p. 2). In 2009, there were 101 cacti located in the monitoring plot, including 8 new plants. Thirty-one plants were either found dead or could not be located (NNHP 2011b, p. 2). In 2011, 28 plants were found dead or were not located, with one new seedling observed (NNHP 2011b, p. 3). Of the remaining plants in the plot, their observed condition, mean diameter, and reproductive output declined. From 2006 to 2008, the majority of plants were rated in excellent condition. The number of plants rated fair or poor increased from 4 in 2008, to 23 in 2009. These patterns may have been influenced by above-average rainfall in 2005 and 2007, but below-average precipitation in 2008 through 2010, on the Navajo Nation (NNHP 2011b, p. 3).

The mean diameter of plants between 2008 and 2009 was 28 mm (1.10 in). By 2011, the mean diameter declined by 5 mm (0.20 in) as a result of the cactus shrinking rather than a loss of plants in that size class. The plot has been dominated by the larger size classes with one percent of the plants recorded as seedlings. Reproductive structures observed in 2009 and 2011 were flower buds, flowers both at and past their peak, and aborted flower buds, an observation which was similar to phenological results in 2008. In general, reproductive effort in 2009 was moderate, while, in 2011, it was extremely low compared to 2008. In 2008, researchers observed 205 reproductive structures on 98 plants, and attributed this to above-average rainfall in 2007, whereas 2008 and 2010 had below-average rainfall (NNHP 2011b, p. 3).

In summary, short-term results demonstrate a continued decline over the last 5 years. Mortality, combined with the number of plants missing between years, is higher than the number of smaller, young plants observed. In addition, the documented reproductive output appeared to be low in 2011 but variable in years prior, and was likely influenced by below-normal precipitation.

Kaibab National Forest Lands—There were two areas on the North Kaibab Ranger District thought to be occupied by the Fickeisen plains cactus (USFS 2005, p. 148; AGFD 2011b, entire). One population is on the eastern Forest boundary at South Canyon near House Rock Valley and the Grand Canyon National Park. The South Canyon population was discovered in 2004 when a few individuals were observed (FWS files; Phillips 2013, pers. comm.). Information describing abundance, size classes, status, and distribution of the plants was unknown until it was revisited again in March 2013 (Hannemann 2013, pers. comm.). We now know the population consists of 62 plants distributed in several areas along the canyon rim. Plants of various size classes were found, including a few seedlings (diameter less than 1 mm (0.04 in)) and very large adults (diameter greater than 30 mm (1.18 in)). A monitoring site was established to collect detailed information on the status of the Fickeisen plains cactus in the near future.

The second population was believed to be located near the western Forest boundary at Snake Gulch (Phillips 2012, entire; USFS 2013a, pp. 44–46). Several areas in the vicinity of Snake Gulch were considered to be occupied by the Fickeisen plains cactus prior to 2013. An observation of a plant or plants was reported there following a botanical survey in the 1980s (AGFD 2011b, entire). However, searches for the plant in 2002 and 2003 during a section 7 consultation (USFS 2004, p. 601) and again in 2013, failed to locate any individuals. Investigation into the 1980s field information revealed an error in the reporting of the original observation clarifying that Fickeisen plains cactus was never found at Snake Gulch. Although there is potential habitat that is suitable to support the cactus, the site is considered to be unoccupied.

No Fickeisen plains cacti are known to occur on the Tusayan Ranger District. Habitat suitable to support the cactus was believed to exist in the Lower and Upper Basin areas but surveys were needed to verify any potential sites that could be occupied (USFS 2009, p. 72). A floristic survey was completed in 2013 on the Coconino Rim and Upper Basin (USFS 2013b, p. 1). The results of the survey determined that potentially suitable habitat in the Upper Basin was outside of the cactus' known elevational range. In addition, areas underlain by Kaibab limestone appear to be outside of the Tusayan Ranger District's boundary.

State and Private Lands—A large population of the Fickeisen plains cactus was documented in 2006, near the rims of Cataract Canyon on Cataract and Espee Ranches, which are owned and managed by the Babbitt Ranches, LLC (Goodwin 2006, p. 7; Goodwin 2008, pp. 8–10; Goodwin 2011a, pp. 1–9). These ranches are located on the Coconino Plateau south of the Grand Canyon National Park. The land within Cataract Ranch includes 18,210 ha (45,000 ac) of private land and 53,823 ha (133,000 ac) of land leased from the State of Arizona (The Nature Conservancy (TNC) 2000, p. 4). On December 7, 2000, TNC acquired a conservation easement on 13,953 ha (34,480 ac) of the privately owned parcels (TNC 2000, p. 22). In 2001, Coconino County acquired a separate conservation easement on an additional 2,590 ha (6,400 ac) of private land on Cataract Ranch. The deeded land forms a large contiguous block in the southern portion of Cataract Ranch, then is interspersed among numerous parcels of State land in the northern portion of the ranch (TNC 2000, p. 3). The Espee

Ranch is adjacent to the western boundary of the Cataract Ranch and includes State and private lands.

From 2006 to 2011, Goodwin conducted a general floristic inventory on the Cataract Ranch and located 307 Fickeisen plains cacti at 37 sites (2006, p. 7; Goodwin 2008, pp. 8–10; Goodwin 2011a, pp. 1–9). Of the 37 sites, 16 are on the conservation easement land. The number of plants recorded at each site was detected using a 5–10 minute visual search of the area (Goodwin 2011b, pers. comm.). In total, about 146 Fickeisen plains cacti were located on private land, and 161 plants are on State land of the Cataract Ranch (Goodwin 2011a, pp. 18–20). Two mature plants were located on the Espee Ranch. Goodwin defined sites as physical breaks in the habitat separating one occupied area from another (Goodwin 2011b, pers. comm.). Occupied sites had an average of 8.3 plants (range of 1 to 32 individuals) within a 0.10-ha (0.25-ac) or smaller sized area. About 30 percent (92 of 307 plants) of the plants observed were classified as immature plants that appear to be of less than reproductive age. The distribution of the plants appears to be loosely associated with the Cataract drainage. Most occupied areas occurred no farther than 3.22 to 4.83 km (2 to 3 mi) from the rim of the canyon and covered a 48-km (30-mi) linear area (Goodwin 2011a, p. 7). No formal surveys or permanent monitoring plots have been established on the Cataract Ranch. No surveys are planned for the Espee Ranch, but it is likely that additional plants may occur there.

On the eastern side of the Coconino Plateau, two small populations of the Fickeisen plains cactus have been documented near the community of Gray Mountain, which is north of the town of Flagstaff, on a mix of Federal, tribal, and private land. One population is located on private lands next to the boundary of the Navajo Nation and west of U.S. Route 89. In 1984, four Fickeisen plains cacti were found near a sewage disposal pond. Researchers visited the area in 2013 to try and relocate the site where plants were originally found. No in-depth searches were conducted, but one plant in flower was relocated (Service 2013, p.1). The second population is located on the east side of U.S. Route 89 near Mays Wash on BLM and privately owned lands (AGFD 2011b, entire; Goodwin 2012, pers. comm.). In 1981, researchers found 29 live and 4 dead Fickeisen plains cacti and established a monitoring plot in 1983 on BLM land (AGFD 2011b, entire) but we have no information describing those efforts or results. The area was last visited in 1984, and four plants were observed, three of which were in bloom.

The Fickeisen plains cactus has also been documented to the west of the Babbitt Ranches on private land held in fee simple by the Navajo Nation (Chapman 2012, pers. comm.; Navajo Department of Justice 2012, p. 2). Plants, known only as a variety of *Pediocactus peeblesianus,* were first documented there in 1979. The occupied area was revisited in 2006, and the plants were confirmed to be variety *fickeiseniae* (Goodwin 2006, p. 5). Another visit to the area occurred in the spring of 2012, but no documentation describing the site visit or the status of the Fickeisen plains cactus is available (Goodwin 2012, pers. comm.; Hazelton 2012b, pers. comm.) The area is believed to have abundant habitat that is suitable for the Fickeisen plains cactus and likely supports additional, currently unknown plants (Chapman 2012, pers. comm. Goodwin 2012, pers. comm.). If additional Fickeisen plains cacti do exist here, it would expand the known range of the species.

In summary, abundance and trend information on the Fickeisen plains cactus is limited to 6 populations totaling 466 individuals. We acknowledge that additional Fickeisen plains cacti may be present in the other 27 known populations and there may be additional populations within suitable habitat that has not yet been surveyed, but the status of those plants is unknown because these areas have not been visited regularly or visits have occurred once in more than 18 years. Of the six populations, five are being monitored. These five monitoring plots are within the largest populations on the Arizona Strip and one of the largest populations on the Navajo Nation. The BLM has been monitoring the Fickeisen plains cactus for nearly 26 years. Information obtained from their monitoring reports represents the majority of knowledge about the status of the taxon. Long-term monitoring results from the BLM show a 72 percent decline in plant numbers among the four monitored plots combined since 1992. The decline appears to be a result of higher rates of missing or retracted plants and mortality over several consecutive years in conjunction with low seedling recruitment. Adult plants, which produce more fruit and have a greater reproductive output than immature plants have been removed from the BLM populations and are not being replaced by new recruits even during favorable conditions. Short-term monitoring results from the Salt Trail Canyon monitoring plot on the Navajo Nation indicate plant numbers have declined by 49 percent in the last 5 years. This population is also dominated by older adult individuals that appear to have low reproductive output based on aborted reproductive structures observed in 4 of the 5 years monitoring occurred, with high mortality compared to recruitment.

Of these five monitored populations, the observed decline or absence in seedling recruitment and survival is difficult to attribute to a single cause; it is more likely associated with a combination of environmental factors that are acting together. The reproductive capacity for the Fickeisen plains cactus is considered to be naturally low (e.g., seed dormancy, low seed production, poor dispersal mechanisms, and slow growth), in which, introducing external factors that may place additional stress on the life-history characteristics of these populations may further inhibit population growth. Moreover, information from other species of *Pediocactus* suggests that the low recruitment being observed may be influenced by the young age of individuals, as well as other climatic factors. Because these five monitoring plots are located in large populations of the Fickeisen plains cacti but have demonstrated significant decreases in plant numbers, it is likely that the smaller, isolated populations whose status is unknown are also experiencing similar declines. The Fickeisen plains cactus in the Cataract Canyon population and South Canyon on the Kaibab National Forest are the exception. These occupied areas are the only locations showing relatively good age-class diversity (30 percent of the individuals on the Cataract Ranch is considered to be immature). The Kaibab National Forest will begin long-term monitoring in the future and collect detailed information to help our knowledge of the taxon. Until then, it is too early to draw conclusions about the status of plants at these locations. The Fickeisen plains cactus on the Cataract Ranch, however, benefits by the protection afforded to it from the conservation easement.

Based on our review of the best available information on the species, the known numbers of the Fickeisen plains cactus have declined. The species will likely continue to decline for the reasons described below, as mature plants die and few seedlings are present to replace them. The viability of the five monitored populations has been reduced due to low recruitment and the loss of mature, reproductive plants. If the threats described below continue to affect these populations, the long-term

viability of the rangewide population may be compromised. We acknowledge that the observed declines are restricted to monitoring plots that may not accurately reflect rangewide trends. In addition, our inability to conclude with certainty that plants that have been recorded as missing or retracted are dead may mean that we have underestimated the decline. However, we conclude, based on the information analyzed, that the largest Fickeisen plains cactus populations have declined, and that recruitment is reduced or nonexistent.

Summary of Factors Affecting the Fickeisen Plains Cactus

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Based on the habitat characteristics described above, potential factors that may affect the habitat or range of the Fickeisen plains cactus are discussed in this section, including: (1) Livestock grazing; (2) nonnative, invasive species; (3) uranium mining; (4) road construction and maintenance; (5) ORV use and recreation; (6) commercial development; and (7) drought and climate change.

Livestock Grazing

The habitat of the Fickeisen plains cactus has been grazed since the late 1800s, and continues to be used for grazing by cattle, domestic sheep, and feral horses. In general, livestock grazing may result in direct loss or damage to the Fickeisen plains cactus and the habitat that supports its persistence as a result of trampling, compacting soil, increasing erosion, losing the soil seed bank, introducing invasive species, and disturbing native pollinators (Klemmedson 1956, p. 137; Ellison 1960, p. 24; Fleischner 1994, entire; Trimble and Mendel 1995, pp. 234–240; Kearns *et al.* 1998, p. 90; DiTomaso 2000, p. 257). For the Fickeisen plains cactus, the risk of trampling is greatest when plants emerge above ground at the same time that cattle occupy the area. Given their small size and lack of hard spines, plants are vulnerable to being stepped on and may be killed or damaged as a result (Phillips and Phillips 1995, p. 6). During the wet winter months when rainfall is sufficient, water may collect in pockets of bedrock on the canyon rims, attracting livestock to these areas. Although most plants retract in winter, those plants whose crown sits above the surface are still vulnerable to trampling and risk damage to their meristem. Plants can also be dislodged by cattle as they wander through an occupied area. Increased grazing pressure can negatively impact Fickeisen plains cactus habitat. The soil where plants occur is shallow, sandy, and easily compactible, and may be covered by biological soil crusts, which are easily damaged by trampling (NRCS 1997, p. 10; Evans and Johansen 1999, p. 185). Livestock concentrating within occupied areas can lead to soil compaction and erosion that may decrease the ability of the soil to store seed and support seedling establishment and may prevent plants from seasonally retracting underground (BLM 2007b, p. 74).

Bureau of Land Management Lands—Livestock grazing has occurred on the Arizona Strip and within the habitat of the Fickeisen plains cactus since the mid-1800s (BLM 2007a, p. 3–123). Unregulated use of the rangeland between the late 1880s and early 1900s resulted in overgrazing and rangeland deterioration. The passage of the Taylor Grazing Act (43 U.S.C. 315) in 1934 led to grazing reform, the establishment of allotments, and designation of the kind and number of livestock and seasons-of-use regulations. Between the late 1950s and 1980s, the BLM made further adjustments in livestock numbers and the season-of-use, and implemented regulated grazing systems and management plans. Compared to the 1900s, the current permitted level of grazing has been substantially reduced. The land and the vegetation community are slowly recovering with habitat improvements noted by the BLM over the last several decades. Although the Fickeisen plains cactus have persisted during past years of overgrazing, we do not have information to describe any historical effects grazing may have had to the plant.

All habitat occupied by the Fickeisen plains cactus on the Arizona Strip occurs within active grazing allotments (BLM 2007b, p. 67). The Dutchman Draw plot is located in the Mainstreet Allotment and within a transitional pasture that is used in May for 2 to 4 weeks; the Clayhole Ridge plot is located within a single pasture of the White Pockets Allotment and has season-long grazing from mid-October to June; the Sunshine Ridge plot is within the Wildband pasture of the Wildband Allotment that is used from mid-June to September; and the North Canyon plot is within Rider Point pasture of the Soap Creek Allotment that has winter–spring use (Roaque 2011, pers. comm.). The Salaratus Draw population is in the Salaratus pasture that is used in the winter season. Plants in the Temple Trail cluster plot are in the Temple Trail Allotment, Beanhole Well plants are in the Beanhole Allotment, and Toquer Tank plants are in the Toquer Tank Allotment (BLM 2008a, Appendix C). We do not have information about the season of use for these allotments.

The Beanhole, Soap Creek, Temple Trail, and Wildband Allotments are categorized as ''improve allotments.'' These are ''managed to improve resource conditions or conflicts and receive the highest priority for funding and management actions'' (BLM 2007a, p. 3–124). The Mainstreet, Toquer Tank, and White Pockets Allotments are managed as ''maintain allotments.'' These allotments are managed ''to maintain current satisfactory resource conditions and are actively managed to ensure that resource values do not decline'' (BLM 2007a, p. 3–124). The Mainstreet Allotment is managed under a best pasture system, which attempts to match cattle movements with variable precipitation patterns and seasonal forage production rather than strict rotational schedules (Howery *et al.* 2000, entire). Forage utilization levels for key species are authorized at the 50 percent average of the current years' growth (BLM 2007a, p. 3–125). Trend data for some allotments containing the Fickeisen plains cactus was recorded in various years between 1981 through 2011 (Hughes 2012b, pp. 2–7). The information provided stated that the Twin Tanks Pasture in the Mainstreet Allotment, the Wildband Allotment, Toquer Allotment, and Soap Creek is ranked static and its condition is late seral in plant composition. Information regarding utilization indicates varying levels of grazing use across occupied habitat on the Arizona Strip (Service 1995, p. 1; Roaque 2011, pers. comm.).

Impacts associated with livestock grazing have documented direct mortality to the Fickeisen plains cactus from trampling. Over a 17-year period, monitoring by the BLM detected 12 Fickeisen plains cacti killed from trampling. Three plants died at Clayhole Ridge following heavy spring rains. Hughes (1988, p. 2) documented cattle had congregated in the area of the Fickeisen plains cactus, and it appeared that considerable bull fighting occurred, resulting in disturbance to the plant and the soil. Seven plants died from trampling at Sunshine Ridge, including a large mature plant and five seedlings in 2001 (Hughes 2004, p. 2), and two plants died from trampling at Dutchman Draw (Hughes 2000a, p. 2). In House Rock Valley, the risk of trampling to the Fickeisen plains cactus may be greatest during the wet winter months when rainfall is sufficient to provide water for cattle on the canyon rims and into

occupied habitat (Hughes 2001, pers. comm.). Because not all plants retract completely underground, directly stepping on the plant can damage the meristem and prevent flower production in the future.

Evidence from other monitored *Pediocactus* species indicates that trampling can impact numerous plants and often results in direct mortality. For example, the BLM conducts similar monitoring for the Brady pincushion cactus as they do for the Fickeisen plains cactus. Over a 15-year period, demographic monitoring identified three incidences when plants had been stepped on or harmed by cattle. One account occurred in 2001 where Hughes (2001, pers. comm.) reported a Brady pincushion cactus with an intact seed pod had been stepped on but the plant appeared to have survived; the second account was in 1990 when two plants were killed as a result of trampling. However, in response to the Service's concern for grazing impacts to the Brady pincushion cactus, the BLM established linear transects to determine livestock damage to the cactus along the rim of Marble Canyon (Service 2001b, entire). The purpose of the damage transects were to capture data on mortality/damage effects on the plant that were being missed through demographic monitoring. During the 4 years transects were walked, the BLM recorded 18 Brady pincushion cacti stepped on by cattle (Hughes 2002, p. 5; Hughes 2004, p. 6; Hughes 2005b, p. 17; Hughes 2012b, p. 1). Fifteen of those were reported as uninjured and three were killed, in which the soil was wet and hoofprints were deep in the soil thus pushing the plants into the ground resulting in mortality. Those plants found in shallow hoofprints were observed to be alive and bloomed or fruited (Hughes 2012b, p.1), noting that the timing of when cacti were stepped on coincided with their flowering period.

Clark and Clark (2008, p. 3), monitoring the *Pediocactus winkleri* (Winkler pincushion cactus), found that 58 of 107 (54 percent) plants were stepped on directly by cattle over a 13-year period, with some plants stepped on more than once. Thirty-five of those plants died immediately from being trampled, while, of those that survived, 60 percent eventually died within 4 years of their trampling injury. This provides some evidence that damage caused to plants from trampling may not be readily apparent immediately after the event. Thus, we anticipate that more Fickeisen plains cacti have been injured or died after being stepped on, either immediately or later in time, but the impacts are not being detected through the current monitoring methods used by the BLM (Service 2000, p. 2; Service 2007a, p. 8).

In the House Rock Valley, the Fickeisen plains cactus occurs within the Kane Ranch on the Soap Creek Allotment (formerly the Cram Allotment). Historically and up until 1996, the BLM had identified the western half of the Cram Allotment as having a severe overgrazing problem. The North Canyon population occurred in the area heavily grazed (Hughes 2000b, p. 21). An October 1995 site visit to the Cram Allotment by Service staff reported that the number of cattle had been reduced from 150 head yearlong to 50 head in the winter–spring season due to the poor condition of the allotment (Service 1995, p. 1). During that same year, the BLM installed new water sources on the eastern half of the allotment and blocked water tanks from filling up on the western half. This was anticipated to reduce livestock use on the western half and help to alleviate grazing pressure within occupied Fickeisen plains cactus habitat (Hughes 2000b, p. 22). In 2003 to 2005, all livestock were removed from the Cram Allotment, now Soap Creek Allotment, and grazing ceased on the Kane Ranch for two years. During the period from 2003 to 2005, the Fickeisen plains cactus in the North Canyon plot experienced the greatest increase in the number of plants observed in the plot since 1986.

In 2005, the Grand Canyon Trust (GCT) and The Conservation Fund purchased the grazing lease for the Kane Ranch and currently maintain a reduced number of cattle on the allotment compared to previous levels (GCT 2011). They conducted an extensive ecological assessment to ''provide a context for management and to establish a baseline for tracking changes and inform management'' (Sisk *et al.* 2010, pp. 45–47). They found that past heavy use of the range, in conjunction with arid conditions and drought, have resulted in degradation of the rangeland and slowed grassland regeneration. In order to improve the rangelands but also to discover if they could achieve a landscape-level grassland restoration and conservation within an active cattle ranch, the GCT began an experimental native cool-season grass reseeding project on the Kane Ranch in House Rock Valley. Preliminary results showed that seedling recruitment was low overall and small-scale disturbances to the soil associated with some of the different reseedling methods employed had the unintentional consequence of proliferating nonnative, invasive plants while decreasing soil stability. One method investigated the soil seedbank in response to cattle trampling; results showed little support that germination of native grass could be improved by this form of disturbance (Sisk *et al.* 2010, p. 58). However, if these efforts successfully achieve native grassland recovery in the long term, it would improve the quality of habitat that supports the Fickeisen plains cactus.

In summary, the four monitored Fickeisen plains cactus populations on BLM lands are within active grazing allotments. The timing of when cattle are present within occupied Fickeisen plains cactus habitat varies among the 14 total populations, but corresponds to the periods when the plants are emergent and also when they flower and produce fruit. Direct mortality from trampling has resulted in the documented loss of 12 plants within the monitoring plots, but more plants have likely been affected. The extent of damage or mortality to the plants caused by livestock trampling is unknown. No comprehensive monitoring, designed to detect and measure the extent of damage or mortality has been conducted. Over time, losses to mature individuals or damage caused by trampling that prevents future reproduction will result in population declines of the Fickeisen plains cactus.

The rangeland that supports habitat for the Fickeisen plains cactus experienced past overgrazing. Although current grazing levels are far reduced from historic levels, portions of the rangeland have been grazed during periods of drought and we have no information to suggest at present that grazing during a drought is at a reduced stocking rate. Information from the BLM and GCT suggests that the seasonal variation and changes in the timing of precipitation have resulted in slow recovery of the rangelands from historic overgrazing and heavy, winter grazing over the past few years. The effects from the culmination of past grazing levels with hot and dry climate conditions have likely diminished the quality of suitable habitat, particularly in the Sunshine Ridge and North Canyon Wash plots that are being managed to improve resource conditions or conflicts. Both of these plots have shown great fluctuations in plant numbers that may be correlated with habitat deterioration from livestock grazing coupled with climate conditions. In addition, cattle grazing in areas where the Fickeisen plains cactus is present and during times when the plant may already be stressed from drought may be contributing to the plant's poor or nonexistent germination

and recruitment. The Fickeisen plains cactus population in the North Canyon plot appeared to rebound during the period of time when the allotment was rested. Although the reasons for the increased numbers are unclear, the cactus may be sensitive to some level of ground disturbance. However, if the numbers of individuals within a population are too low—such as the Dutchman Draw plot—recovery may be very slow, or may not occur.

Navajo Nation Lands—Livestock grazing on the Navajo Nation has occurred since the 1880s, primary by domestic sheep and cattle. Stocking rates and the impact of grazing on the landscape have varied over the years (NNHP 2011a, p. 2). Overgrazing was documented in the past (Libecap and Johnson 1980, pp. 71–75; Richmond and Baron 1989, entire) and remained problematic through the mid-1990s (High Country News (HCN) 1996, p. 2). We do not have information on the current grazing levels, but, similar to the BLM land, drought conditions have compounded rangeland recovery from past heavy use necessitating balancing rangeland capacity, family-owned herd sizes, and local economies (Redsteer *et al.* 2010, pp. 5–6, 11). Navajo Nation also supports an estimated 30,000 feral horses that contribute to and cause overgrazing problems (Navajo Times 2012). Attempts to control the feral horse population continue to be an ongoing issue on the Navajo Nation.

Livestock grazing is managed by the District Grazing Committees, Farm Boards, and Eastern Navajo Land Board members. Oversight and technical assistance is provided by the Grazing Management Office under the Navajo Nation Department of Agriculture. In general, grazing permits are authorized year round on the west side of the Navajo Nation, while the Eastern Navajo authorizes seasonal permits for the mountainous areas (Hazelton 2012c, pers. comm.). Grazing permits are held by individuals for a certain number of animal units. The grazing permits are generally considered permanent and are inherited by the spouse or children within a family. Livestock rotation is at the discretion of the families that own the livestock.

All areas occupied by the Fickeisen plains cactus on the Navajo Nation are potentially subjected to impacts associated with this grazing (NNHP 2011a, p. 1). However, monitoring has not been conducted in such a way to assess the overall impacts of grazing to the Fickeisen plains cactus and its habitat. Notes from the Navajo Nation Heritage Program pertaining to the 15 known Fickeisen plains cactus populations indicate some livestock impacts have been observed within the three largest populations (Hellhole Bend, Salt Trail Canyon, and Blue Spring) (NNHP 2011a, p. 4). Livestock impacts at Hellhole Bend and Blue Spring referred to the appearance of the range being heavily grazed, but no mortality or direct damage to the Fickeisen plains cactus from livestock was recorded at the time (NNHP 2013, p. 13). Hellhole Bend was visited in 2012. The habitat appeared to have been disturbed by feral horses and sheep. Some of the native vegetation within occupied habitat appeared to have been heavily grazed, likely attributable to animals seeking forage following a dry winter. Most of the Fickeisen plains cacti were retracted with some flushed with the soil surface. No impacts to the individuals were noted at that time (Robertson 2012, p. 1).

Livestock disturbance has been documented in the Salt Trail Canyon population. Damage by sheep was observed in 2005 (Roth 2007, p. 2) and again in 2008, with six livestock-related mortalities. Roth (2008, p. 2) documented that the six dead plants were located within a depression in the ground that was believed to have been dug by sheep that bedded down on top of the plants. In 2011, monitoring of the plot found some evidence that the plot had been disturbed by an animal (i.e., one plant appeared to have been partly eaten), which may have contributed to the high mortality that year (NNHP 2011b, p. 4). An October 2011 site visit by the Service observed the habitat had been disturbed by feral horses and sheep concentrating in the area. We do not know at this time how frequently this site is used by feral horses or sheep or how long this site may be used by either of these animals. Other available information pertaining to livestock and the Fickeisen plains cactus was a documented observance of hoofprints of cattle and sheep near some individuals in the Shinumo area in 1991, but only one cactus was directly impacted. The cactus was lying in a hoofprint and partially uprooted (NNHP 1994, p. 5).

Kaibab National Forest Lands—The South Canyon population is within the Grand Canyon National Game Preserve, now known as the Buffalo Ranch Management Area. Livestock grazing by cattle is not authorized in the management area, and thus no impacts to the Fickeisen plains cactus from cattle would occur. The Buffalo Ranch Management Area supports forage for a bison herd and other game species, which are managed by the Arizona Game and Fish Department. The bison are known to spend much of their time in the remote forested areas of the Kaibab Plateau. Researchers with the Kaibab National Forest did not observe any current use at South Canyon and no evidence that bison had been in areas where the Fickeisen plains cactus occurs. Because of the loose soils at this site, historic bison tracks or trailing would have been evident (Hannemann 2013, pers. comm.). Additionally, developed water for bison is over 4 km (2.4 mi) from occupied Fickeisen plains cactus habitat that would reduce the potential to attract bison or wildlife to the site where plants could potentially be trampled. No signs of disturbance were observed within occupied habitat in spring of 2013 due to the isolation of the area, and wildlife does not appear to pose a threat to the plants.

State and Private Lands—The Cataract Canyon population is on an active cattle ranch that has been utilized for livestock grazing for well over 100 years. The management of livestock grazing by cattle and horses occurs within occupied Fickeisen plains cactus habitat on State and private lands. While the cattle operations are vital to the Cataract Ranch, livestock grazing is managed in a manner that is consistent with the philosophies, values, and conservation ethic of the Babbitt Ranches. For example, cattle operations are one component of the Cataract Ranch, but the Ranch and the other Babbitt Ranches are managed in a holistic manner that incorporates ecology (wildlife habitat, vegetation diversity, watershed health, historical preservation, cultural values, and recreation), the local and regional economies, and the local and regional human community (Babbitt Ranches 2012, entire). Therefore, herd sizes are not adjusted in response to seasonal availability of water and forage due to drought but are managed together with rangeland health, watershed, and wildlife habitat. More specific to the Fickeisen plains cactus, Goodwin (2011a, p. 8) noted no habitat impacts from grazing in occupied habitat while conducting searches for the plant from 2006 to 2011. Additionally, a land assessment by TNC determined that much of Cataract Ranch remains in an undisturbed, natural state (TNC 2000, p. 1), and the general ecological conditions of the land are excellent (TNC 2011, p. 9). While the Fickeisen plains cactus remains vulnerable to being stepped on by cattle or horses, livestock grazing under the system used on Cataract Ranch is not a threat to the Fickeisen plains cactus and its habitat.

In summary, the majority of habitat for the Fickeisen plains cactus occurs in areas that have been grazed and will

continue to be grazed in the future. Grazing on Navajo Nations lands is largely unregulated. Although current grazing pressures across the range of the Fickeisen plains cactus are far below the levels of the late 1800s, the rangelands are still recovering from this past heavy grazing in many areas of the range of the Fickeisen plains cactus. Continued grazing on the BLM and Navajo Nation during the prolonged drought in the late 1990s and local droughts in the 2000s has added to rangeland deterioration and changes to the vegetation community. While changes in seasonality, timing, and intensity of grazing have been implemented on the Arizona Strip to improve rangeland conditions from past use, the warmer and drier climate is compounding recovery of the grasslands that support habitat for the Fickeisen plains cactus.

Long-term monitoring has documented direct mortality to the Fickeisen plains cactus from livestock grazing. More plants on the BLM lands have likely been killed or damaged from trampling, but for which the effects have not been captured during the monitoring period. While trampling occurs infrequently, it has removed adult individuals from the population and contributes to population declines exacerbating the effects of small population size (see *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence section*). We recognize that in some areas occupied by the Fickeisen plains cactus, livestock grazing in combination with other factors appears to be contributing to the decline of the cactus and low recruitment. In other occupied areas, livestock grazing and the Fickeisen plains cactus coexist and the populations have a diverse age-class and are reproducing. The differences between areas experiencing population declines and those with reproducing populations may be due to the intensity, timing, and other factors of livestock grazing management. Thus, livestock grazing, in and of itself, may not rise to a population-level threat for the Fickeisen plains cactus, but when combined with additional stressors such as drought and climate change, and rodent and rabbit predation (discussed below), the combined effect is producing population-level impacts to the Fickeisen plains cactus. Therefore, we conclude that livestock grazing, in conjunction with other factors, is a threat to the Fickeisen plains cactus and its habitat.

Nonnative, Invasive Plant Species

A potential threat to the Fickeisen plains cactus and its habitat is nonnative, invasive species. The spread of nonnative, invasive species is considered the second largest threat to imperiled plants in the United States (Wilcove *et al.* 1998, pp. 608–609). Nonnative, invasive plants—specifically annuals—negatively affect native vegetation, including rare plants. One of the most substantial effects of nonnative plant invasion is the change in vegetation fuel properties that, in turn, alter fire frequency, intensity, extent, type, and seasonality (Menakis *et al.* 2003, pp. 282–283; Brooks *et al.* 2004, p. 677; McKenzie *et al.* 2004, p. 898). The resulting unnaturally shortened fire-return intervals make it difficult for native plants to reestablish or compete with invasive plants (D'Antonio and Vitousek 1992, p. 73). Invasive plants can also exclude native plants through competition for space, soil nutrients, moisture, and light, and by altering pollinator behaviors (D'Antonio and Vitousek 1992, pp. 74–75; DiTomaso 2000, p. 257; Traveset and Richardson 2006, pp. 211–213; Cane 2011, pp. 27–32).

Nonnative, invasive annual species have been identified as potential future threats to other *Pediocactus* species due to their ability to deplete available soil moisture, particularly during the early spring growing season, and causing the habitat to be at risk of a fire when the habitat is not historically fire adapted (USFWS 2007, p. 5; Spence 2008, p. 5; USFWS 2008, pp. 13–14). Due to these concerns, nonnative, invasive species may also be a potential threat to the Fickeisen plains cactus and its habitat.

On the Arizona Strip, the BLM identified 15 nonnative, invasive species which occur; five of these species are listed by the State of Arizona as noxious weeds (BLM 2007a, pp. 3–34; NRCS 2009, entire). These five are: *Acroptilon repens* (Russian knapweed), *Alhagi maurorum* (camelthorn), *Centaureau diffusa* (diffuse knapweed), *Halogeton glomeratus* (halogeton), and *Onopordum acanthium* (scotch thistle). In addition, the species *Taeniatherum caput-medusae* (medusahead) is a species of concern, and the species is moving into the region from the north and may occur on the Arizona Strip in the future. Three additional nonnative, invasive species that occur on the Arizona Strip include *Bromus tectorum* (cheatgrass), *B. rubens* (red brome), and *Centaurea melitensis* (Malta starthistle). With the exception of Medusahead, these nonnative, invasive species are also found on the Kaibab National Forest (USFS 2005, pp. 16–17). On the Navajo Nation, red brome and *Erodium cicutarium* (red filaree) have been observed in Fickeisen plains cactus habitat (Roth 2007, p. 2). Nonnative, invasive species found on the Coconino Plateau and which may occur within Fickeisen plains cactus habitat include cheatgrass and *Salsola tragus* (Russian thistle) (Thomas et al. 1998, p. 43).

Cheatgrass is the most widespread nonnative, invasive annual within the range of the Fickeisen plains cactus followed by red brome and redstem filaree. Cheatgrass is an erect winter and spring annual grass from Europe and is a prolific seed producer. Red brome can dominate a landscape by emerging prior to native annuals in response to early season precipitation events (Salo 2004, p. 293). It is known to deplete soil water faster and at greater depths than native annual species (Brooks 2009, p. 118). If already present in the vegetative community, cheatgrass and red brome increase in abundance after a wildfire, increasing the risk for more frequent wildfires on the landscape (D'Antonio and Vitousek 1992, pp. 74–75). In addition, cheatgrass invades areas in response to surface disturbances (Hobbs and Huenneke 1992, pp. 324–325, 329, 330), in which density is correlated with the availability of bare soil for germination, rather than the number of seeds produced (USFS 2005, p. 63). Additionally, livestock have been implicated in spreading nonnative, invasive species such as cheatgrass and red brome, although we do not know the extent to which livestock contribute to the spread of these two grasses. Both cheatgrass and red brome are likely to increase in quantity and distribution due to climate change (see ''Drought and Climate Change'' discussion, below) because these species increase biomass and seed production at elevated levels of carbon dioxide (Smith *et al.* 2000, pp. 80–81; Ziska *et al.* 2005, p. 1328). Seeds of redstem filaree can also be prolific following wet winters and remain viable in the soil for years. Redstem filaree can rapidly form dense ground cover, crowding out native species, and competing with them for soil moisture and nutrients.

We have very limited information on the distribution and density of cheatgrass, red brome, and redstem filaree in respect to Fickeisen plains cactus populations. The BLM identified general locations where noxious weeds are found on the Arizona Strip (BLM 2007a, Figure 3.12). Based on the identified areas, noxious weeds appear to be in the vicinity of, or within, Fickeisen plains cactus habitat, although the specific information identifying which species and their densities or abundance are unknown. In House Rock Valley, the GCT identified 34 nonnative, invasive species during

their baseline ecological assessment of Kane Ranch, with cheatgrass being the most widely distributed (Sisk *et al.* 2012, p. 59). Sisk *et al.* (2012, pp. 61–63) developed a preliminary computer model of cheatgrass occurrence based on 606 random vegetation plots (baseline assessment plots) for the Kane and Two Mile Ranches in 2005. Preliminary results from the model predicted a low to moderate (25 to 35 percent) probability of cheatgrass occurrence in occupied areas near North Canyon Wash and along Marble Canyon, but a high probability (greater than 65 percent) of a cheatgrass occurrence near the Beanhole Well population. There is a potential for cheatgrass to spread into Fickeisen plains cactus populations by means of a wildfire. There is also the potential of cheatgrass to facilitate or provide the right conditions for another nonnative, invasive species to thrive within Fickeisen plains cactus habitat and negatively impact the plant.

On the Kaibab National Forest, cheatgrass was not observed in occupied Fickeisen plains cactus habitat at South Canyon. Small pockets of cheatgrass are located within a quarter mile from the rim of South Canyon with a potential for it to spread into occupied habitat if the area is burned from a wildfire in the future. However, there is minimal ground cover or low fuel load along the rim of South Canyon and little ground disturbance due to the isolation of the area. Therefore, the potential fire risk along the rim of South Canyon is considered to be low. If a wildfire were to ignite in the vicinity of the Fickeisen plains cactus and cheatgrass invades, then control measures would be taken to ensure cheatgrass does not move into occupied habitat.

On the Navajo Nation, past and present botanists have expressed differing opinions on whether nonnative, invasive species are having an impact on the Fickeisen plains cactus. Roth (2005, p. 1) observed high densities of red brome and redstem filaree in Fickeisen plains cactus habitat during a wet spring season in 2005 in which she found more cacti in places with fewer nonnative, invasive plants. She hypothesized that low recruitment may be related in part to the invasion of red brome, cheatgrass, and redstem filaree. These nonnative, invasive species dominate the habitat during wet years (Roth 2008, p. 4; Roth 2011, pers. comm.), but impacts on the germination and establishment of Fickeisen plains cactus seedlings are unclear and warrant more study. More recently, the Navajo Nation recognizes that redstem filaree and red brome become abundant in some parts of the cactus' range on the Nation during the spring growing season that is unusually wet. However, they feel no data currently supports a negative correlation between abundance of exotic annual species and declines in the Fickeisen plains cactus (NNDFW 2013, p. 14). The effects that red brome and redstem filaree may have on the cactus or the underlying mechanisms they may have within the native vegetation community or the cactus itself have not been investigated.

The threat of fire from nonnative, invasive species may be localized to areas where the Fickeisen plains cactus is found in dense grasses, such as those populations in Mohave County (Mainstreet Valley). A range fire could easily impact or eliminate one or all populations in the Mainstreet Valley and Hurricane Cliffs area and degrade Fickeisen plains cactus habitat to the point that it will no longer be suitable for the plant. The loss of one of these populations and associated suitable habitat would be a significant loss to the plant when considering its small population size and wide but disjunct distribution. The Fickeisen plains cactus populations in Coconino County occur on canyon rims, terraces, or in gravelly soils with sparse vegetation, thereby occupying sites with a low fuel source. Lacking sufficient information on the distribution of nonnative, invasive species to areas occupied by the Fickeisen plains cactus, it is difficult to approximate the likelihood of the cactus being adversely affected by wildfires caused by litter derived from nonnative, invasive annuals. Due to its diminutive size, the Fickeisen plains cactus likely would be killed from a wildfire. Monitoring of the Kaibab plains cactus exposed to different fire intensities indicated high-intensity fires resulted in plant mortality (Warren *et al.* 1992, abstract). Evidence also suggests that invasion and dominance of cheatgrass following a past fire may have contributed to the decline or loss of some Kaibab plains cacti in the House Rock Valley (USFS 2007, p. 47), suggesting that fire could impact the Fickeisen plains cactus in a similar manner.

We acknowledge the amount of peer-reviewed literature describing the negative effects nonnative, invasive species have on native plants, including rare plants. However, we do not have sufficient information that describes the direct and indirect effects cheatgrass, red brome, and redstem filaree have on the Fickeisen plains cactus or how their presence and distribution contribute to the decline in the Fickeisen plains cactus. The habitat of the Fickeisen plains cactus is not homogenous in that some populations are in dense grass where nonnative, invasive plants may be more prevalent or at risk to invasion while other populations are located in gravelly soil near canyon rims that have sparse vegetation. Moreover, while some of the Fickeisen plains cactus habitat may be more susceptible to impacts posed by nonnative, invasive grasses, few or none have been observed in occupied areas at South Canyon and on the Babbitt Ranches. As previously mentioned, little is known about nonnative, invasive species on the remaining 14 populations on the Navajo Nation who manages for a large number of Fickeisen plains cacti. Cheatgrass and redstem filaree have been documented in contributing to the decline of other listed plant species indirectly. Indirect competition includes increase in litter accumulation that altered the soil condition and enabled other nonnative, invasive plants to invade and increased siltation, distribution of seed and loss of microphyltic plants (Rosentreter 1994, pp. 170–175).

In summary, nonnative, invasive species such as cheatgrass, red brome, and redstem filaree grow rapidly and are prolific seed producers in wet years. At this time, we lack site-specific information on the abundance, density, and distribution of nonnative, invasive species in relation to Fickeisen plains cactus populations and evidence of the cactus being negatively affected by exotic species. Landowners also have conflicting opinions on whether nonnative, invasive species are impacting the cactus because of the direct lack of evidence, differing land management practices, and/or existing vegetation conditions. We know that, in general, they occur in varying densities within or near some Fickeisen plains cactus populations or within its habitat. We acknowledge that nonnative, invasive species are stressors on the landscape within the range of the Fickeisen plains cactus. Ample evidence documents the adverse effects cheatgrass, red brome, and redstem filaree pose to native species and native pollinators. With climate change, we anticipate that the density of these species will increase in the future and negatively impact the Fickeisen plains cactus, but we lack sufficient information that these nonnative, invasive species are contributing to the decline of the Fickeisen plains cactus either directly or indirectly. Additionally, we do not have information to find that high densities of cheatgrass, red brome, and redstem filaree would increase the risk of fire in Fickeisen plains cactus habitat

rangewide. Therefore, we conclude that nonnative, invasive species are not a threat to the Fickeisen plains cactus at this time.

Uranium Mining

High-quality uranium ore deposits are found on the Arizona Strip and on the Coconino Plateau. Interest in the region's uranium deposits increased in 2008, as the price for uranium ore rose, and applications for new mining claims were sought on public lands surrounding the Grand Canyon. In response, the Secretary of the Interior signed Public Land Order Number 7787 (PLO 7787) effectively withdrawing 407,335 ha (1,006,545 ac) of Federal mineral estates within three parcels from any individual or company making a new mining claim under the Mining Law of 1872 (30 U.S.C. 22 *et seq.*) for a 20-year period (BLM 2012a, pp. 1–4). Existing locatable mineral operations in the withdrawal area will continue to be managed under the current Federal land agency regulations.

Notices of intent or plans of operations submitted after the effective date of the withdrawal for mineral exploration or development on BLM and National Forest System lands on claims pre-dating the withdrawal would not be able to proceed unless the mining claim was determined to be valid under the Mining Law of 1872 as of the date of the segregation from new mining claims (July 21, 2009). Sampling may still occur on claims pre-dating the withdrawal to support the mineral examination. In the event the claims are determined to be valid, mining activities could occur at some point in the future (BLM 2011a, p. 2–14).

There are two Fickeisen plains cactus populations in two parcels of the withdrawal area boundary. The North Canyon population and the South Canyon population on the Kaibab National Forest are in the East parcel; the Sunshine Ridge population is in the North parcel (BLM 2011a, Figure 3–8.1). The mineral withdrawal essentially removed the potential for negative effects on the Fickeisen plains cactus and its habitat that would be associated with the location and development of new mining claims for the longevity of PLO 7787. If the development of existing valid mining claims in the East parcel were to proceed, we anticipate that the potential for adverse effects from development of a mine to the Fickeisen plains cactus along the North Canyon wash on the Arizona Strip would be low. This is primarily due to plants growing on limestone soils along ledges and canyon rims where mineral activity would not likely occur.

On the Kaibab National Forest, lands in the Grand Canyon National Game Preserve were withdrawn from locatable mineral entry in 1906 when the Preserve was designated (BLM 2012a, p. 2; USFS 2013a, p. 48). The Grand Canyon National Game Preserve is available for saleable and leasable mineral development on a case-by-case basis where the purpose is consistent with the management of the Preserve. The Kaibab National Forest has proposed to implement a guideline in their revised Land and Resource Management Plan that use and occupancy should be restricted yearlong in areas supporting populations of threatened, endangered, and sensitive plant species (USFS 2013b, p. 2).

On the North Parcel, there are six mines surrounding the Sunshine Ridge population (BLM 2011a, Figure 2.4–2). Two mines (Hack Canyon and Hermit mines) are located in close proximity to the Sunshine Ridge population but are currently in reclamation status and no impacts to the Fickeisen plain cactus are anticipated. Three mines (Arizona 1, Kanab North, and Pinenut) have an approved plan of operation and pre-date the withdrawal. All three are located well outside of occupied Fickeisen plains cactus habitat. The Arizona 1 mine has been operating since late 2009 (BLM 2012b, p. 6), and no impacts to the plants have been documented by the BLM. It is expected to cease production and enter into reclamation in late 2013 (Florence 2013, pers. comm.). The Pinenut mine is scheduled to begin operations in 2013, but due to its distance from the Sunshine Ridge population, no impacts are anticipated. The Kanab North mine has started initial reclamation activities, which include removal of buildings or structures as of the summer of 2013 (Florence 2013, pers. comm.). The sixth mine, EZ Mine, is located to the west of the population. Development of the mine has not started and is not expected to happen until at least 2016 or longer.

The potential direct and indirect effects to the Fickeisen plains cactus would be the loss, removal, or injury of plants and loss of habitat from the development of the mine but also habitat degradation or fragmentation from road construction, material transport, and new power lines (Payne *et al.* 2010, pp. 8–9; BLM 2011a, p. 2–15). The BLM, however, will complete a project-specific environmental analysis in the near future to develop a plan of operations (BLM 2011a, pp. 2–29—2–30). We anticipate the opportunity to work with BLM and discuss any potential negative impacts that may occur from this mine on the Fickeisen plains cactus at that time. In addition, the North Parcel has seven breccia pipes that are confirmed to have uranium resources, and those uranium resources have been estimated (BLM 2011a, pp. 3–35—3–36; BLM 2012b, p. 7). Any mining claim containing these seven breccia pipes would be able to demonstrate valid existing rights and would be mined. If one of the claims were to be developed into a mine, the BLM would take measures to minimize impacts to the Fickeisen plains cactus, such as conducting preconstruction surveys to flag avoidance areas and minimize impacts to the species (BLM 2007b, pp. 74–76).

Lands on the Arizona Strip that are outside of the withdrawal area boundary are open to uranium mineral development (BLM 2008a, pp. 1–20). Because the Fickeisen plains cactus occurs in small, isolated areas on particular soil types, small disturbances to the vegetation and soils may reduce suitable habitat; increase the erosion potential; enable invasion of nonnative, invasive plants; and increase the risk of mortality from clearing, crushing, or trampling associated with developing mining sites (Service 2007a, p. 90; BLM 2011a, p. 4–154). The BLM anticipates a very low likelihood that any such project would be proposed within the habitat of the Fickeisen plains cactus. If such a project is proposed, the BLM would take measures to minimize impacts to the Fickeisen plains cactus as described above (BLM 2007b, pp. 74–76).

On the Coconino Plateau, just south of the Grand Canyon National Park, there is a continued interest in uranium mining on State land. The company VANE Minerals holds mineral rights (or mineral interest to mine uranium) on a large number of properties that are spread over an area of approximately 16,187 sq km (6,250 sq mi) (VANE Minerals 2012) and that include occupied Fickeisen plains cactus habitat on State land within the Cataract Ranch. The company has completed surface drilling for their Wate Uranium Breccia Pipe—located 9 miles south of the Grand Canyon National Park and near the Hualapai Indian Reservation. The company is pursuing a mineral lease from the Arizona State Land Department for uranium exploitation of the Wate deposit and for preliminary efforts regarding development of the mine. No Fickeisen plains cactus has been documented in this general area; therefore, the plant would not be affected by development of a mine.

Exploration drilling has been conducted for 12 additional uranium mineralized breccia pipes that are

located within 32 km (20 mi) of the Wate deposit (SRK Consulting 2011, p. 14–1). No mineral resources for these have been established as of 2011, but if a uranium resource is confirmed, a potential exists for a mine to be developed. If that occurs and depending on location information, there is a potential for construction and operations to impact some Fickeisen plains cactus on State land within Cataract Ranch. Direct and indirect impacts would be the same as those identified for the Sunshine Ridge population. However, any development, including mining and associated roads from State land that would need to cross onto land in the Cataract Natural Reserve Land, would be prohibited.

Additionally, the Arizona State Lands Department issued two mineral closure orders for land surrounding the rims of Cataract Canyon that total 65,644.72 acres (Williams 2013, pers. comm.). Closure order 551–86/87 became effective December 30, 1986, by issuance of the State Land Commissioner. This order closes State trust land to mineral location and mineral prospecting permit application (mineral claim location, new mineral prospecting permit applications, and new mineral lease applications). Closure 251–2010/2011 became effective June 27, 2011, and closes State subsurface lands that were not included in the prior closure order. The 2010/2011 order closes State subsurface land to mineral claim location, new mineral exploration permit applications, and new mineral lease applications. Both orders do not close the land to renewal applications for exploration permits. They remain in effect until further order of the State Land commissioner. All of the known Fickeisen plains cacti on State land are located within the mineral closure order areas. Unless an interested applicant locates a mineral resource, we do not anticipate impacts to the Fickeisen plains cactus from mineral exploration as most of the techniques can be done without causing ground disturbances. If a mineral deposit is located, the applicant must apply for a mineral lease, which includes a pre-construction Native Plant survey prior to any surface disturbance. The purpose of the Native Plant Survey is to calculate the compensation that must be paid to the State for the removal of specific cacti, succulents, trees, shrubs, and sub-shrubs, including ''highly safeguarded protected'' plants. If the Fickeisen plains cactus is within the construction area, the State would not deny a mine based on its presence or that of any listed plant. The State would likely write allowances into the mineral lease or mining company's reclamation plan to require preservation measures or mitigation for listed plant species (ASLD 2013). For all of this to happen, it would require the mineral closure order to be lifted and a discovery of a mineral resource. Because the 551–86/87 closure order has been in effect for over 25 years, we anticipate that they will remain in effect in the near future.

In summary, PLO 7787 effectively withdrew over 407,335 ha (1,006,545 ac) of federal mineral estates for a 20-year period; this action removes the immediate threat of habitat loss or degradation associated with development of new uranium mines to the Fickeisen plains cactus populations at Sunshine Ridge and in House Rock Valley. Populations on the North Kaibab Ranger District would not be impacted by mineral development as they are located in areas that were historically withdrawn from mineral location and entry. We acknowledge the possibilities that valid existing mining claims in the withdrawal area boundary could result in the development of a uranium mine in the future and result in adverse impacts to the Fickeisen plains cactus on BLM lands, though these two populations occur near canyon rims and are less likely to be adversely affected.

For land on the Arizona Strip that is outside of the withdrawal boundary area, we anticipate a low probability that Fickeisen plains cactus populations would be impacted by future uranium development. If a mine were to be developed near occupied habitat, the BLM would implement avoidance measures to reduce or minimize impacts to the Fickeisen plains cactus, which we anticipate would be incorporated into their analyses for the development of the EZ Mine. On State land, the potential for uranium mining could result in direct mortality and loss of habitat within the Cataract Canyon population. However, most plants on State land are located in close proximity to the rim of Cataract Canyon and occur in areas included in the mineral closure order. As discussed above, these plants would not likely be affected by construction or development associated with uranium extraction. Additional protection to the plant is provided through the terms of the conservation easement on the private parcels, which prohibits any new development, including construction of any new roads or right-of-ways from State lands crossing onto private lands.

Therefore, based on the best scientific and commercial data available, we do not anticipate that development of a uranium mine would rise to the level of significance and meaningfully impact the Fickeisen plains cactus and its habitat. Thus, we conclude that uranium mining is not a threat to the Fickeisen plains cactus or its habitat.

Road Construction and Road Maintenance

Roads can destroy or modify habitat and increase human access that may lead to trampling (discussed below). Additionally, road construction can lead to increased erosion, and vehicle traffic on unimproved roads can result in increased atmospheric dust and dust deposition on vegetation. Road maintenance on U.S. Highway 64 near the Navajo Nation resulted in three Fickeisen plains cacti being salvaged from the existing right-of-way and a fourth cactus protected by fencing (Arizona Department of Transportation 1992, p. 1). Road maintenance also contributed to an unknown amount of habitat loss or disturbance, which was likely small in size.

We analyzed road maintenance and considered it a potential threat to the Fickeisen plains cactus in the November 9, 2009, Candidate Notice of Review (74 FR 57804). On the Arizona Strip, the Fickeisen plains cactus occurs next to roads that receive routine maintenance. The cactus grows close to and, in some cases, in the middle of existing unpaved but well-maintained roads, making it highly vulnerable to becoming crushed or injured by motorized vehicles. Road maintenance activities had resulted in the mortality of a few individuals of the Fickeisen plains cactus on BLM land. These appear to have been isolated occurrences that happen infrequently and impacted a small number of individual plants. Future road construction associated with both uranium and urban development may impact plants that occur on non-BLM lands. However, future road construction is anticipated to be localized in time and space and would not rise to the level of becoming a significant threat to the Fickeisen plains cactus. Therefore, we do not consider road construction and road maintenance to be a threat to the Fickeisen plains cactus.

Off-Road Vehicle Use and Recreation

Off-road vehicles are a means of transportation and a form of recreation in the range of the Fickeisen plains cactus. On the Arizona Strip, the BLM limits motorized and mechanized vehicle use within Fickeisen plains cactus habitat to existing routes and trails. However, motorized vehicles may pull off a designated route up to 30.5 m

(100 ft) on either side of the centerline to camp. There is the potential for vehicles to injure or kill a Fickeisen plains cactus and impact its habitat by pulling off the roadway to park or turn around (BLM 2007b, p. 75). Plants growing along the Navajo Trail near Mainstreet Valley have been affected by drivers pulling off designated routes in the past (Hughes 2005, pers. comm.). Disturbance from ORV use associated with unauthorized camping was documented in House Rock Valley, where a driver drove off-road toward the canyon rim near the South Canyon population (Service 2007b, p. 1). These are the two documented reports that we have of the Fickeisen plains cactus being impacted by ORV use on BLM lands since 2005. In reviewing the BLM's monitoring reports, there were no documented mortalities of Fickeisen plains cactus associated with ORV use over the 23 years the plant was monitored.

Most of the Fickeisen plains cactus habitat on the Navajo Nation is accessible by dirt two-track roads. Although traffic in these areas is light and there is an extensive network of existing dirt roads, new roads are continually being created, presumably by locals herding livestock (NNHP 2011a, p. 1). No plants have reportedly been impacted, but there is potential for habitat degradation as a result. In addition, 9 of the known 15 populations are located along the scenic canyon rims of Marble Canyon and the Little Colorado River gorge, where tourist traffic is concentrated. Car tires and foot traffic have been documented as damaging the Fickeisen plains cactus at some of these sites (NNHP 1994, p. 5; NNHP 2011a, p. 1). These impacts are likely to increase in the future as there are future plans to develop tourist activities on Navajo land near Marble Canyon and the Little Colorado River gorge (NNHP 2011a, p. 1).

On the Cataract Ranch, increased recreation, primarily associated with hunting, has been observed since 2006. Hunting practices often rely on the use of ORVs to retrieve wildlife and access camp sites. However, no impacts to the Fickeisen plains cactus related to recreational activities or ORV use have been observed while conducting searches for the plant on the Cataract Ranch (Goodwin 2011a, p. 8).

In summary, the habitat of the Fickeisen plains cactus is mostly open with flat topography. With most plants growing along scenic canyon rims, there is an increased risk of plants being destroyed or damaged by vehicles driving off-road for recreational purposes. We identified ORV use as a potential threat to the Fickeisen plains cactus in our annual assessment for candidate species (most recently at 75 FR 69222, November 10, 2012). At this time, however, we cannot quantify the extent of ORV use impacts on the taxon or its habitat, but they continue at some unknown level. Most documented occurrences happened in the past and were isolated occurrences. ORV use may become a threat to the Fickeisen plains cactus in the future, but, at this time, we do not consider it to be a threat to the plant or its habitat.

Commercial Development

The Navajo Nation is currently interested in developing its land along the canyon rims of Marble Canyon and the Little Colorado River gorge to increase tourism and create more jobs that would boost their local economy (NNHP 2011a, p. 1; Navajo-Hopi Observer 2012). The Navajo Nation President recently signed a nonbinding agreement with a local Arizona developer that lists a resort hotel and spa, restaurant, half-mile river walk, and recreational vehicle park among the attractions that would enable tourists to easily descend into the Grand Canyon. While we do not have specific information about these plans, development along the rim of the Little Colorado River has the potential to impact the Salt Trail Canyon population located nearby. Trampling of plants by people and loss of plants and habitat to make way for development are both of concern. Available information suggests that plans for the proposed development have not begun (NNHP 2011a, p. 1) and may still be in the early design phase.

The Salt Trail Canyon is a known recreational site located to the north of areas occupied by the Fickeisen plains cactus. Aside from use by hikers, the area is used by Federal and State agencies as a point of entry to conduct native fish surveys in the Little Colorado River. Overall use of the area appears to be minimal, and no recreational impacts to the Fickeisen plains cactus have been observed.

A popular tourist destination that has existed for many years occurs within occupied Fickeisen plains cactus habitat that is adjacent to a Little Colorado River overlook. This population was last visited in 1997, and contained 15 plants distributed among 2 ridges (NNHP 2011a, p. 4). The Navajo Nation Heritage Program identified abundant foot traffic within occupied habitat as a threat to the Fickeisen plains cactus located there. Although the tourism at this site will continue in the future, most foot traffic is confined to paved sidewalks leading toward the canyon rim and outside of occupied habitat. An additional area occupied by the Fickeisen plains cactus occurs east of the overlook area that is also well known among plant enthusiasts and, consequently, is frequently visited (NNHP 1994, p. 5). This population was last visited in 1999, and one individual was located (Table 1). The timing of the visit was outside of the flowering season, making it difficult to locate plants (NNHP 2011a, p. 4). Both of these areas are easily accessible from the highway and receive a large number of visitors. Trampling of plants and habitat disturbance associated with tourism may increase in the future simply due to the popularity of this site and the accessibility of plants next to the highway. Although habitat disturbances to the Fickeisen plains cactus have occurred here in the past and may be occurring presently, we have no information to be able to quantify this threat.

Human development could expand into or next to the Fickeisen plains cactus habitat on the Navajo Nation. A land dispute between the Navajo and Hopi Tribes resulted in the implementation of a construction ban in 1966 that limited development (Maxx 2012, p. 2). That ban was lifted in 2009, but no development has occurred due to the poor economy. The land has remained mostly undeveloped, but the ability to construct new homes or make improvements provides tribal members access to areas previously restricted. If this occurs, we do not anticipate the Fickeisen plains cactus to be significantly impacted because new home locations would not be near the canyon rim where the plant occurs. Additionally, the Fickeisen plains cactus is listed as a Group 3 species on the Navajo Endangered Species List, which is a species or subspecies whose prospects of survival or recruitment are likely to be in jeopardy in the near future (NNDFW 2008, entire). Its listed status on Tribal land, in addition to the location of the Salt Trail Canyon population within an area designated as a Preserve, would likely reduce or minimize impacts to the population (see *Factor D. The Inadequacy of Existing Regulatory Mechanisms,* below).

In addition to urban development, some of the land surrounding the town of Gray Mountain is currently opened to oil and gas leasing. The BLM proposes to lease, through competitive lease sale, four parcels that total 3,596 ha (8.887 ac) of split estate lands for the purpose of oil and gas exploration and development. The parcels are located on both sides of Highway 89 and include 3,343 ha (8,263 ac) of surface lands

administered by the State of Arizona, and 252 ha (624 ac) of private holdings. The lease sale allows private individuals or companies to explore for and potentially develop oil and gas resources for sale on public markets. The Arizona State Office has received an Expression of Interest from an exploration company for consideration of competitive oil and gas lease sale (BLM 2013a, pp. 1–41). Some of the parcels that will be offered for lease sale occur on limestone soils that are suitable to support the Fickeisen plains cactus. A few scattered plants are known to occur nearby these parcels but the entire area has not been searched to confirm occupancy. Several requirements would have to be met prior to any oil and gas development. For instance, parcels that are located to the southeast of Highway 89 lack any access roads. Therefore, if a mineral resource was identified, the project proponent would be responsible for securing a right-of-way from the State and/or private landowners. The BLM has published an Environmental Assessment indicating no significant impacts from the leasing decision (BLM 2013b, pp.1–44). At this time, it would be too speculative to assess what impacts would occur to the Fickeisen plains cactus. Any future development of the lease would be analyzed by the BLM at the time of the site-specific Application for Permit to Drill. The BLM would be required to enter into a section 7 consultation if actions they authorize, permit, or carry out adversely affect a listed species.

In summary, commercial development for urban development and mineral development is planned within the range of the Fickeisen plains cactus. Commercial development associated with tourism activities has impacted Fickeisen plains cactus habitat. Impacts to occupied habitat near the Little Colorado River overlook were documented in the past and are ongoing. This population is small and would benefit from a current site visit. Plans for future commercial development near Marble Canyon and the Little Colorado River gorge may substantially impact the Salt Trail Canyon population through potential habitat loss or disturbance. Areas occupied at Salt Trail Canyon support one of the larger number of Fickeisen plains cactus on the Navajo Nation and rangewide. Losses of individuals at Salt Trail Canyon would result in further declines to the rangewide population. However, the protected status of the Fickeisen plains cactus on the Navajo Nation Endangered Species List and its occurrence within a designated Preserve would serve to minimize or reduce potential impacts from future commercial development. In addition, we do not have any information to indicate whether plans to develop commercial properties will occur in the future. Therefore, the threat of commercial development is not impending, and we do not consider this a threat at this time or within the near future.

Drought and Climate Change

For background information, please refer to the first paragraph of the ''Drought and Climate Change'' discussion under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range* in the Summary of Factors Affecting the Acuña Cactus. As previously discussed, the Fickeisen plains cactus is an endemic species that exists in isolated, small populations. In addition, the Fickeisen plains cactus is restricted to very specific geologic formations. Global climate change exacerbates the risk of extinction for species that are already vulnerable due to low population numbers and restricted habitat requirements. Predicted changes in climatic conditions include increases in temperature, decreases in rainfall, and increases in atmospheric carbon dioxide in the American Southwest (Easterling *et al.* 2000, pp. 2072–2073; IPCC 2007, p. 48; Archer and Predick 2008, pp. 23–24; Karl *et al.* 2009, p. 129). Although we have no information on how the Fickeisen plains cactus will respond to effects related to climate change, persistent or prolonged drought conditions are likely to reduce the frequency and duration of flowering and germination events; lower the recruitment of individual plants; compromise the viability of populations; and impact pollinator availability, as pollinators have been documented to become locally extinct during periods of drought (Memmott *et al.* 2007, pp. 713–715). The smallest change in environmental factors, especially precipitation, plays a decisive role in plant survival in arid regions (Jordan and Nobel 1981, pp. 904–905; Nobel 1984, pp. 310, 316).

In the last 30 years, the Colorado Plateau has experienced a 0.2 to 0.5 °C (0.36 to 0.9 °F) increase in average temperature, particularly in average fall-winter temperatures (Schwinning *et al.* 2008, p. 4). Future climate projections forecast increases in both the average and extreme temperatures that are expected to result in less available soil moisture for plants (Schwinning *et al.* 2008, p. 4). In addition, the Colorado Plateau may be shifting toward a climate of reduced winter precipitation over the next 20 to 30 years. Winter accumulation, which recharges the soil moisture needed for spring vegetative growth, was below average in 11 years from 1996 to 2007. Similarly, spring precipitation was below average in 8 years from 1996 to 2006 (Hereford 2007, p. 6). By 2090, precipitation is predicted to decline by as much as 5 percent across the Colorado Plateau, placing greater stress on native plants and resulting in a greater susceptibility of existing ecosystems to be replaced by nonnative, invasive plant species (BLM 2011b, entire).

The Fickeisen plains cactus is adapted to the semi-arid climate of the Colorado Plateau by retracting underground in response to dry and cold climatic conditions. Weather patterns, timing of precipitation, and cool nighttime low temperatures influence germination and seedling establishment of the Fickeisen plains cactus (Brack 2012, pers. comm.). If climate patterns move toward more aridity, the reproductive output of the Fickeisen plains cactus may be reduced. Increases in summer temperatures may lead to longer periods of time that the plant remains retracted underground, and temperatures may rise to a level that is beyond the plants' natural threshold for survival. Studies on cacti seedling survival have shown that seedlings are able to survive long periods of drought when they are larger and have the capacity to store enough water to endure their first dry season (Nobel 1984, p. 316). Seedlings of the Fickeisen plains cactus have been observed under mature plants, which act as nurse plants; the shading provided by a parent or nurse rock may increase their survival (NNHP 1994, p. 4). Increases in soil temperatures, however, coupled with below-average precipitation, may increase seedling mortality.

A study published in 2012 modeled the species' distribution of endemic plants on the Colorado Plateau (Krause and Pennington 2012, entire). It identified limiting factors that define the habitat needs of the species and the top-five predictor variables that influence their distribution. In level of importance, the model included the Fickeisen plains cactus' and ranked the minimum temperature of the coldest month second, precipitation of driest quarter third, and isothermality fourth in predicting Fickeisen plains cactus distribution (Krause and Pennington 2012, p. 140). Of emphasis was the variable isothermality, the mean day-to-night temperature range compared to

the annual temperature range, in predicting endemism on the Colorado Plateau. As nighttime low temperatures during the winter season are predicted to increase, isothermality or the reduction in daily temperature variance may hinder seedling germination for the Fickeisen plains cactus for reasons discussed above.

On BLM lands, observed trend information from the four monitoring plots appear to correlate with changes in climate patterns. Increases in plant numbers and observed seedlings were documented between 1986 and roughly 1992. These years were characterized as a wet period where the annual precipitation was above the regional median on the Colorado Plateau (United States Geological Survey 2002, p. 2). After 1992 through approximately 2005, when the region experienced a prolonged drought, the Fickeisen plains cactus among the plots experienced variable decreases in plant numbers. Monitoring of the Fickeisen plains cactus during years with below-average precipitation documented low recruitment, increased rodent predation, and an increase in the number of plants retracted or missing (Hughes 1988, p. 1; Hughes 1996c, p. 1; Roaque 2012, pers. comm.). In total, 817 plants were recorded as missing or retracted over the 13 years when this parameter was recorded. The years with the highest number of missing plants were from 1999 to 2007, the time period that corresponds to the drought in the Southwest. We do not believe all 817 missing plants are attributed solely to drought, but drought is likely a significant contributing factor to the observed decline in the number of individuals among Fickeisen plains cactus populations.

The Navajo Nation is in one of the driest areas in the southwest. About 45 percent of all annual precipitation occurs during the warmer months of July through September. Climate data are variable on the reservation, but long-term information shows a drying trend has occurred since 1944, and a warming trend has occurred since the mid-1970s (Navajo Times 2011). The drought in the Four Corners region was officially recorded from 1999 to 2009, although many residents believe it began in 1996, which would make it the longest drought in Navajo history. The effects of the last drought have been particularly extreme on the Navajo population. For example, from 2001 to 2002, Navajo officials reported 30,000 cattle mortalities from lack of water and forage. Many traditional people on the reservation live in subsistence lifestyles. Over half of the population lives without indoor plumbing and are dependent on hauling water. Their water supplies are derived from shallow aquifers and are sensitive to dry conditions. When availability is low, families often use water supplies intended for livestock (Redsteer *et al.* 2010, p. 2).

In interviews with 50 tribal elders, Redsteer *et al.* (2010, p. 7) summarized the most common observations regarding drought: (1) Long-term decreases in the amount of annual snowfall over the past century; (2) decline in surface water features and water availability; (3) disappearance of springs and of plant and animal populations; and (4) changes in the frequency of wind, sand, and dust storms. These have been corroborated with other findings. Weiss *et al.* (2009, p. 5923) found that a significant increase in evapotranspiration occurred during the warmer months of the 2000s drought due to higher temperatures. Above-average spring temperatures are likely linked to a decrease in the amount of new growth among plants. It has been suggested that warmer spring temperatures could lead to early germination. Plants respond by ending dormancy and begin using available soil moisture earlier and more quickly in the season. Then, they must survive longer dry periods before the start of the monsoons (Redsteer *et al.* 2010, p. 7).

Seasonal increases in temperature and changes in the timing of precipitation have likely influenced the observed 49 percent decline in the Salt Trail Canyon population. The observed low recruitment, high number of plants missing between years, and mortality can thus be partly attributed to the drought (NNHP 2011b, pp. 4–5). Corresponding with regional climate patterns, annual precipitation during the monitoring period was below average for each year except for 2007. Winter precipitation was uncommonly high during 2005, the year before the monitoring plots were installed, and in 2010, the year that the plots were not monitored. While several winter storms came through the region, total rainfall accumulation was still below average during the 2011 monitoring period. Many of the plants that could not be located in 2011 were assumed dead because their vigor during previous surveys was rated as ''poor'' in 2009 (NNHP 2011b, p. 3). Some of these plants may have been retracted at the time. However, many plants observed between 2008 and 2011 failed to produce fruit or flower, and fruit buds were observed to be aborted. This suggests low seed production, which would cause a decline in overall abundance over time.

In summary, the climate on the Colorado Plateau and Navajo Nation is predicted to become warmer with reduced precipitation in the future. We have strong evidence to suggest that the Fickeisen plains cactus is being impacted by drought coupled with increased annual temperatures. We believe that the high number of dead and missing or retracted plants in all plots monitored is influenced by below-average winter or spring precipitation at the time when plants need soil moisture to flower. Poor reproduction in the Fickeisen plains cactus is likely to worsen in the future if climatic patterns shift toward becoming more arid with increased winter nighttime temperatures. With climatic models predicting future regional droughts, it is likely that all populations of the Fickeisen plains cactus will continue to be affected by drought and climate change. However, it is not clear if drought or climate change, of themselves, present population-level threats of extinction. It appears that drought and climate change in combination with rodent predation (see *Factor C. Disease or Predation,* below), as a combined effect, is the more likely scenario for population-level impacts to the plant. Additionally, the small and declining populations of the Fickeisen plains cactus make the species susceptible to natural environmental variability, including climate conditions. Therefore, based on our review of the best scientific and commercial data available, we conclude that the effects of climate change and drought are threats that have significant impacts to the Fickeisen plains cactus and its habitat.

Summary of Factor A

Based on our review of the best scientific and commercial data available, we conclude that fire associated with nonnative, invasive plant species; uranium mining; road construction and road maintenance; ORV use; and commercial development are not threats to the Fickeisen plains cactus and its habitat. We conclude that direct loss of plants and habitat loss and modification due to the direct and indirect effects of livestock grazing and drought and climate change are threats to the Fickeisen plains cactus. These threats, in and of themselves, may not result in significant population-level impacts to the Fickeisen plains cactus. However, the above factors appear to be acting synergistically, placing a major stress on the known plants monitored rangewide with little indication of

population growth and age-class diversity. The populations for which we do not have reliable and current information on their status are likely in decline. These populations are also being impacted by drought and are also susceptible to the same level of threats as the monitored populations. Thus, the combined effects of each threat elevate the intensity and scope of impacts to the Fickeisen plains cactus and its habitat to where these threats are significant over time. Therefore, based on our review of the available information, we conclude that the present or threatened destruction, modification, or curtailment of the Fickeisen plains cactus habitat or range is a threat to the species.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Unauthorized collection is a potential threat for all species of cacti, but it is a specific and definite threat for the genus *Pediocactus.* Their small size, large attractive flower, and rarity make *Pediocactus* species in general highly sought by collectors, growers, or gardens (Benson 1982, p. 243). *Pediocactus* are difficult to grow and maintain in cultivation. As plants grown in backyard gardens die, there is more demand for replacement plants. Unauthorized collection is currently a continuing problem for populations of the threatened *Pediocactus winkleri* (Winkler cactus) in south-central Utah (NPS 2004, p. 1; Borthwick 2012, pers. comm.).

We identified unauthorized collection of the Fickeisen plains cactus as a potential threat in our 2006 Candidate Notice of Review (71 FR 53756) and as a minor threat in our 2010 Species Assessment and Listing Priority Assignment Form. Phillips *et al.* (1982, p. 5) considered the Fickeisen plains cactus to be highly sought after and collected by commercial cactus collectors or hobbyists wherever it was found. For the period 1994 to 1997, the Convention on International Trade in Endangered Species (CITES) annual report documented a total of 5 specimens and 5,015 seeds of Fickeisen plains cactus exported (Service 2001a, p. 4). However, we do not know what impact the unauthorized collection had on the Fickeisen plains cactus during that time. We are not aware of any evidence of unauthorized collection of the Fickeisen plains cactus within the last 10 years. The BLM and the Navajo Nation have not observed or documented incidences of Fickeisen plains cacti being collected on their lands. In addition, we do not have information from the Arizona Native Plant Division indicating that unauthorized collection of Fickeisen plains cactus from their natural habitat has occurred (Reimer 2012, pers. comm.). If it has occurred, apprehension of collectors or enforcement of the law is difficult for *Pediocactus* species considering they occur in remote areas that are not regularly patrolled.

Currently, collection pressure on the Fickeisen plains cactus and demand for plants in the wild appears to be low for several reasons. Over the past 20 years, there has been increased sensitivity toward collection of rare plants from their natural populations among collectors who are satisfied with taking photographs rather than live specimens (Brack 2005, pers. comm.; Brack 2012, pers. comm.). Secondly, the Fickeisen plains cactus has been difficult to grow in cultivation mainly because of its specificity to particular climate conditions (cold winter temperatures) (Brack 2012, pers. comm.). However, more experienced growers have successfully propagated seeds and grown seedlings in captivity. Growers in Europe have successfully grown the Fickeisen plains cactus in cultivation because their climate is similar to that of the Colorado Plateau (Brack 2012, pers. comm.). Currently, the Fickeisen plains cactus is available from commercial vendors who can meet the market demand for this rare plant which has helped alleviate collection pressures. Seeds of the Fickeisen plains cactus are also readily available for sale on the Internet to cactus hobbyists. If evidence of unauthorized collection becomes available or there is information suggesting that the cactus is at risk, we will address prevention measures and conservation through the recovery planning process.

In summary, unauthorized collection is a threat for some *Pediocactus* species and a potential threat for the Fickeisen plains cactus. We acknowledge that illegal collection may occur but go undiscovered due to lack of reporting or enforcement. Based on the best scientific and commercial data available, no evidence at this time suggests that overutilization of the Fickeisen plains cactus for recreational, scientific, or educational purposes has occurred or is presently occurring such that it negatively affects individuals or populations of the Fickeisen plains cactus within its range. We also do not have evidence to suggest that overutilization of the Fickeisen plains cactus is likely to occur in the future to such an extent that the survival of the taxon would be compromised. We conclude that overutilization for commercial, recreational, scientific, or educational purposes would not rise to the level of significance and meaningfully impact the Fickeisen plains cactus and its habitat. Therefore, overutilization for commercial, recreational, scientific, or educational purposes is not considered to be a significant threat to the Fickeisen plains cactus at this time nor do we expect it to be in the future.

Factor C. Disease or Predation

We are not aware of any diseases impacting the Fickeisen plains cactus. Therefore, we do not consider disease to be a threat to the Fickeisen plains cactus.

Insect Predation

Insect predation by flightless beetles in the genus *Moneilma* are common among cactus species in the southwest. The species *Moneilma semipuctatum* that is referred to as the cactus borer beetle is common in northern Arizona and New Mexico. It typically prefers plants in the genus *Opuntia* as its host but it will also use plants in the genus *Sclerocactu*s and *Pediocactus* as well, in which mortality of these species has been reported (Roth 2004, p. 6; USFWS 2007, p. 4). The adult females deposit eggs at the base of the cactus and, after hatching, the larvae burrow into and feed on the plant depositing an orange-red fecal material around the wound. Kass (2001, pp. 495–496) found that the cactus borer beetle appears to select for larger, reproductively mature cacti and infestation will lead to collapse and mortality of the plant. There is one report of insect predation to a Fickeisen plains cactus that was possibly caused by the cactus borer beetle. In 1991, the Navajo Nation had found a large mature plant in the Shinumo Altar population that was retracted and yellow-green in color. When the plant was removed, it had a large hole bored through its caudex (base) with a small amount of orange-red material around the caudex (NNHP 1994, p. 3). Similar damage had been seen on the *Sclerocactus mesa-verde* (Mesa Verde cactus) in New Mexico that helped to identify the cause of the injury. No other land managers have reported observing signs of similar damage to a Fickeisen plains cactus by a cactus borer beetle.

Rodent and Rabbit Predation

Small mammal herbivory on cactus species is known to occur during dry conditions when animals seek available moisture from the plant or available food from cactus fruit (Butterwick 1987, p. 3; Phillips and Phillips 2004, pp. 14–15; Sivinski and McDonald 2007, p.

104). Because of their small size and spongy spines, the Fickeisen plains cactus may be less protected from animals than other spiny cactus species. Herbivory, primarily by rodents, on the Fickeisen plains cactus has been reported only on BLM lands; however, it likely occurs throughout the range.

The BLM reported a total of 56 plant mortalities associated with rodent predation in the years 1988, 1989, 1990, and 1992. All of the four plots have had reported rodent predation. The greatest losses were reported at Dutchman Draw plot, with 21 plants lost between 1988 and 1990 (Hughes 1988, p. 2; Hughes 1989, p. 2; Hughes 1990, p. 2), and 26 plants at the North Canyon plot in 1992 (Roaque 2012, pers. comm.). Correspondingly, the winter-spring precipitation in 1992 was below average. Small mammal burrows have been observed at the Dutchman Draw, Clayhole Ridge (Robertson 2011, p. 1), and South Canyon (Travis 1987, p. 4) populations. During the 2012 monitoring period, Hughes (2012a, p. 6) observed ground squirrel burrows underneath the cactus at the Sunshine Ridge population. While no mortalities from rodent predation were recorded, 28 plants were missing or retracted. Hughes noted that the Sunshine Ridge area was very dry during the spring, which, in addition to ground squirrels, probably contributed to the high number of missing/retracted plants. We do not have information about the small mammal burrows found in the Arizona Strip populations. Moreover, Hughes (1996a, p. 51) believed that heavy cattle grazing may in some part contribute to high incidences of rodent predation through competition for available forage, particularly during periods of drought that, in turn, cause rodents to eat the cactus. While the relationship between drought and small mammal predation is less obvious on BLM lands, mortality associated with small mammal herbivory on other *Pediocactus* species suggests that the Fickeisen plains cactus is likely being impacted rangewide in a similar fashion.

Monitoring efforts on other *Pediocactus* species reported high rates of plant mortality associated with rodent or rabbit herbivory. The BLM found that rodent predation resulted in 81 Brady pincushion cactus mortalities over a 15-year period (BLM 2007b, p. 55). Phillips and Phillips (1995, p. 7) reported 23 Peebles Navajo cactus individuals were lost due to herbivory in 1989, which was attributed to a dry and warmer than normal winter. Sivinski and McDonald (Service 2010, p. 5) identified rabbit and rodent predation as a significant cause of mortality on the *Pediocactus knowltonii* (Knowlton's cactus). They also found that predation rates increase during periods of drought, and no significant germination events had been observed over a 14-year period (Service 2010, p. 12). They infer that low recruitment may be due to high seed predation by rodents in 1993, and they find that seeds of mature fruit are readily eaten by rodents as the fruit ripens, resulting in little seed left to mature.

In summary, insect predation and rodent and rabbit predation are identified threats to the Fickeisen plains cactus. Infestation by the cactus borer beetle is a cause of death among *Pediocactus* species, but damage to the Fickeisen plains cactus has only been observed to an individual in 1991. With little evidence that the cactus borer beetle is affecting larger numbers of Fickeisen plains cacti rangewide, we do not find that insect predation is a significant threat to the plant. Rodent or rabbit predation is a cause of mortality for the plant on the Arizona Strip. Small mammal predation on cacti in general is natural under drought conditions (Kelly and Olsen 2011, pp. 8–9). While the data are variable for the Fickeisen plains cactus, there is adequate evidence from monitoring studies on this species and other *Pediocactus* species that rodent predation is high in drought years, which has affected a large number of individuals, either by direct mortality or contributing to the number of missing/retracted individuals. Climatic conditions throughout the Southwest are predicted to continue to warm with less precipitation in the future as previously discussed. We, therefore, anticipate that rodent or rabbit herbivory may increase in the future as a result of predicted changes in climate. In addition, mortality caused by rodent predation has contributed to population declines on the Arizona Strip, effectively exacerbating the negative effects that can occur to an already small population. Although we lack clear evidence of the scope of the impact that rodent predation has had on the Fickeisen plains cactus and its seeds, taken in conjunction with other habitat disturbances occurring across its range, low recruitment, and small population size, we find that rodent or rabbit predation is likely to rise to the level where it becomes a significant threat to the plant.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Please refer to the two introductory paragraphs of the *Factor D* discussion presented above for the acuña cactus. In this section, we review existing State, Federal, and tribal regulatory mechanisms to determine whether they effectively reduce or remove threats to the Fickeisen plains cactus.

State Laws or Regulations

Approximately 14 percent of the total documented plants occur on State of Arizona lands. The State of Arizona classifies the Fickeisen plains cactus as a highly safeguarded native plant under the Arizona Native Plant Law (Arizona Revised Statutes, Chapter 7, 2007, entire). Because of this classification, it is unlawful for any person to destroy, dig up, cut, collect, mutilate, harvest or take, and place into possession any of these plants, including their parts, from any lands without permission from the landowner and a permit from the Arizona Department of Agriculture (AZDA 2013). Under the law, private landowners can destroy highly safeguarded protected plants on their property if they notify the Arizona Department of Agriculture up to 60 days in advance of the intended destruction and with certain exceptions. On State lands, highly safeguarded protected plants may be impacted if they are in the footprint of a surface-disturbing activity. The project proponent would have the options of transplanting individuals to adjacent State land and commit to irrigating plants or other measures to insure at least 75 percent survival after 3 years; or purchase the plants according the Native Plant fee schedule and transplant them to private land. The law does not contain any provisions for habitat protection. While the Arizona Native Plant Law may provide some protection to the species on private and State land, it is not designed to protect the species' habitat.

Federal Laws or Regulations

The BLM manages the habitat for about 22 percent of the known Fickeisen plains cactus population. An approved Resource Management Plan (RMP) for the Arizona Strip Field Office was completed in 2008 (BLM 2008, entire; Service consultation number 22410–2002–F–0277–R1), which provides overall direction for management of all resources on BLM-administered land. The approved RMP establishes desired future conditions on BLM-administered lands with associated management actions to achieve those conditions. Management actions include giving priority during planning to priority species and their habitats in conflict resolution. Some of the priority species include federally listed, proposed, or candidate species; and species included on the Arizona BLM sensitive list, which includes the Fickeisen plains

cactus. As described in the BLM Manual section 6840 (BLM 2008b, pp. 37–38), the BLM will focus sensitive species management on maintaining species' habitat in functional ecosystems, ensuring the species is considered in land management decisions, and prioritizing conservation that emphasizes habitat needs for the species, thereby preventing the need to list the species under the Act. Their policy for the management of sensitive species recommends avoidance and minimization of threats to plants and habitat, as well as habitat conservation assessments and conservation agreements (BLM 2008c, pp. 8, 36–38). No habitat conservation agreements have been formalized for the Fickeisen plains cactus between the BLM and the Service.

The BLM has the ability to implement conservation measures and best management practices to reduce the threats to the Fickeisen plains cactus from livestock grazing, but we are not aware of any efforts to minimize cattle impacts to the plant or its habitat. Their approved 2008 RMP identifies the Fickeisen plains cactus as one of six species that will be managed as indicators of the conditions of Plains–Grassland Ecological Zone (BLM 2008a, p. 2–25). The BLM designated vegetative habitat areas at Twist Hills (1,255 acres) and Clayhole Valley (7,362 acres) for the Fickeisen plains cactus that will be managed to meet desired future conditions (BLM 2008a, p. 2–41). Management actions that apply to vegetative habitat areas include increased emphasis on protection of the species; increased consideration during National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) analyses; and the ability to modify, mitigate, postpone, or restrict proposed actions to minimize effects to the species. We are not aware of whether the implementation, status, or effectiveness of these vegetation habitat areas has been beneficial on the health of the Fickeisen plains cactus or its habitat or whether the progress toward desired future conditions has been made; it may be too soon to evaluate. While the BLM has reported drought leading to mortality and/or declines in the Fickeisen plains cactus as well as other sensitive plant species on the Arizona Strip, it is likely that drought also has affected rangeland forage. We are not aware if drought policies were implemented for livestock grazing across the Arizona Strip when below-average precipitation was predicted or for seasons when the southwest region was experiencing prolonged droughts (1996 to 2006). Continued livestock grazing at levels authorized for normal or above-normal precipitation during a drought may exacerbate cattle-related impacts within occupied Fickeisen plains cactus habitat. The baseline ecological assessment for House Rock Valley on the Kane Ranch has shown that heavy grazing during the dry winter seasons prior to 2005 has caused the range to be unproductive and in need of restoration to restore native grasses. These lands are administered by the BLM and subject to management objectives in their RMP.

The Fickeisen plains cactus is also listed as a sensitive species for the U.S. Forest Service's Southwestern Region (USFS 2007, p. 19). The U.S. Forest Service would develop and implement management practices to ensure that designated sensitive species do not become threatened or endangered because of U.S. Forest Service actions. Essentially, sensitive species must receive special management considerations or protection by the U.S. Forest Service to ensure their viability to preclude trends toward endangerment that would result in the need for Federal listing. The U.S. Forest Service recently verified a large population of the Fickeisen plains cactus on the eastern Kaibab National Forest boundary near Marble Canyon, where approximately five percent of all documented individuals occur. The land, including where the cactus is found, was part of the Grand Canyon National Game Preserve. The Preserve was established by presidential proclamation and was withdrawn from locatable mineral entry as a result of this designation. The Grand Canyon Game Preserve is available for saleable and leasable mineral development on a case-by-case basis where the purpose is consistent with the game preserve. The U.S. Forest Service, however, has proposed that use and occupancy should be restricted yearlong in areas supporting populations of threatened, endangered, and sensitive plant species (USFS 2013, p. 1). Occupied areas at South Canyon are now in the Buffalo Range Management Area. The area is not permitted for livestock grazing for cattle, and, due to its isolation, there is very little recreation in the area. The U.S. Forest Service did not find any ground disturbance in occupied habitat from bison.

A Land and Resource Management Plan is currently being revised for the Kaibab National Forest that addresses management of the Fickeisen plains cactus (Forest Service 2013, pp. 43–52). Forest plans must address such issues as recreation, range, timber, biological diversity, and economic and social factors in agency decisionmaking. The revisions to the Kaibab National Forest Plan include a discussion of protection of the Fickeisen plains cactus and its habitat. The U.S. Forest Service would commit to managing the bison herd so it is in balance with the ecological conditions in the Buffalo Range Management Area, thereby meeting the desired future conditions there. The U.S. Forest Service would also continue to monitor the taxon and collect detailed monitoring data to help guide management decisions, as well as survey new areas in suitable habitat for new populations.

Tribal Laws or Regulations

The Navajo Nation lists the Fickeisen plains cactus as a Group 3 species on the Navajo Endangered Species List, which is a ''species or subspecies whose prospects of survival or recruitment are likely to be in jeopardy in the foreseeable future'' (Navajo Nation Division of Natural Resources 2008). Species listed pursuant to the Navajo Nation Tribal Code 17, Subsection 507 are protected from take (17 N.N.C. § 507). In addition to its listed species protection, 9 of the 15 populations are within areas designated as a Preserve, including the 3 largest populations. No new activity or development is allowed within these Preserves, unless it is compatible with management goals established by the Navajo Nation Department of Fish and Wildlife for that area. Any development project proposed within a Preserve requires a biological evaluation be prepared. The biological evaluation must demonstrate that the development activity is compatible with management goals for the Preserve, as defined by the Navajo Nation Department of Fish and Wildlife Resource Land Use Clearance Policies. These policies are also used by Navajo Nation Department of Fish and Wildlife to ensure that proposed development activity in a Preserve will not negatively affect any listed species, including the Fickeisen plains cactus. It does not, however, apply to daily activities, such as livestock herding and any tourist activities that cannot be easily regulated (e.g., driving and parking at unofficial overlooks) (Hazelton 2012c, pers. comm.). It also does not include approved preexisting activities.

Conservation Agreements

On the Cataract Ranch, privately owned parcels occupied by the Fickeisen plains cactus are under a conservation easement held by TNC (TNC 2000, entire). These deeded lands prohibit any development activities from occurring on these parcels and

protect the inherent value of the land for perpetuity. Daily activities such as livestock grazing and range improvements are permitted but are managed to preserve and maintain the health of the ecosystem within Cataract Ranch. Approximately 146 Fickeisen plains cacti are protected by the conservation easement.

In summary, the existing regulatory mechanisms that are in place appear to provide adequate protection to the Fickeisen plains cactus and its habitat in the manner they were intended to provide; however, they are not minimizing threats to the Fickeisen plains cactus or its habitat. State regulations prohibiting the destruction of highly safeguarded native plants do not address threats to habitat, particularly ground disturbance associated with livestock grazing. While the BLM has the ability to provide habitat protection for the Fickeisen plains cactus, any actions would be voluntary under conservation measures aimed to improve the status of sensitive species. Because most of the threats to the Fickeisen plains cactus are from effects to its habitat including drought and predation, habitat must be protected to ensure the species' long-term conservation and survival.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Small Population Size

The Fickeisen plains cactus is a rare, endemic cactus that is restricted to a particular soil type. Factors such as the small population size, low population density, the isolation of populations between occurrences, and a poor mechanism for seed dispersal renders this cactus vulnerable to extinction from human and natural disturbances. We recognize that this species appears to have always been rare, yet continues to survive, and could be well equipped to continue to exist into the future. Many naturally rare species have persisted for long periods within small geographic areas, and many naturally rare species exhibit traits that allow them to persist despite their small population sizes. Consequently, the fact that a species is rare does not necessarily predispose it to being an endangered or threatened species.

However, this species has shown a marked decline in recent years, and populations across its range do not appear to be recovering. This indicates that there is a heightened risk of extinction, and the contributing factors of ever-decreasing population size, coupled with poor seed dispersal, increase the extinction risk. Small populations that are restricted by habitat requirements are more vulnerable to the effects of climate change, such as prolonged droughts and increased fire frequencies. Although small population size makes the species intrinsically more vulnerable, we are uncertain whether this alone would rise to the level of threat. However, when combined with the threats from livestock grazing, drought and climate change, and rodent and rabbit predation, small population size likely exacerbates the effects of these threats on the Fickeisen plains cactus.

Determination for the Fickeisen Plains Cactus

We have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats to the Fickeisen plains cactus. We find that the species is in danger of extinction due to the current and ongoing modification and destruction of its habitat and range (Factor A) from ongoing and future livestock grazing, long-term drought, and warmer winters occurring in the past several decades and projected to continue with the effects of climate change. We find that livestock grazing, in combination with drought and climate change, exacerbate the threats to this species (Factor A). We also find predation (Factor C) and other natural or manmade factors are threats to the Fickeisen plains cactus (Factor E). In addition, no existing regulatory mechanisms address these threats. We find that unauthorized collection (Factor B) does not currently occur to such an extent to warrant a threat to the species.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the Fickeisen plains cactus is presently in danger of extinction throughout its entire range based on documented loss of individuals on the majority of its range, little to no recruitment, and continuation of the threats, as described above. Therefore, on the basis of the best available scientific and commercial information, we find that the Fickeisen plains cactus meets the definition of an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

The elevated risk of extinction of the Fickeisen plains cactus is a result of the cumulative stressors on the species and its habitat. We have detailed information about population trends from five of the six large populations that have been monitored, all of which show a significant decline in overall population, reduction in reproductive adults, few to no seedlings, and low representation of age-class diversity. The decline of these five populations is likely indicative of what is occurring in other populations that are smaller, more isolated, and not as well studied. Some of these smaller populations have already shown declines in plant numbers; at some sites, plants no longer are found. Information from the 27 populations would increase our knowledge of the species, but it is uncertain if these populations will be monitored in the future due to resource limitations and access to the land. Losses of adult plants in a naturally rare, endemic species exacerbate the species vulnerability to extinction because the older, larger adults contribute more to the population's growth. In the Fickeisen plains cactus, water and heat stress results in reduced flower and seed production, and seedling survival is dependent on winter precipitation and soil moisture. Climate change is anticipated to increase drought periods and warming winters. This combination is expected to continue the documented trend of mortality exceeding recruitment across all populations. All of these factors contribute together to heighten the risk of extinction and lead to our finding that the Fickeisen plains cactus is in danger of extinction, and thus meets the definition of an endangered species.

Listing the Fickeisen plains cactus as a threatened species is not the appropriate determination because the ongoing threats described above are severe enough to create the immediate risk of extinction. The continued loss of reproductive adults without adequate recruitment poses a significant and immediate risk of extinction to the species throughout the species' range, and is not restricted to any particular significant portion of that range. All of these factors combined lead us to conclude that the threat of extinction is high and immediate, thus warranting a determination of endangered species status rather than threatened species status for the Fickeisen plains cactus.

Under the Act and our implementing regulations, a species may warrant listing if it is an endangered species or a threatened species throughout all or a significant portion of its range. The threats to the survival of the species occur throughout the Fickeisen plains cactus' range and are not restricted to any particular significant portion of that range. Accordingly, our assessment and

final determination applies to the species throughout its entire range.

Available Conservation Measures for the Acuña Cactus and the Fickeisen Plains Cactus

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and tribal lands.

Once these species are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, under section 6 of the Act, the State of Arizona would be eligible for Federal funds to implement management actions that promote the protection and recovery of the acuña cactus and the Fickeisen plains cactus. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.* Please let us know if you are interested in participating in recovery efforts for the acuña cactus or the Fickeisen plains cactus. Additionally, we invite you to submit any new information on these species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within both species' habitat that may require conference or consultation, or both, as described in the preceding paragraph include any management actions that could result in impacts to soil characteristics or seedbank viability, pollinators or their habitat, and associated native vegetation community, and any other landscape-altering activities on Federal lands administered by Federal agencies, such as: issuance of section 404 Clean Water Act (33 U.S.C. 1251 et seq.) permits by the U.S. Army Corps of Engineers; construction and management of gas pipeline and power line rights-of-way by the Federal Energy Regulatory Commission; reauthorization of grazing permits by the BLM and the U.S. Forest Service, and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as an endangered species, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies. The acuña cactus and the Fickeisen plains cactus are listed under the Arizona Native Plant Law as highly safeguarded protected plants, which makes it unlawful for any person to destroy, dig up, cut, collect, mutilate, harvest or take, and place into possession any of these plants on public lands (Arizona Revised Statutes, Chapter 7, 2007, entire). However, the Arizona Native Plant Law does not prohibit landowners from removing or destroying protected plants on their property or from removing them on State lands. They are required to notify the Arizona Department of Agriculture 20 to 60 days prior to destruction of a protected native plant on their private property. The Arizona Native Plant Law

also does not afford protection to the habitat of either cactus species.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened plant species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.62 for endangered plants, and at 17.72 for threatened plants. With regard to endangered plants, a permit must be issued for the following purposes: for scientific purposes, or for the enhancement of propagation or survival of the species.

Our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), is to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of species proposed for listing. The following activities could potentially result in a violation of section 9 of the Act. Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, except for properly documented antique specimens of these taxa at least 100 years old, as defined by section 10(h)(1) of the Act.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Requests for copies of the regulations concerning listed plants and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, Southwest Regional Office, P.O. Box 1306, Albuquerque, NM, 87103–1306; telephone (505) 248–6911; facsimile (505) 248–6915.

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

Please see our statement under this required determination in our October 3, 2012, proposed rule (77 FR 60565–60566) for information regarding the Tribes affected by the determination of endangered status for the acuña cactus and the Fickeisen plains cactus. Since the publication of the proposed rule, we distributed a letter notifying the affected tribes of the proposed listing and critical habitat rule on October 31, 2012, and sent subsequent letters notifying the same tribes of the reopening of the comment period for availability of the draft economic analysis and revisions to the proposed critical habitat rule on April 1, 2013, and July 9, 2013, respectively. As mentioned in the proposed rule, the Navajo Nation and the Tohono O'odham Nation are the main Tribes affected by the determination of endangered status for the acuña cactus and the Fickeisen plains cactus. We specifically sent the Chairmen of the Tohono O'odham Nation and Navajo Nation letters of notification of the proposed rule on May 16, 2012, and May 21, 2012, respectively. Prior to publication of the proposed rule, we coordinated with the Navajo Nation by meeting with their botanist on October 3, 2011, and February 24, 2012, for a site visit to two large populations on their land. We subsequently had a teleconference with the Navajo Nation in July 2012, to discuss information submitted by the Navajo Nation regarding the proposal to list the Fickeisen plains cactus. To coordinate with the Tohono O'odham Nation, we participated in an informal meeting in May 2012, and informal teleconferences in November 2012, January 2013, and February 2013, to discuss the proposed determination of endangered status and designation of critical habitat for the acuña cactus. We also held face-to-face meetings with Tohono O'odham Nation staff informally in February 2013, and formally in April 2013, to discuss the proposed determination of endangered status and designation of critical habitat for the acuña cactus.

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2012–0061 or upon request from the Field Supervisor, Arizona Ecological Services Office (see **ADDRESSES** section).

Authors

The primary author of this document is staff from the Arizona Ecological Services Office (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

■ 2. Amend § 17.12(h) by adding entries for ''*Echinomastus erectocentrus* var. *acunensis*'' and ''*Pediocactus peeblesianus* var. *fickeiseniae*'' in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants, as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Echinomastus erectocentrus var. *acunensis*.	acuña cactus	U.S.A. (AZ), Mexico	Cactaceae	E	821	NA	NA
*	*	*	*	*	*	*	
Pediocactus peeblesianus var. *fickeiseniae*.	Fickeisen plains cactus.	U.S.A. (AZ)	Cactaceae	E	821	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: September 9, 2013.

Steven D. Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–23124 Filed 9–30–13; 8:45 am]

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When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

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