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Notice of February 4, 2014

The President

Continuation of the National Emergency With Respect to the Situation in or in Relation to Côte d'Ivoire

On February 7, 2006, by Executive Order 13396, the President declared a national emergency, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the situation in or in relation to Côte d'Ivoire and ordered related measures blocking the property of certain persons contributing to the conflict in Côte d'Ivoire. The situation in or in relation to Côte d'Ivoire, which has been addressed by the United Nations Security Council in Resolution 1572 of November 15, 2004, and subsequent resolutions, has resulted in the massacre of large numbers of civilians, widespread human rights abuses, significant political violence and unrest, and fatal attacks against international peacekeeping forces.

Since the inauguration of President Alassane Ouattara in May 2011, the Government of Côte d'Ivoire has made progress in advancing democratic freedoms and economic development. While the Government of Côte d'Ivoire and its people continue to make progress towards peace and prosperity, the situation in or in relation to Côte d'Ivoire continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared on February 7, 2006, and the measures adopted on that date to deal with that emergency, must continue in effect beyond February 7, 2014. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13396.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
February 4, 2014.

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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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210 and 245

RIN 0584-AE17

National School Lunch Program: Independent Review of Applications Required by the Healthy, Hunger-Free Kids Act of 2010

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule requires certain local educational agencies participating in the National School Lunch Program to conduct an independent review of initial eligibility determinations for free and reduced price school meals. Additionally, this final rule requires each affected local educational agency to submit to the relevant State agency the results of the reviews including the number and percentage of reviewed applications for which the eligibility determinations changed and the type of change made. State agencies are required to submit to the Food and Nutrition Service, a report describing the results of the second reviews in their State. These changes respond to amendments made to the Richard B. Russell National School Lunch Act by section 304 of the Healthy, Hunger-Free Kids Act of 2010 which requires that local educational agencies demonstrating high levels of, or a high risk for, administrative error associated with certification, verification, and other administrative processes, have an individual or entity independently review the initial eligibility determinations for free and reduced price school meals for accuracy prior to sending out household notifications of eligibility or ineligibility. This final rule is expected to reduce administrative errors in

eligibility determinations for free and reduced price school meals.

DATES: This final rule is effective March 10, 2014.

FOR FURTHER INFORMATION CONTACT: William Wagoner or Jessica Saracino, School Programs Branch, Child Nutrition Policy and Program Development Division, Food and Nutrition Service at (703) 305-2590.

SUPPLEMENTARY INFORMATION:

I. Background

The Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111-296) (the HHFKA), enacted December 13, 2010, made changes to the free and reduced price process for determining children's eligibility for free and reduced price meal benefits in an effort to strengthen rules governing certification.

Section 304 of the HHFKA amended section 22 of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1769c(b)) to require local educational agencies (LEAs) that demonstrate high levels of, or a high risk for, administrative error associated with certification, verification, and other administrative processes, as determined by the Secretary, to have an individual or entity independently review the initial eligibility determinations for free and reduced price school meals for accuracy prior to notifying households of eligibility or ineligibility.

The Department has determined that, given the results of Food and Nutrition Service (FNS) studies demonstrating the presence of administrative error during the certification process, this final rule should focus on administrative errors that occur during certification of eligibility. For purposes of this final rule, certification includes both benefit issuance and updating student eligibility for program benefits on rosters used to claim meals to the extent the State agency identifies problems in the benefit delivery process during an administrative review. A subsequent rulemaking may address administrative error associated with verification and other administrative processes.

The Department published a proposed rule on September 13, 2012 (77 FR 56565), which proposed amending 7 CFR parts 210 and 245 to include criteria for identifying LEAs that must conduct an independent or "second" review of applications; requirements for

the second review of applications, including timeframes and duration of second reviews; and requirements for reporting review results. The proposed rule invited public comment for a 60-day period, beginning September 13, 2012, and ending November 13, 2012. During the comment period, FNS received 65 comments on the proposed rule: 29 comments from LEAs, 27 comments from individuals, 7 from State agencies and 2 from advocacy organizations.

II. Discussion of Public Comments, Policy Changes and FNS Response

Following an analysis of comments, this rule adopts, as final, the provisions of the proposed rule, with revisions as described below. The finalized provisions include criteria for identifying LEAs that must conduct a second review of applications; requirements for the second review of applications, including timeframes and duration of second reviews; and requirements for reporting results.

LEA Selection Criteria

Criteria in the Proposed Rule

The proposed rule at 7 CFR 245.11(a) would have required State agencies to annually identify LEAs that demonstrate high levels of, or a high risk for, administrative error associated with the certification process and to notify those LEAs that they must conduct a second review of applications.

Proposed 7 CFR 245.11(b) would have established four criteria to assist State agencies in identifying LEAs with high levels of, or high risk for, administrative error. The proposed criteria follow:

1. All LEAs subject to a follow-up administrative review due to certification, benefit issuance, or updating eligibility status violations of Performance Standard 1.
2. All LEAs at risk for a follow-up administrative review because they claim between 5-10 percent of the free and reduced price lunches incorrectly for the review period due to errors of certification, benefit issuance or updating of eligibility status.
3. All LEAs establishing a new Provision 2 or 3 base year in the following school year.
4. Of the LEAs scheduled for an administrative review the following year, the State agency must select those LEAs not selected under criteria 1-3

that are at risk for certification error, as determined by the State agency.

The final rule makes a number of revisions to the proposed criteria as described below.

Public Comments and Policy Changes Related to Proposed LEA Criteria

Criterion 1

Under the proposed Criterion 1, a second review of applications would have been required for all LEAs subject to a follow-up administrative review due to certification, benefit issuance, or updating eligibility status violations of Performance Standard 1. Under the administrative review process in effect at the time the proposed rule was issued, the Coordinated Review Effort, a follow-up administrative review was required if the LEA exceeded the follow-up review thresholds. For Performance Standard 1, a follow-up review was required if 10 percent or more of the free and reduced price lunches claimed for the review period were claimed incorrectly due to errors of certification, benefit issuance or updating eligibility status.

Since publication of the proposed rule, FNS has updated the administrative review process, as required by amendments to the NSLA by section 207 of the HRFKA. The updated administrative review streamlines and makes a number of changes to the administrative review, including eliminating the requirement to conduct a follow-up review and the corresponding follow-up review thresholds upon which Criterion 1 was based. FNS will issue a proposed rulemaking to address the changes in the administrative review process. However, most State agencies have been approved to follow the requirements of the updated administrative review process for School Year 2013–14, in advance of the formal rulemaking. A few State agencies are still following the Coordinated Review Effort process.

To accommodate the anticipated elimination of the follow-up review/review threshold for States under the updated administrative review process, the final rule requires a second review of applications in all LEAs with 10 percent or more of the certification/benefit issuances in error, as determined by the State agency under an administrative review. This change is expected to update Criterion 1 while identifying those LEAs with essentially the same level of errors in the certification and benefit issuance process, as proposed. Both State agencies currently following the new administrative review procedures and

those under the Coordinated Review Effort are able to identify these error levels through their reviews.

FNS received one comment regarding the needs of small LEAs under Criterion 1. The comment noted that a small LEA with only 10 certifications would be required to conduct a second review if only one certification/benefit issuance is in error.

While FNS understands the concern of this comment, the second review requirements are not expected to place an undue burden on LEAs with a small number of applications. The second review requirement is expected to result in better outcomes during an administrative review for these LEAs. Therefore, the final rule does not exempt any LEAs from the second review requirement.

Criterion 2

Under the proposed Criterion 2, a second review of applications would have been required for all LEAs which claimed between 5–10 percent of the free and reduced price lunches incorrectly due to errors of certification, benefit issuance or updating eligibility status, as determined by an administrative review.

Several commenters expressed confusion about which LEAs were to be selected under criterion 2. One State suggested that this LEA selection criterion be folded into criterion 4 and that selecting at-risk LEAs should be left to State discretion.

FNS agrees with comments that proposed criterion 2 may be confusing for States and can be folded into criterion 4, State discretion. Therefore, this final rule at 7 CFR 245.11(b)(1)(ii) leaves the determination of which LEAs are “at risk” for certification errors to the discretion of the State agency. In identifying at-risk LEAs, State agencies are strongly encouraged to include those LEAs with between 5–10 percent of the certification/benefit issuances in error, as determined by the State agency under an administrative review.

Criterion 3

Proposed Criterion 3 would have required a second review of applications in LEA’s establishing a new Provision 2 or 3 base year. The proposal responded to findings from FNS’ 2007 Access, Participation, Eligibility, and Certification (APEC) study, which included national estimates of the amounts and rates of erroneous payments in the NSLP and SBP. The APEC study found that schools in Provisions 2 or 3 base years, on average, experience higher erroneous payments rates than other schools (1.75 times

higher for NSLP), making them at high-risk for administrative error associated with certification.

However, since publication of the proposed rule, FNS issued guidance on Provision 2 and 3 base years, SP 59–2013, “*Review of Provision 2/3 Base Year*”. The guidance requires State agencies to conduct a review of base year certification and benefit issuance documentation for any LEA requesting approval to participate in the NSLP using Provision 2 or 3.

The new requirement contained in SP 59–2013 makes a criterion singling out Provision 2/3 base year schools unnecessary, and for this reason Criterion 3 is not included in the final rule. It should be noted that Provision 2/3 schools in their base year could still be subject to a second review of applications if their LEA is selected under other criteria. This would be in addition to the State review of all base year applications.

Criterion 4

Proposed Criterion 4 would have allowed State agencies to select LEAs that are not identified in the above criteria, and that the State agency identifies as at risk for certification error, and are scheduled for an administrative review the following year.

In regards to criterion 4, it was suggested that FNS eliminate the limitation on State agency discretion that would require LEAs to be selected to conduct the second review only if they are scheduled for an administrative review the following year. The comments argued that if a State agency determines that an LEA is at risk for certification error, the State agency should be permitted to require a second review of applications regardless of the LEA’s position in the review cycle.

FNS agrees that criterion 4 should be expanded to capture all at risk LEAs, not just those LEAs that are scheduled for an administrative review the following year, and this final rule removes the limitation from Criterion 4 at 7 CFR 245.11(b)(1)(ii).

Finalized LEA Selection Criteria

In summary, in response to comments on the proposed criteria and changes to the administrative review process, this rule finalizes at 7 CFR 245.11(b)(1) two criteria for the selection of LEAs demonstrating a high level of, or at risk for, certification errors:

1. All LEAs with 10 percent or more of the certification/benefit issuances in error as determined by the State agency during an administrative review; and

2. LEAs not selected under Criterion 1 that are at risk for certification error, as determined by the State agency. State agencies are strongly encouraged to include those LEAs with between 5–10 percent of the certification/benefit issuances in error, as determined by the State agency under an administrative review.

LEAs with Electronic Systems

In the proposed rule, FNS asked for comment on whether the second review of applications requirement should be required of those LEAs that have electronic systems to review applications. A majority of comments state that these LEAs should be required to conduct a second review if they meet the LEA selection criteria, arguing that whether the calculations are manual or electronic, if an incorrect amount is entered into the system, the potential for error still exists.

FNS agrees that LEAs that meet the selection criteria should be required to conduct a second review of applications, regardless of whether the LEA has an electronic system in place to review applications. Therefore, an exemption for LEAs with electronic systems is not included in this final rule.

LEA Requirements

Timeframes

As required by amendments made to the NSLA by the HHFKA, the proposed rule would have required the second review of applications by identified LEAs to be conducted in a timely manner and not result in the delay of an eligibility determination for more than 10 operating days after the date the application is submitted. Once the review of eligibility has been completed, the household must be notified immediately.

FNS received one comment on this requirement from an advocacy group. The group argued that a second review of applications will make meeting the 10 day timeline for eligibility determinations difficult for LEAs. While FNS understands the concerns of this group, FNS does not have discretion to modify this requirement specifically imposed pursuant to the amendments made by the HHFKA. Therefore, it is finalized at 7 CFR 245.11(c)(1).

In addition, the proposed rule would have changed the timeframes for application approval for all LEAs, not simply those affected by the second review of applications requirements. Under the proposal, the Department would have established a regulatory requirement that all LEAs notify the

household of the children's eligibility and provide the eligible children the benefits to which they are entitled within 10 operating days of receiving the application. This change would have conformed the regulations with longstanding guidance and was intended to make the certification process consistent for both LEAs that are required to conduct a second review of applications and those that are not. FNS did not receive comments on this change, and it will be finalized in this rule at 7 CFR 245.6(c)(6)(i).

One advocate suggested that FNS take this rulemaking as an opportunity to allow the certification for free and reduced price meals to take effect for claiming and household charging purposes on the date on which the application was submitted regardless of when the decision is made or family is notified.

FNS agrees that this is an important clarification to make regarding the eligibility certification process and is most appropriately addressed through guidance. On December 3, 2013, FNS issued SP 11–2014 “Effective Date of Free or Reduced Price Meal Eligibility Determinations.” This memorandum provides clarification on the flexibility available to LEA officials for establishing the effective date of eligibility for children certified for free or reduced price meals based on household applications. Therefore, FNS is not including this change in the final rule.

Second Review Duration

Under proposed 7 CFR 245.11(c)(2), LEAs selected for a second review would have been required to conduct a second review of applications each year, until the State agency determines that the LEA is no longer demonstrating a high level of, or is no longer at risk for, administrative error associated with the certification process. For LEAs selected for a second review of applications using Criteria 1, 2, or 4, second reviews would be required until such time as the LEA provided the State agency with documentation demonstrating that no more than 5 percent of reviewed applications required a change in eligibility determination. For LEAs selected for the second review of applications using criterion 3, a second review of applications would have been required every base year of the Provision 2 or Provision 3 cycle.

The proposed rule defined documentation as the required LEA annual report (described next) detailing the number of free and reduced price applications subject to a second review and the number and percentage of

reviewed applications for which the eligibility determination was changed, and a summary of the type of changes made.

In recognition of the changes to the LEA selection criteria, this rule finalizes at 7 CFR 245.11(c)(2) that selected LEAs must conduct a second review of applications until LEA-provided documentation demonstrates to the satisfaction of the State agency, that no more than 5 percent of reviewed applications required a change in eligibility determination.

To provide LEAs more flexibility in demonstrating they no longer are at risk for certification error, this final rule expands documentation to also include information obtained by a State agency through administrative reviews. This change is finalized at 7 CFR 245.11(c)(2).

State Agency and LEA Reporting Requirements

As required by the HHFKA, the proposed rule would have established reporting requirements for State agencies and LEAs. The proposed reporting requirements were expected to allow the State agency and the Department to monitor the effect of the second review of applications requirement.

State Agency Requirements

Under 7 CFR 245.11(b) of the proposal, State agencies would have been required to submit an annual report to FNS on February 1 in a format prescribed by FNS. The report would provide information detailing the number of free and reduced price applications subject to a second review, the number and percentage of reviewed applications for which the eligibility was changed, and a summary of the type of changes that were made for all the LEAs subject to a second review of applications.

The final rule makes two technical changes to the proposed State agency reporting requirements. The proposed rule did not specify a format for State reporting. Therefore in an effort to provide clarification and keep consistent with data already collected on the FNS–742, this final rule requires at 7 CFR 245.11(b) that the report required by State agencies include LEA-level information. This means State agencies will provide the information described above for each LEA required to conduct a second review of applications. In addition, the final rule at 7 CFR 245.11(b) changes the date reports are due to FNS from February 1 to March 15, consistent with existing verification reporting requirements.

This change provides State agencies with additional time to obtain the data from LEAs.

Finally, the final rule adds a requirement that State agencies provide technical assistance to LEAs who demonstrate they are at risk for certification errors to ameliorate any problems. While newly added to paragraph (b), this addition falls within existing State agency responsibilities in managing the program.

LEA Requirements

The proposed rule at 7 CFR 245.11(c)(3) would have required LEAs subject to the second review of applications to submit to the State agency an annual report, detailing the number of free and reduced price applications subject to a second review, the number and percentage of reviewed applications for which the eligibility determination was changed, and a summary of the types of changes that were made.

While the proposed rule did not address the timeframes covered by the LEA report, this final rule clarifies that the information reported to the State agency, is information as of October 31st. This means State and LEAs will only need to report on applications for the current school year that have been reviewed on or before October 31st, a date consistent with already existing reporting requirements. State agencies have discretion in establishing the reporting format and timeframe for report submission, provided such timeframes permit the State to meet its reporting deadline to FNS.

One comment acknowledged that there will be additional reporting and recordkeeping, and three comments stated that the estimates for reporting and recordkeeping burden provided in the proposed rule were low. FNS agrees that LEAs will need to track how many applications were approved in error compared to total applications and the reasons for the errors, and that SAs will need to collect and report the data collected from LEAs to FNS. FNS also acknowledges that the second review of all applications has administrative burden for LEAs that are at risk for eligibility determination errors. However, reviewing applications as mandated by this rule is considered a normal (usual and customary) operating task and therefore this new requirement does not add new burden. It should be noted that a second review of applications can be expected to help LEAs ensure better outcomes during an administrative review which could lessen the burden during and following an administrative review.

State agencies are encouraged to use the administrative review process or other existing mechanisms, wherever possible, to implement this requirement as seamlessly as possible. State agencies can notify LEAs subject to the second review requirements at the exit conference for the administrative review or through the administrative review report. This approach would allow LEAs sufficient time to obtain technical assistance and establish procedures for the forthcoming school year.

The reporting requirements described above are finalized at 7 CFR 245.11(b)(2) for State agencies and reporting requirements for LEAs are finalized at 7 CFR 245.11(c)(3).

Implementation

As noted in the **DATES** section, this final rule is effective March 10, 2014. However, because implementation begins with identification of LEAs with high error rates or at-risk of error, the actual conduct of second reviews will not start until the beginning of the next school year. For example, for School Years 2013–2014 and 2014–2015, implementation is phased-in as follows:

- State agencies must identify LEAs subject to a second review and notify affected LEAs no later than June 30, 2014 (School Year 2013–2014) (7 CFR 245.11(a)).
- Identified LEAs must conduct second reviews of applications beginning July 1, 2014 (School Year 2014–2015) (7 CFR 245.11(c)).
- Affected LEAs must submit to the State agency, an annual report on the results of the second review in a format prescribed by the State agency. The report must be submitted no later than the date specified by the State agency (in School Year 2014–2015) (7 CFR 245.11(c)(3)).
- State agencies must submit a report providing LEA-level information including the number of free and reduced price applications subject to a second review in the LEA, the number and percentage of reviewed applications for which the eligibility determination was changed in the LEA, and a summary of the types of changes that were made to applications reviewed in the LEA to FNS no later than March 15, 2015 (7 CFR 245.11(b)(2)).

Amendatory Changes Since Publication of Proposed Rule

Since publication of the proposed rule, FNS has amended 7 CFR part 245 by adding a new 7 CFR 245.12, *State agencies and direct certification requirements*. Therefore, this final rule will redesignate 7 CFR 245.11 through 245.14 as 7 CFR 245.12 through 245.15

and add a new 7 CFR 245.11, which contains the second review of application requirements.

Monitoring of Compliance

While not directly addressed in the proposed rule, FNS would like to take this opportunity to remind State agencies and LEAs that, as with other program requirements, this provision will be monitored through the administrative review process. Additional information regarding monitoring of compliance with the second review of applications requirement will be addressed in a forthcoming administrative review regulation.

Technical Correction

This rule also corrects a typographical error which appeared in the proposed rule statement regarding Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect, as provided for in the statement in this final rule.

III. Procedural Matters

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (RFA) of 1980, (5 U.S.C. 601–612). Pursuant to that review, it has been certified that this rule will not have a significant impact on a substantial number of small entities. While there may be some LEA burden associated with the second review of applications required in this final rule, the burden will not be significant and will be outweighed by the benefits of decreased administrative error associated with certification. Additionally, only LEAs that fall under the established criteria would be

required to conduct the second review of applications.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance Programs under 10.555. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency’s considerations in terms of the three categories called for under Section 6(j)(2)(B) of Executive Order 13121.

Prior Consultation With State Officials:

Prior to drafting this final rule, FNS staff received informal input from various stakeholders while participating in various State, regional, national, and professional conferences. Numerous stakeholders, including State and local program operators, also provided input

at public meetings held by the School Nutrition Association.

Nature of Concerns and the Need To Issue This Rule:

State agencies and LEAs want to provide the best possible school meals through the NSLP but are concerned about the costs and administrative burden associated with increased program oversight. While FNS is aware of these concerns, the National School Lunch Act, 42 U.S.C. 1769c(b)(6), as amended by the HHFKA, requires that LEAs that demonstrate a high level of, or a high risk for, administrative error associated with certification have an individual or entity review the initial eligibility determinations for free and reduced price school meals for accuracy prior to sending out household notifications of eligibility or ineligibility.

Extent to Which We Meet Those Concerns:

FNS has considered the impact of this final rule on State and local operators and has developed a rule that would implement the second review of applications requirement in the most effective and least burdensome manner.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This final rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of this rule, all applicable administrative procedures under § 210.18(q) or § 235.11(f) must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, “Civil Rights Impact Analysis”, and 1512–1, “Regulatory Decision Making Requirements.” to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule’s intent and provisions, FNS has determined that this rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits on the basis of their race, color, national origin, sex, age or disability, nor is it intended to have a differential impact on minority owned or operated business establishments, and women-owned or operated business

establishments that participate in the Child Nutrition Programs. The final rule is technical in nature, and it affects only State agency and local educational agency operations.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the information collection or recordkeeping requirements included in this final rule, which were filed under 0584–0573, have been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, if approval is denied, we will publish a document in the **Federal Register** providing notice of what action we plan to take.

E-Government Act Compliance

FNS is committed to complying with the E-Government Act, 2002 to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 210

Children, Commodity School Program, Food assistance programs, Grant programs-social programs, National School Lunch Program, Nutrition, Reporting and recordkeeping requirements, Surplus agricultural commodities.

7 CFR Part 245

Civil rights, Food assistance programs, Grant programs-education, Grant programs-health, Infants and children, Milk, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR parts 210 and 245 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

- 2. Amend § 210.15:
 - a. In paragraph (a)(7), by removing the word “and”;
 - b. In paragraph (a)(8), by removing the period and adding “; and” in its place;
 - c. By adding a new paragraph (a)(9).
The addition reads as follows:

§ 210.15 Reporting and recordkeeping.

(a) * * *

(9) For any local educational agency required to conduct a second review of free and reduced price applications as

required under § 245.11 of this chapter, the number of free and reduced price applications subject to a second review, the number and percentage of reviewed applications for which the eligibility determination was changed, and a summary of the types of changes made.

* * * * *

■ 3. Amend § 210.20:

■ a. In paragraph (a)(8), by removing the word “and”;

■ b. In paragraph (a)(9), by removing the period and adding “; and” in its place;

■ c. By adding a new paragraph (a)(10).
The addition reads as follows:

§ 210.20 Reporting and recordkeeping.

(a) * * *

(10) For each local educational agency required to conduct a second review of applications under § 245.11 of this chapter, the number of free and reduced price applications subject to a second review, the results of the reviews including the number and percentage of reviewed applications for which the eligibility determination was changed, and a summary of the types of changes made.

* * * * *

PART 245—DETERMINING ELIGIBILITY FOR FREE AND REDUCED PRICE MEALS AND FREE MILK IN SCHOOLS

■ 4. The authority citation for part 245 continues to read as follows:

Authority: 42 U.S.C. 1752, 1758, 1759a, 1772, 1773, and 1779.

■ 5. Revise § 245.6(c)(6)(i) as follows:

§ 245.6 Application, eligibility and certification of children for free and reduced price meals and free milk.

* * * * *

(c) * * *

(6) * * *

(i) *Income applications.* The local educational agency must notify the household of the children’s eligibility and provide the eligible children the benefits to which they are entitled within 10 operating days of receiving the application from the household.

* * * * *

§§ 245.11 through 245.14
[Redesignated]

■ 6. Redesignate §§ 245.11 through 245.14 as §§ 245.12 through 245.15, respectively;

■ 7. Add a new § 245.11 to read as follows:

§ 245.11 Second review of applications.

(a) *General.* On an annual basis not later than the end of each school year, State agencies must identify local

educational agencies demonstrating a high level of, or risk for, administrative error associated with certification processes and notify the affected local educational agencies that they must conduct a second review of applications beginning in the following school year. The second review of applications must be completed prior to notifying the household of the eligibility or ineligibility of the household for free or reduced price meals.

(b) *State agency requirements—(1) Selection criteria.* Local educational agencies subject to a second review must include:

(i) *Administrative review certification errors.* All local educational agencies with 10 percent or more of the certification/benefit issuances in error, as determined by the State agency during an administrative review; and

(ii) *State agency discretion.* Local educational agencies not selected under paragraph (b)(1)(i) that are at risk for certification error, as determined by the State agency.

(2) *Reporting requirement.* Beginning March 15, 2015, and every March 15 thereafter, each State agency must submit a report, as specified by FNS, describing the results of the second reviews conducted by each local educational agency in their State. The report must provide information about applications reviewed in each local educational agency and include:

(i) The number of free and reduced price applications subject to a second review;

(ii) The number of reviewed applications for which the eligibility determination was changed;

(iii) The percentage of reviewed applications for which the eligibility determination was changed; and

(iv) A summary of the types of changes that were made.

(3) State agencies must provide technical assistance to ameliorate certification related problems at local educational agencies determined to be at risk for certification.

(c) *Local educational agency requirements.* Beginning July 1, 2014, and each July 1 thereafter, local educational agencies selected by the State agency to conduct a second review of applications must ensure that the initial eligibility determination for each application is reviewed for accuracy prior to notifying the household of the eligibility or ineligibility of the household for free and reduced price meals. The second review must be conducted by an individual or entity who did not make the initial determination. This individual or entity is not required to be an employee of the

local educational agency but must be trained on how to make application determinations. All individuals or entities who conduct a second review of applications are subject to the disclosure requirements set forth in § 245.6(f) through (k).

(1) *Timeframes.* The second review of initial determinations must be completed by the local educational agency in a timely manner and must not result in a delay in notifying the household, as set forth in § 245.6(c)(6)(i).

(2) *Duration of requirement to conduct a second review of applications.* Selected local educational agencies must conduct a second review of applications annually until the State agency determines that local educational agency-provided documentation provided in accordance with paragraph (c)(3) of this section or data obtained by the State agency during an administrative review, demonstrates that no more than 5 percent of reviewed applications required a change in eligibility determination.

(3) *Reporting requirement.* Each local educational agency required to conduct a second review of applications must annually submit to the State agency, on a date established by the State agency, the following information as of October 31st:

(i) The number of free and reduced price applications subject to a second review;

(ii) The number of reviewed applications for which the eligibility determination was changed;

(iii) The percentage of reviewed applications for which the eligibility determination was changed; and

(iv) A summary of the types of changes that were made.

Dated: January 31, 2014.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2014–02556 Filed 2–5–14; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2013–0601; Special Conditions No. 25–527–SC]

Special Conditions: Learjet Inc. Model LJ–200–1A10; Airplane Fuselage Post-Crash Fire Survivability

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Learjet Inc. Model LJ-200-1A10 airplane. This airplane will have a novel or unusual design feature associated with advanced composite materials in the construction of its fuselage and wings. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* March 10, 2014.

FOR FURTHER INFORMATION CONTACT: Alan Sinclair, Airframe/Cabin Safety Branch, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057-3356; telephone 425-227-2195; facsimile 425-227-1320; email alan.sinclair@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

On February 9, 2009, Learjet Inc. applied for a type certificate for their new Model LJ-200-1A10. The Model LJ-200-1A10 is a business-class airplane with two high-bypass turbine engines and interior seating configuration for up to 10 passengers. The Model LJ-200-1A10 is the first airplane manufactured by Learjet Inc. to utilize advanced composite materials in the construction of its fuselage and wings.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Learjet Inc. must show that the Model LJ-200-1A10 meets the applicable provisions of part 25, as amended by Amendments 25-1 through 25-127.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model LJ-200-1A10 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Model LJ-200-1A10 must comply with the fuel-vent and

exhaust-emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36, and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92-574, the "Noise Control Act of 1972."

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Model LJ-200-1A10 will incorporate the following novel or unusual design features:

The Model LJ-200-1A10 is the first airplane manufactured by Learjet Inc. to utilize advanced composite materials in the construction of its fuselage and wings. In accordance with § 21.16, fuselage structure fabricated from monolithic carbon-fiber reinforced plastic (CFRP) prepreg material (reinforcement fiber pre-impregnated with a thermoplastic or thermoset resin matrix) constitutes a novel and unusual design feature for a large transport-category airplane certificated under 14 CFR part 25.

Discussion

Existing regulations do not adequately ensure that composite structure offers passengers the same protection from an on-ground, post-crash fire condition as would a conventional aluminum structure. Learjet is introducing a new material that may have different toxicity characteristics than those of traditional materials. Service experience has shown that, in post-crash fires, traditional aluminum structural materials emit acceptable toxicity levels. Therefore, it is necessary to ensure that the material being utilized does not reduce the survivability of the passengers during a post-crash fire, or provide levels of toxic fumes that would be lethal or incapacitating, preventing evacuation of the aircraft following a crash scenario.

These special conditions are necessary to ensure a level of safety equivalent to that provided by 14 CFR part 25. Regulations applicable to burn requirements, including §§ 25.853 and 25.856(a), remain valid for this airplane but do not reflect the threat generated from toxic levels of gases produced from carbon-fiber/resin system materials following a post-crash fire.

Discussion of Comments

Notice of proposed special conditions no. 25-13-13-SC, for Learjet Inc. Model LJ-200-1A10 airplanes, was published in the **Federal Register** on November 5, 2013 (78 FR 66317). No comments were

received, and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Model LJ-200-1A10. Should Learjet Inc. apply at a later date for a change to the type certificate to include another airplane model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Learjet Inc. Model LJ-200-1A10 airplanes.

The Learjet Model LJ-200-1A10 must show that toxic levels of gases produced from the composite-material system are in no way an additional threat to the passengers and their ability to evacuate when compared to an aluminum-constructed aircraft.

Issued in Renton, Washington, on January 31, 2014.

John P. Piccola, Jr.,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014-02495 Filed 2-5-14; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2013-0950; Airspace Docket No. 13-AGL-34]

Amendment of Class D and Class E Airspace; Grand Forks, ND

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment, correction.

SUMMARY: This action corrects the geographic coordinates and adds the

geographic coordinates of the Grand Forks International Airport ILS Localizer, and removes NOTAM information, in the regulatory text of a final rule that was published in the **Federal Register** of December 10, 2013, amending Class D and Class E airspace in the Grand Forks, ND area.

DATES: *Effective Date:* 0901 UTC, February 6, 2013.

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:

History

On December 10, 2013, the FAA published in the **Federal Register** a final rule amending Class D and Class E airspace in the Grand Forks, ND area. (78 FR 74005, Docket No. FAA-2013-0950). Subsequent to publication, an error was discovered in the latitude coordinates for Grand Forks International Airport listed in the Class D airspace description, as well as the NOTAM information inadvertently copied in error for Grand Forks AFB. In addition, reference to the Grand Forks International Airport ILS localizer navigation aid was omitted from the descriptor for the Grand Forks, ND, Class E airspace.

Class D and Class E airspace designations are published in paragraph 5000 and 6005, respectively, of FAA Order 7400.9X dated August 7, 2013, and effective September 15, 2013, which is incorporated by reference in 14 CFR Part 71.1. The Class D and Class E airspace designations listed in this document will be published subsequently in the Order.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the Class D airspace areas at Grand Forks International Airport, Grand Forks, ND, and Grand Forks AFB, ND, and the Class E airspace area extending upward from 700 feet above the surface at Grand Forks International Airport, Grand Forks, ND, as published in the **Federal Register** December 10, 2013 (78 FR 74005), (FR Doc. 2013-29222) FAA Docket No. 2013-0950, are corrected as follows:

AGL ND D Grand Forks, ND [Corrected]

Grand Forks International Airport, ND

■ On page 74006, column 1, line 29 of the regulatory text, remove 'lat. 47°5'50" N.,' and insert 'lat. 47°56'50" N.'

AGL ND D Grand Forks AFB, ND [Corrected]

■ On page 74006, column 1, and beginning on line 51, remove the following:

This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will therefore be continuously published in the Airport/Facility Directory.

AGL ND E5 Grand Forks, ND [Corrected]

■ On page 74006, column 2, add the following after line 46:

Grand Forks International Airport ILS Localizer
(Lat. 47°53'43" N., long. 97°10'52" W.)

Issued in Washington, DC, on February 3, 2014.

Mark W. Bury,

Assistant Chief Counsel, International Law, Legislation, and Rulemaking.

[FR Doc. 2014-02563 Filed 2-3-14; 4:15 pm]

BILLING CODE 4910-13-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 906

[Docket No. 101019524-3999-02]

RIN 0648-BA36

National Appeals Office Rules of Procedure

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

ACTION: Final rule.

SUMMARY: With this final rule, NMFS implements procedural regulations governing the National Appeals Office (NAO), a division of NMFS Office of Management and Budget within NOAA. NAO's central mission is to provide an efficient means of adjudicating appeals by providing due process and consistency to NMFS administrative decisions, particularly those involving Limited Access Privilege Programs (LAPPs) established pursuant to Section 303A of the Magnuson-Stevens Fishery Conservation and Management Act. The procedures contained herein could also be used to adjudicate appeals from other offices that incorporate these rules into their regulations or otherwise notify potential appellants of the procedures' applicability to their proceedings.

DATES: This final rule is effective March 10, 2014.

FOR FURTHER INFORMATION CONTACT: Steven Goodman, National Appeals

Office, Office of Management & Budget, NMFS, 1315 East-West Hwy., Room 10843, Silver Spring, MD 20910; *nmfs.nao.contact@noaa.gov*; (301) 427-8774. (This is not a toll-free number.) Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the Federal Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) authorizes LAPPs and requires NMFS to "include an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges." To fulfill that requirement, NMFS is adopting this final rule at 15 CFR part 906, which would designate NAO, a division within NMFS Office of Management and Budget, as adjudicator for appeals in future LAPPs established under section 303A of the MSA.

NAO adjudicates initial administrative determinations, agency actions that directly and adversely affect an appellant. Although not exclusively, NAO proceedings are for appeals of denials of permits or other limited access privileges. Typically, NAO will be used for informal administrative appeals.

This final rule addresses operations as well as events that occur during the course of adjudicating an appeal filed with NAO. NAO will produce written decisions upholding or reversing the initial administrative determination under review. Under this final rule, a decision issued by NAO becomes final after a NMFS Regional Administrator has had the opportunity to review NAO's decision. A Regional Administrator may adopt, reverse, remand, or modify NAO decisions.

Additional background information on this final rule is found in the preamble to the proposed rule published on June 8, 2012 (77 FR 33980), and is not repeated herein. The proposed rule solicited public comments; the comments and NMFS' responses are identified below.

Comments and Responses

The proposed rule solicited public comments through July 9, 2012. During the comment period, NMFS received comments from five individuals and two entities. The two entities are the Public Employees for Environmental Responsibility and the Alaska Commercial Fisheries Entry Commission. Some persons and entities made multiple comments in one document. The specific comments and our responses are as follows.

Comment 1: One entity recommends a different description for preponderance of the evidence as it relates to the burden of proof on issues of fact.

Response: NMFS revised the definition of “preponderance of the evidence” by deleting “reasonable person” and modifying the reference to a contested fact being “more likely than not” to “more likely to be true than not true.” The revised definition maintains an objective standard and does not substantively change the burden of proof. Although federal agencies appear to use various definitions of “preponderance of the evidence,” the definitions are generally consistent in their meaning, and the definition set out in the final rule is used by a number of other federal agencies.

Comment 2: One individual would like a different definition of “Initial Administrative Determination” or “IAD.” The individual believes the proposed definition is too limited, and recommends NMFS adopt the definition found in The Design and Use of Limited Access Privilege Programs, a Technical Memorandum NOAA published in 2007. In the Memorandum, an IAD is identified as: “[A] formal decision on an applicant’s claims that identifies the applicant, the program, and the claim. The IAD contains a background section that summarizes the proceedings to date and then discusses the claim in light of information in the Official Record and the requirements of the regulations. The formal denial is then set out and the applicant is informed of her/his right to appeal.”

Response: The commentator’s definition was written specifically for limited access privilege programs. NMFS chose a broad definition in the Proposed Rule to capture all possible types of decisions over which it may assume jurisdiction. NMFS requires the flexibility to use NAO to process appeals from decisions not associated with limited access privilege programs.

Comment 3: One entity states that if an appellant fails to meet a deadline, the appellant should be able to file for an extension to the deadline to file. The entity also states allowing appellants to file after a deadline has past is consistent with the Federal Rules of Civil Procedure. An individual stated a deadline should be stayed while a request for extension is pending.

Response: In response to the comment, NMFS revised § 906.4(d) to state that one thirty day extension may be granted if an appellate officer determines a party has established good cause for an extension of time, taking into account whether the party timely

requested the extension or the extent to which the party missed the deadline. A person may not request an extension of time to file a petition to appeal. The Federal Rules of Civil Procedure do not apply to administrative appeals.

Comment 4: One entity and three individuals believe it is unfair to require an appellant to raise the arguments in support of his or her appeal in the petition. They believe appellants may be unsophisticated and therefore should be able to add new arguments at any stage of the appeals proceeding. One individual thinks an appellant should have thirty days to amend his or her petition, based on the model in the federal regulations at 15 CFR part 904 et seq.

Response: In response to public comments, NMFS has revised the rule to permit amendments to the petition based on good cause for not raising the arguments in the original petition. The federal regulations at 15 CFR part 904 et seq. apply to law enforcement proceedings. Although NMFS took them into consideration, NMFS believes the final rule is more appropriate for appeals of limited access privileges and other decisions.

Comment 5: Three individuals recommend NMFS accept filing of appeals by electronic method. Two individuals believe an appellant should be able to file by mail or commercial carrier regardless if they have a fax machine.

Response: NMFS agrees that it would be advantageous to permit electronic filing of appeals; however, NMFS decided not to proceed with this method of filing because of privacy and security concerns. NMFS will accept filing by mail or commercial carrier. NMFS believes filing by fax machine is preferable to filing by mail or commercial carrier because the former is faster and less problematic than the latter.

Comment 6: One individual thinks fishermen need at least 60 days to file a petition.

Response: The Proposed Rule sets a default of a 45-day filing deadline; however, if the substantive program regulations contain a specified deadline this will supplant the default 45-day deadline. NMFS believes 45 days is a sufficient default.

Comment 7: One individual thinks ten days’ notice of a hearing is too short and that at least 30 days’ notice should be required. Another individual states that 10 days is too short for fishermen who may be at sea for more than 10 days at a time.

Response: The time frames in the final rule reflect a balancing of many factors,

including the nature of the fishing industry, the need to provide a meaningful opportunity to be heard, and the need to resolve appeals in a timely manner to provide certainty for all limited access privilege holders. NMFS believes 10 days’ notice of hearings provides due process. A 10 day timeframe appears in 15 CFR 906.8(b), 906.9(b) and (c), 906.11(a)(3), 906.16(a), and 906.17(a). The individual did not identify which part of the Proposed Rule he was referring to, but NMFS balanced similar considerations when determining the length of all time periods.

Comment 8: One individual does not think filing with NAO should be complete upon receipt at NAO’s office and suggests NMFS use the model found at 15 CFR 904.3(b).

Response: NMFS believes it is necessary to have a clear date and time of filing and filing as of the date of a postmark may not provide that certainty. The federal regulations at 15 CFR part 904 et seq. apply to law enforcement proceedings. Although NMFS took them into consideration, NMFS believes the final rule is more appropriate for appeals of limited access privileges and other decisions.

Comment 9: One entity and three individuals recommend NMFS not give deference to the interpretation of an ambiguous regulation by the program office issuing the Initial Administrative Determination (IAD). One entity and one individual claim giving deference to the program office will prevent NMFS from being able to correct decisions made by program offices. One individual claims NMFS program employees are not properly trained in regulatory interpretation. The same individual requests that the RA make the final policy determinations. Another individual claims determining whether an interpretation is ambiguous or whether a program office’s interpretation is reasonable would result in expensive and unproductive arguments.

Response: NAO (and the RA) generally review appeals de novo, and the final rule provides that NAO shall defer to the reasonable interpretations of applicable ambiguous laws and regulations made by the office issuing the initial administrative decision. NAO defers in that instance because the program office comes into contact with a much greater number of program cases than NAO, which encounters only those regulatory issues resulting in contested cases. The program office has expertise in this area and is in the best position to make determinations on ambiguous regulations. Further, because the

program office is interpreting regulations for all the applications for a specific program, they develop a consistent set of interpretations for that program. NMFS program employees are well-trained and consult with the regional sections of NOAA's Office of the General Counsel. NMFS believes that deferring to the program office in this area is appropriate. NAO is able to correct a program office decision when the office has not made a reasonable interpretation of an ambiguous regulation. In reviewing administrative appeals, the RA will consider the evidentiary record including arguments, claims, evidence of record and other documents of record that were before NAO when it rendered its decision or revised decision. Affording deference to the program office will not result in expensive and unproductive arguments, but rather will provide for both a sound process for interpreting ambiguous regulations and better appeals and agency decisions.

Comment 10: Two individuals recommend an appellant be given the opportunity to submit arguments regarding the program office's response to an NAO request for its interpretation of an ambiguous regulation. One individual recommends the program office be required to include its interpretation of an ambiguous regulation in its IAD. One individual recommends that if NMFS needs a program office interpretation then it should issue an order requiring a program office to provide an interpretation.

Response: Generally, a program office may interpret an ambiguous regulation in its IAD. If NAO determines that a regulation is ambiguous, it may be necessary for NAO to contact the program office to obtain its interpretation. The request can be made by order, but an order is not necessary. If NAO contacts a program office for its interpretation of an ambiguous regulation, an appellant will be provided notice of the request. The rules do not preclude an appellant from submitting arguments regarding a program office's response to a request for its interpretation.

Comment 11: One entity and two individuals indicated the requirement that copies be of "equal legibility" as the originals was not warranted. One individual said that appellants may only have carbon copies of documents, and suggested the standard for accepting copies should be left to the discretion of the appellate officer based on whether the copy is sufficiently clear.

Response: An appellate officer will decide whether to admit evidence into

the NAO case record. To be offered as evidence, copies of documents must be of equal legibility and quality as the originals. Copies of documents that are not of equal legibility and quality as the originals may indicate documents that are suspect. NMFS needs the ability to reject documents that are suspect or because the quality of the original relates to a material fact.

Comment 12: Two individuals recommend that the RA have more than 10 days to review NAO decisions. One individual believes that if 10 days remains the time period then NAO should be required to transmit its decision to the RA by email. This individual also believes the term "days" should be clarified to mean business days. One individual does not believe the RA should be precluded from considering anything that was not before NAO. A third individual thinks the language addressing when an RA can issue a decision is unclear.

Response: NMFS removed the 10-day review period from 15 CFR 906.17 and clarified the RA review process in that section. The term "day" does not mean business day, but is defined in the rule as calendar day. It is appropriate for an appellant to present evidence to the fact finder. The fact finder for NMFS is NAO, who can probe the truth and veracity of evidence, determine credibility, and otherwise develop the record. The RA is not in a position to fact find because he or she is reviewing the record as it exists. NMFS clarified the RA review process in 15 CFR 906.17, specifying when an RA can issue a written decision adopting, remanding, reversing, or modifying NAO's decision or revised decision.

Comment 13: One entity and three individuals commented about the pre-hearing and hearing provisions of the proposed rule. The entity and an individual believe hearings should be recorded as a matter of law. One individual believes that a prehearing conference should be mandatory unless an appellate officer can justify, in writing, his or her decision to not hold a pre-hearing conference. The same individual echoes the concern with respect to hearings, stating that if a hearing is not held, an appellate officer should be required to state in writing why he or she decided a hearing was not necessary.

Response: Pre-hearings and hearings do not always need to be held. For example, if no material issues of fact or law are in dispute, a pre-hearing or hearing may be unnecessary. Further, holding unnecessary pre-hearings or hearings is an inefficient use of government resources. Because an

appellate officer has the discretion to order a pre-hearing or hearing, there is no requirement for an appellant officer to state in writing why he or she did not order a hearing if he or she did not order a hearing. If an RA believes a hearing is necessary, he or she may remand the appeal for a hearing. While NAO may conduct formal hearings, typically, NAO's proceedings are informal and recording is not required by law. However, NAO will record all hearings unless an appellant consents to proceed without a recording.

Comment 14: One individual states the rule should include a provision for discovery and compelling witness testimony. Without a discovery process, according to the individual, it will be difficult for an appellant to prove his or her case. The same individual states that the rule is not clear about when an appellant can submit evidence in support of his or her petition. The same individual thinks without a hearing, an appellant cannot offer exhibits for the record.

Response: The rule is generally for informal proceedings. An appellant can obtain evidence to support his or her claim through various means, including the record from the NMFS office that issued the IAD. The rule allows the appellant to submit evidence to support his or her petition when the appellant files his or her petition to appeal. However, NAO will determine whether to admit proffered evidence into the record.

Comment 15: One individual states that once a motion for reconsideration is filed with NAO, NAO should issue a stay so that an appellant has time to meet the deadline for filing a petition for review before the RA.

Response: There is no petition for review to the RA. The RA reviews all appeals. NMFS modified the rule so that NAO will have adequate time to review a motion for reconsideration.

Comment 16: Two individuals state that the office issuing the administrative determination should provide a copy of the agency record to the appellant. One of the individuals suggests a twenty-day timeframe for transmitting the copy.

Response: NMFS assumes the individual's reference to "administrative determination" means IAD. The agency may supply records upon request and will follow all Federal law applicable to reviewing requests for records.

Comment 17: One individual agrees that ex parte communication on the merits of a pending appeal should not be permissible. The same individual, however, thinks the rule should apply

to communications between appellate officers and their chief.

Response: The chief is responsible for the quality and timeliness of the decisions issued by NAO and must be able to communicate with his or her employees.

Comment 18: One individual suggests NMFS add language to the Proposed Rule so that the office that issued the IAD may file a motion for reconsideration.

Response: Any party, including an agency that decides to be a party, may file for reconsideration. NMFS thinks this is appropriate since the parties participate in the proceedings.

Comment 19: One individual requests NMFS revise the Proposed Rule so that on reconsideration NAO can grant the motion and reopen the record to accept additional evidence or argument on the points raised in the petition for reconsideration.

Response: The final rule permits appellants to move for reconsideration. Reconsideration is not a new level of appeal. Rather, reconsideration is to correct errors of fact or law, based on evidence of record, that were made in the NAO decision. The appellate officer has discretion to reopen the record when appropriate.

Comment 20: One individual requested a yearly summary of decision outcomes in order to increase transparency and reduce the potential for corruption. One entity and two individuals recommend NAO publish all decisions by appellate officers and decisions by the RA in reviewing decisions by appellate officers. The entity and an individual thought names should not be redacted and that the decisions should be indexed. One individual requested that in addition to making decisions available, decisions be published on both NMFS headquarters Web site and the Web site from the region where the appeal originated. One individual wants decisions published within 10 days of issuance.

Response: NMFS appellate officers will apply the law to the facts in each individual appeal to determine case outcomes. A NMFS appellate officer will disqualify him or herself if he or she has a perceived or actual conflict of interest, prejudice or bias. NMFS may publish NAO and RA decisions on NMFS' Web site. If it does so, NMFS will comply with applicable laws and regulations, including but not limited to the Freedom of Information Act (FOIA), the Privacy Act, the Health Insurance Portability and Accountability Act (HIPAA), and the MSA.

Comment 21: Two entities and one individual suggest NMFS regional

offices should be allowed to opt out of using NAO or that NAO should not exist. One individual asks how a program or office may opt in to use NMFS appeals process.

Response: The purpose of NAO is to provide a central forum, using uniform rules. To ensure consistency and fairness, NMFS believes it is advantageous to use one process when possible. The details for opting into NMFS administrative appeals process will be addressed as the need arises.

Comment 22: Two entities and one individual state that the MSA does not authorize a central appeals process. They advocate a process controlled exclusively by NMFS regional offices. One entity states local expertise is needed to adjudicate appeals. One individual adds NMFS is not following its policy articulated in NOAA Technical Memorandum NMFS-F/SPO-86, The Design and Use of Limited Access Privilege Programs, published in 2007. The individual says that document recommended handling appeals regionally. The same individual states that NMFS could set minimal standards for regions to follow in adjudicating appeals, but removing the adjudicative function entirely from the region is not the answer.

Response: The MSA requires NMFS to establish an appeals process for agency denials of limited access privileges under LAPPs. NMFS decided to vest that authority in NAO. NAO will base its decisions on published regulations, and be a neutral body. NMFS believes the fact that NAO is geographically removed from the regions does not undermine that neutrality, but enhances it. The Memorandum was published in 2007 and states that it is non-binding. In 2008, NMFS decided to create a centralized appeals office. The administrative appeals process will not forego regional input; each RA retains ultimate decision-making authority.

Comment 23: One individual thinks "the only 'current infrastructure for LAPP appeals' is in the Alaska Region." One entity and one individual believe a centralized process will not be cost efficient. The individual believes there is no evidence the Office of Administrative Appeals, formerly at NMFS Alaska Regional Office, failed to achieve economies of scale or efficient use of resources. The individual thinks NMFS is disingenuous when it states: "A cadre of experienced and well-trained appellate officers would free other employees to use their time performing duties within their area of expertise." The individual thinks that the time used to review NAO decisions will not be cost effective.

Response: All regions have a process for processing administrative appeals. In the Preamble to the Proposed Rule, NMFS stated: "Historically, administrative appeals were processed by NMFS regional offices. Each NMFS region has had a different structure and process for resolving appeals." NMFS also noted: "Most of the appeals processes currently used by NMFS pre-date the new MSA requirement. Further, the current infrastructure for LAPP appeals does not achieve optimum economies of scale, or efficient use of resources." NMFS believes that efficiencies will be realized through NAO rather than running five different processes in five different locations. The decision to consolidate appeals processes nationally was not directed at the Office of Administrative Appeals. NMFS acknowledges that NMFS employees will review NAO decisions. However, that does not undermine the benefits of a centralized process and enhances the checks and balance function inherent in a robust administrative appeals process.

Comment 24: One entity and one individual believe NAO should not be a division of NMFS Office of Management and Budget. The individual thinks NAO should be within an operational division of NMFS headquarters. The entity thinks NMFS Office of Management and Budget's responsibilities are alien to the substantive adjudication of LAPP entitlements.

Response: NAO is within the operations chain-of-command. NMFS believes placing NAO in the Office of Management and Budget would enhance neutrality and independence. LAPPs are not entitlement programs; as the name states, they are Limited Access Privilege Programs.

Comment 25: One entity and one individual state NMFS does not understand LAPPs because NMFS characterized LAPPs in the Proposed Rule as a privilege which may provide benefits to some members of the public while excluding others.

Response: LAPPs are not entitlement programs. LAPPs are privilege programs. Some members of the public will gain access, or the privilege to fish, and some members of the public may be excluded, as implied by the name Limited Access Privilege Programs.

Comment 26: One entity states NMFS is wrong that the Proposed Rule will not have a significant economic impact on a substantial number of small entities. The entity believes small entities face serious economic burden if they must pursue their appeals at a distant location.

Response: The cost of filing and participating in an appeal will typically be minimal. There are no filing fees, and no requirement that an appellant or witnesses appear for in-person hearings. This issue is discussed further in the Classification section, below. Further, implementing standardized rules could reduce the cost of appeals on small entities.

Comment 27: One individual states the Proposed Rule suggests NAO will be created after the Proposed Rule is finalized.

Response: NMFS established NAO in 2010. The Proposed Rule states that “NAO adjudicates initial administrative determinations, defined in the proposed rule as agency actions that directly and adversely affect an appellant.” In the Proposed Rule, NMFS proposed procedural rules to govern proceedings before NAO. With this final rule, NMFS implements procedural regulations governing NAO.

Comment 28: Two individuals state that NAO has not improved the quality of decision making.

Response: The comment is broader than the subject matter of the Proposed Rule. NAO does not yet function under the proposed procedural rules, as they have not yet been promulgated.

Comment 29: One individual questions whether an appellant can seek judicial review from a decision from NAO, and not undergo RA review.

Response: The agency decision is not final until after RA review, and judicial review cannot be initiated until after a final agency action occurs.

Changes From the Proposed Rule

NMFS made minor changes to the proposed rule. NMFS clarified the scope of NAO review by explicitly stating that the NAO process cannot be used to challenge the legality of underlying law (§ 906.1(e)). NMFS also consolidated text regarding the definition of “day” and “ex parte communication,” deleted definitions of “person” and “Secretary” because they are already defined in the MSA, and corrected typographical errors in the proposed rule.

In response to comments, NMFS revised the definition of “preponderance of evidence” (§ 906.14) and clarified the decisions to be made through the appeals process (§§ 906.3(b)(3), 906.15). NMFS also provided more flexibility regarding extensions of time to file documents (§ 906.4(d)) and amendments to petitions for appeal (§ 906.3(b)(3)(i)), but noted that a person may not request an extension of time for petitions to appeal (§ 906.3(e)(2)). NMFS also clarified the processes for motions for

reconsideration (§ 906.16) and RA review (§ 906.17) and made edits for consistency in § 906.18 (Final Decision of the Department).

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. One comment was received regarding this certification (see comment 26). The commenter believes small entities face serious economic burden if they must pursue their appeals at a distant location. There is no requirement, however, that an appellant or witnesses appear in-person for a hearing. As noted in the proposed rule: “Hearings are also held at the discretion of an appellate officer or if the appellate officer considers such hearing will materially advance his or her evaluation of the issues under appeal. In determining whether to hold a hearing, an appellate officer’s discretion will be guided by whether the appellate officer believes oral testimony is required to resolve a material issue of fact or whether oral presentation is needed to probe a party’s position on a material issue of law. Conferences and hearings may be in person, but more likely, they will be held by telephone or by other electronic means. The rule does not bar face-to-face hearings, but it is not intended to require expenditure of funds in order for an appellant to participate . . . in a hearing.” (77 FR at 33981). NMFS, therefore, disagrees with the commenter, and believes that the costs of an appeal will be minimal. Because appeals will not result in significant costs for small entities, and no other new facts have come to light that would change the determination that this rule will not have a significant impact on a substantial number of small entities, a final regulatory flexibility analysis is not required and none was prepared.

List of Subjects in 15 CFR Part 906

Administrative appeals,
Administrative practice and procedure,
Fisheries.

Dated: January 30, 2014.

Samuel D. Rauch III,

*Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.*

For the reasons set forth in the preamble, 15 CFR part 906 is added to read as follows:

PART 906—NATIONAL APPEALS OFFICE RULES OF PROCEDURE

Sec.	
906.1	Purpose and scope.
906.2	Definitions.
906.3	Requesting an appeal and agency record.
906.4	General filing requirements.
906.5	Service.
906.6	Ex parte communications.
906.7	Disqualification of appellate officer.
906.8	Scheduling and pre-hearing conferences.
906.9	Exhibits.
906.10	Evidence.
906.11	Hearing.
906.12	Closing the evidentiary portion of the NAO case record.
906.13	Failure to appear.
906.14	Burden of proof.
906.15	Decisions.
906.16	Reconsideration.
906.17	Review by the Regional Administrator.
906.18	Final decision of the Department.

Authority: 16 U.S.C. 1801 *et seq.*; 16 U.S.C. 1374, 1375 and 1416; 16 U.S.C. 1540; 16 U.S.C. 773f; 16 U.S.C. 973f; 16 U.S.C. 1174; 16 U.S.C. 2437; 16 U.S.C. 4013; 16 U.S.C. 5507; 16 U.S.C. 7009; 16 U.S.C. 3637; 16 U.S.C. 5103 and 5106; 16 U.S.C. 5154 and 5158; 16 U.S.C. 6905, and; 16 U.S.C. 5010.

§ 906.1 Purpose and scope.

(a) This part sets forth the procedures governing administrative adjudications before the National Appeals Office (NAO).

(b) NAO will adjudicate appeals of initial administrative determinations in limited access privilege programs developed under section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and approved after the effective date of these regulations. Those appeals are informal proceedings.

(c) The procedures in this part may be incorporated by reference in regulations other than those promulgated pursuant to section 303A of the MSA.

(d) The Secretary of Commerce may request that NAO adjudicate appeals in any matter in controversy that requires findings of fact and conclusions of law, and other quasi-judicial matters that the Secretary deems appropriate, consistent with existing regulations. The Secretary will provide notice to potential appellants and to any affected party in these other matters through regulations or actual notice.

(e) The procedures in this part may not be used to seek review of the validity of statutes or regulations.

§ 906.2 Definitions.

As used in this part:

Agency record means all material and information, including electronic, the office that issued the initial administrative determination relied on or considered in reaching its initial administrative determination, or which otherwise is related to the initial administrative determination.

Appeal means an appellant's petition to appeal an initial administrative determination and all administrative processes of the National Appeals Office related thereto.

Appellant means a person who is the named recipient of an initial administrative determination and appeals it to the National Appeals Office.

Appellate officer means an individual designated by the Chief of the National Appeals Office to adjudicate the appeal. The term may include the Chief of the National Appeals Office.

Day means calendar day unless otherwise specified by the Chief of the National Appeals Office. When computing any time period specified under these rules, count every day, including intermediate Saturdays, Sundays, and legal holidays. If the date that ordinarily would be the last day for filing with NAO falls on a Saturday, Sunday, or Federal holiday, or a day NAO is closed, the filing period will include the first NAO workday after that date.

Department or DOC means the Department of Commerce.

Initial Administrative Determination or IAD means a determination made by an official of the National Marine Fisheries Service that directly and adversely affects a person's ability to hold, acquire, use, or be issued a limited access privilege. The term also includes determinations issued pursuant to other federal law, for which review has been assigned to the National Appeals Office by the Secretary.

NAO means the National Appeals Office, an adjudicatory body within the Office of Management and Budget, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce. The term generally means all NAO personnel, including appellate officers.

NAO case record means the agency record and all additional documents and other materials related to an appeal and maintained by NAO in a case file.

NMFS means the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce.

National Oceanic and Atmospheric Administration or NOAA means the National Oceanic and Atmospheric Administration, Department of Commerce.

Party means a person who files a petition for appeal with NAO and an office that issued the IAD if that office participates in the NAO appeal.

Regional Administrator means the administrator of one of five regions of NMFS: Northeast, Southeast, West Coast, Alaska, or Pacific Islands. The term also includes an official with similar authority within the DOC, such as the Director of NMFS Office of Sustainable Fisheries.

Representative means an individual properly authorized by an appellant in writing to act for the appellant in conjunction with an appeal pending in NAO. The representative does not need to be a licensed attorney.

§ 906.3 Requesting an appeal and agency record.

(a) *Who may file.* Any person who is the named recipient of an initial administrative determination.

(b) *Petition to appeal.* (1) To request an appeal, a person shall submit a written petition of appeal to NAO.

(2) The petition shall include a copy of the initial administrative determination the person wishes to appeal.

(3) In the petition, the person shall state how the initial administrative determination directly and adversely affects him or her, why he or she believes the initial administrative determination is inconsistent with the law and regulations governing the initial administrative determination, and whether he or she requests a hearing or prefers that an appellate officer make a decision based on the NAO case record and without a hearing.

(i) Arguments not raised by the person in his or her petition to appeal will be deemed waived unless NAO permits amendments to the petition based on good cause for not raising the arguments in the original petition.

(ii) The petition may include additional documentation in support of the appeal.

(4) If a person requests a hearing, the written request must include a concise statement raising genuine and substantial issues of a material fact or law that cannot be resolved based on the documentary evidence.

(5) In the petition, a person shall state whether the person has a representative,

and if so, the name, address, and telephone number for the representative.

(c) *Address of record.* In the petition, the person shall identify the address of record. Documents directed to the appellant will be mailed to the address of record, unless the appellant provides NAO and other parties with any changes to his or her address in writing.

(1) The address of record may include a representative's address.

(2) NAO bears no responsibility if the appellant or his or her representative does not receive documents because appellant or his or her representative changed his or her address and did not notify NAO.

(3) NAO bears no responsibility if the appellant or his or her representative fails to retrieve documents upon notification from the United States Postal Service or commercial carrier.

(4) NAO will presume that documents addressed to an address of record and properly mailed or given to a commercial carrier for delivery are received.

(d) *Place of filing.* The petition must be transmitted via facsimile. The facsimile number is: 301-713-2384. If the person filing the petition does not have access to a fax machine, he or she may file the petition by mail or commercial carrier addressed to Chief, National Appeals Office, 1315 East-West Hwy., Silver Spring, MD 20910.

(e) *Time limitations.* (1) A petition must be filed within 45 days after the date the initial administrative determination is issued unless a shorter or longer filing timeframe is explicitly specified in the regulations governing the initial administrative determination.

(2) A person may not request an extension of time to file a petition to appeal.

(f) *Agency record.* (1) Within 20 days of receipt of the copy of the petition to appeal, the office that issued the initial administrative determination that is the subject of the appeal shall transmit the agency record to NAO.

(2) The office that issued the initial administrative determination shall organize the documents of the agency record in chronological order. Pages attached to a primary submission shall remain with the primary submission.

(g) *Agency participation in appeal.* Within 20 days of receipt of the copy of the petition to appeal, the office that issued the initial administrative determination that is the subject of the appeal may provide written notice to NAO that it will be a party to the appeal. An office issuing the initial administrative determination is not required to be a party.

§ 906.4 General filing requirements.

(a) *Date of filing.* Filing refers to providing documents to NAO.

(1) Except for the agency record required under § 906.3(f), all documents filed on behalf of an appellant or related to an appeal shall be submitted to NAO via facsimile. The facsimile number is: 301-713-2384. If the person filing does not have access to a fax machine, he or she may file by regular mail or commercial carrier addressed to Chief, National Appeals Office, 1315 East-West Hwy., Silver Spring, MD 20910.

(2) A document transmitted to NAO is considered filed upon receipt of the entire submission by 5 p.m. Eastern Time at NAO.

(b) *Copies.* At the time of filing a submission to NAO, the filing party shall serve a copy thereof on every other party, unless otherwise provided for in these rules.

(c) *Retention.* All submissions to NAO become part of a NAO case record.

(d) *Extension of time.* When a submission is required to be filed at NAO by a deadline, a party may request, in writing, an extension of time to file the submission, citing the specific reason(s) for the need for an extension. NAO may grant one extension of up to 30 days if an appellate officer determines the party has established good cause for an extension of time, taking into account whether the party timely requested the extension or the extent to which the party missed the deadline.

§ 906.5 Service.

(a) Service refers to providing documents to parties to an appeal.

(1) Service of documents may be made by first class mail (postage prepaid), facsimile, or commercial carrier, or by personal delivery to a party's address of record.

(2) Service of documents will be considered effective upon the date of postmark (or as otherwise shown for government-franked mail), facsimile transmission, delivery to a commercial carrier, or upon personal delivery.

(b) A party shall serve a copy of all documents to all other parties and shall file a copy of all documents with NAO the same business day.

(c) NAO may serve documents by electronic mail.

§ 906.6 Ex parte communications.

(a) *Ex parte communication* means any oral or written communication about the merits of a pending appeal between one party and the NAO with respect to which reasonable prior notice to all parties is not given. However, ex parte communication does not include

inquiries regarding procedures, scheduling, and status.

(b) Ex parte communication is not permissible unless all parties have been given reasonable notice and an opportunity to participate in the communication.

(c) If NAO receives an ex parte communication, NAO shall document the communication and any responses thereto in the NAO case record. If the ex parte communication was in writing, NAO shall include a copy of the communication in the NAO case record. If the ex parte communication was oral, NAO shall prepare a memorandum stating the substance of the oral communication, and include the memorandum in the NAO case record. NAO will provide copies of any such materials included in the NAO case record under this paragraph to the parties.

(d) NAO may require a party to show cause why such party's claim or interest in the appeal should not be dismissed, denied, disregarded, or otherwise adversely affected because of an ex parte communication.

(e) NAO may suspend this section during an alternative dispute resolution process established by regulation or agency policy.

(f) Communication with NAO, including appellate officers, concerning procedures, scheduling, and status is permissible.

§ 906.7 Disqualification of appellate officer.

(a) An appellate officer shall disqualify himself or herself if the appellate officer has a perceived or actual conflict of interest, a perceived or actual prejudice or bias, for other ethical reasons, or based on principles found in the American Bar Association Model Code of Judicial Conduct for Administrative Law Judges.

(b) Any party may request an appellate officer, at any time before the filing of the appellate officer's decision, to withdraw on the ground of personal bias or disqualification, by filing a written motion with the appellate officer setting forth in detail the matters alleged to constitute grounds for disqualification.

(c) The appellate officer, orally or in writing, shall grant or deny the motion based on the American Bar Association Model Code of Judicial Conduct for Federal Administrative Law Judges and other applicable law or policy. If the motion is granted, the appellate officer will disqualify himself or herself and withdraw from the proceeding. If the motion is denied, the appellate officer will state the grounds for his or her

ruling and proceed with his or her review.

§ 906.8 Scheduling and pre-hearing conferences.

(a) NAO may convene a scheduling and/or pre-hearing conference if, for example, an appellate officer in his or her discretion finds a conference will materially advance the proceeding.

(b) NAO shall notify the parties in writing 10 days prior to a conference unless the Chief of NAO orders a shorter period of time for providing notice of conducting a conference. A party may request one change in the scheduled pre-hearing date. In determining whether to grant the request, NAO will consider whether the requesting party has shown good cause for the change in date.

(c) In exercising his or her discretion whether to hold a scheduling and/or pre-hearing conference, an appellate officer may consider:

- (1) Settlement, if authorized under applicable law;
- (2) Clarifying the issues under review;
- (3) Stipulations;
- (4) Hearing(s) date, time, and location;
- (5) Identifying witnesses for the hearing(s);
- (6) Development of the NAO case record, and;
- (7) Other matters that may aid in the disposition of the proceedings.

(d) *Recording.* NAO may record the conference.

(e) *Format.* At the discretion of the appellate officer, conferences may be conducted by telephone, in person, or by teleconference or similar electronic means.

(f) NAO may issue a written order showing the matters disposed of in the conference and may include in the order other matters related to the appeal.

§ 906.9 Exhibits.

(a) The parties shall mark all exhibits in consecutive order in whole Arabic numbers and with a designation identifying the party submitting the exhibit(s).

(b) Parties shall exchange all exhibits that will be offered at the hearing at least 10 days before the hearing.

(c) Parties shall provide all exhibit(s) to NAO at least 5 days before the hearing.

(d) NAO may modify the timeframe for exchanging or submitting exhibits if an appellate officer determines good cause exists.

(e) NAO may deny the admission into evidence of exhibits that are not marked and exchanged pursuant to this rule.

(f) Each exhibit offered in evidence or marked for identification shall be filed and retained in the NAO case record.

§ 906.10 Evidence.

(a) The Federal Rules of Evidence do not apply to NAO proceedings.

(b) An appellate officer will decide whether to admit evidence into the NAO case record.

(1) An appellate officer may exclude unduly repetitious, irrelevant, and immaterial evidence. An appellate officer may also exclude evidence to avoid undue prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence.

(2) An appellate officer may consider hearsay evidence.

(c) Copies of documents may be offered as evidence, provided they are of equal legibility and quality as the originals, and such copies shall have the same force and effect as if they were originals. If an appellate officer so directs, a party shall submit original documents to the appellate officer.

(d) An appellate officer may take official notice of Federal or State public records and of any matter of which courts may take judicial notice.

(e) An appellate officer may request, and the program office that issued the initial administrative determination in the case before the appellate officer will provide, the interpretation(s) of the law made by the program office and applied to the facts in the case.

§ 906.11 Hearing.

(a) *Procedures.* (1) An appellate officer in his or her discretion may order a hearing taking into account the information provided by an appellant pursuant to § 906.3(b)(3) and whether an appellate officer considers that a hearing will materially advance his or her evaluation of the issues under appeal. In exercising his or her discretion, an appellate officer may consider whether oral testimony is required to resolve a material issue of fact, whether oral presentation is needed to probe a party's position on a material issue of law, and whether a hearing was held previously for the same appeal. If an appellate officer determines that a hearing is not necessary, then the appellate officer will base his or her decision on the NAO case record. In the absence of a hearing an appellate officer may, at his or her discretion, permit the parties to submit additional materials for consideration.

(2) If an appellate officer convenes a hearing, the hearing will be conducted in the manner determined by NAO most likely to obtain the facts relevant to the matter or matters at issue.

(3) NAO shall schedule the date, time and place for the hearing. NAO will notify the parties in writing of the hearing date, time and place at least 10

days prior to the hearing unless the Chief of NAO orders a shorter period for providing notice or conducting the hearing. A party can request one change in the scheduled hearing date. In determining whether to grant the request, NAO will consider whether the requesting party has shown good cause for the change in date.

(4) At the hearing, all testimony will be under oath or affirmation administered by an appellate officer. In the event a party or a witness refuses to be sworn or refuses to answer a question, an appellate officer may state for the record any inference drawn from such refusal.

(5) An appellate officer may question the parties and the witnesses.

(6) An appellate officer will allow time for parties to present argument, question witnesses and other parties, and introduce evidence consistent with § 906.10.

(7) Parties may not compel discovery or the testimony of any witness.

(b) *Recording.* An appellate officer will record the hearing unless the appellant consents to proceed without a recording.

(c) *Format.* At the discretion of NAO, hearings may be conducted by telephone, in person, or by teleconference or similar electronic means.

§ 906.12 Closing the evidentiary portion of the NAO case record.

(a) At the conclusion of the NAO proceedings, an appellate officer will establish the date upon which the evidentiary portion of the NAO case record will close. Once an appellate officer closes the evidentiary portion of the NAO case record, with or without a hearing, no further submissions or argument will be accepted into the NAO case record.

(b) NAO in its discretion may reopen the evidentiary portion of the NAO case record or request additional information from the parties at any time prior to final agency action.

§ 906.13 Failure to appear.

If any party fails to appear at a pre-hearing conference or hearing after proper notice, an appellate officer may:

(a) Dismiss the case, or;
(b) Deem the failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision based on the NAO case record.

§ 906.14 Burden of proof.

On issues of fact, the appellant bears the burden of proving he or she should prevail by a preponderance of the

evidence. Preponderance of the evidence is the relevant evidence in the NAO case record, considered as a whole, that shows that a contested fact is more likely to be true than not true. Appellant has the obligation to obtain and present evidence to support the claims in his or her petition.

§ 906.15 Decisions.

(a) After an appellate officer closes the evidentiary portion of the NAO case record, NAO will issue a written decision that is based on the NAO case record. In making a decision, NAO shall determine whether the appellant has shown by a preponderance of the evidence that the initial administrative determination is inconsistent with the law and regulations governing the initial administrative determination. In making a decision, NAO shall give deference to the reasonable interpretation(s) of applicable ambiguous laws and regulations made by the office issuing the initial administrative determination.

(b) NAO shall serve a copy of its decision upon the appellant and the Regional Administrator. NAO will not provide the case record to the Regional Administrator when issuing its decision.

§ 906.16 Reconsideration.

(a) Any party may file a motion for reconsideration of an NAO decision issued under § 906.15. The request must be filed with NAO within 10 days after service of NAO's decision. A party shall not file more than one motion for reconsideration of an NAO decision.

(b) The motion must be in writing and contain a detailed statement of an error of fact or law material to the decision. The process of reconsideration is not a forum for reiterating the appellant's objections to the initial administrative determination.

(c) Arguments not raised by a party in his or her motion for reconsideration of a decision will be deemed waived.

(d) In response to a motion for reconsideration, NAO will either:

(1) Reject the motion because it does not meet the criteria of paragraph (a) or (b) of this section; or

(2) Issue a revised decision and serve a copy of its revised decision upon the appellant and the Regional Administrator.

(e) At any time prior to notifying the Regional Administrator pursuant to § 906.17(a), the NAO may issue a revised decision to make corrections and serve a copy of its revised decision upon the appellant and the Regional Administrator.

§ 906.17 Review by the Regional Administrator.

(a) If NAO does not receive a timely motion for reconsideration pursuant to § 906.16(a), receives a timely motion and rejects it pursuant to § 906.16(d)(1), or issues a revised decision pursuant to § 906.16(d)(2) or (e), NAO will notify the Regional Administrator and the appellant, and provide a copy of the case record for its decision or revised decision to the Regional Administrator.

(b) In reviewing NAO's findings of fact, the Regional Administrator may only consider the evidentiary record including arguments, claims, evidence of record and other documents of record that were before NAO when it rendered its decision or revised decision.

(c) The Regional Administrator may take the following action within 30 days of service of NAO's notification and receipt of the case record under paragraph (a) of this section:

(1) Issue a written decision adopting, remanding, reversing, or modifying NAO's decision or revised decision.

(2) Issue a stay for no more than 90 days to prevent NAO's decision or revised decision from taking effect.

(d) The Regional Administrator must provide a written decision explaining why an NAO decision or revised decision has been remanded, reversed, or modified. Consistent with § 906.18(b), the Regional Administrator may, but does not need to, issue a written decision to adopt an NAO decision or revised decision.

(e) The Regional Administrator will serve a copy of any written decision or stay on NAO and the appellant.

§ 906.18 Final decision of the Department.

(a) The Regional Administrator's written decision to adopt, reverse, or modify an NAO decision or revised decision pursuant to § 906.17(c) is the final decision of the Department for the purposes of judicial review.

(b) If the Regional Administrator does not take action pursuant to § 906.17(c)(1), NAO's decision issued pursuant to § 906.15(a) or revised decision issued pursuant to § 906.16(d)(2) or (e) becomes the final decision of the Department for the purposes of judicial review 30 days after service of NAO's notification under § 906.17(a), or upon expiration of any stay issued by the Regional Administrator pursuant to § 906.17(c)(2).

(c) The office that issued the initial administrative determination shall implement the final decision of the Department within 30 days of service of the final decision issued pursuant to § 906.18(a), or within 30 days of the

decision becoming final pursuant to § 906.18(b), to the extent practicable.

[FR Doc. 2014-02565 Filed 2-5-14; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 110**

[Docket No. USCG-2012-0967]

RIN 1625-AA01

Anchorage Regulations: Pacific Ocean at San Nicolas Island, Calif.; Restricted Anchorage Areas

AGENCY: Coast Guard, DHS.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The U.S. Coast Guard is confirming the changes made to the restricted anchorage areas of San Nicolas Island, California. A direct final rule detailing the changes was published in the **Federal Register** on November 12, 2013, (78 FR 67300). We received no adverse comments in response to the direct final rule, therefore, the rule will go into effect as scheduled.

DATES: The effective date of the direct final rule published on November 12, 2013, is confirmed as February 10, 2014.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Lieutenant Junior Grade Blake Morris, Waterways Management Branch, U.S. Coast Guard; telephone (510) 437-3801, email Blake.J.Morris@uscg.mil.

SUPPLEMENTARY INFORMATION: On November 12, 2013, we published a direct final rule and request for comment entitled, "Anchorage Regulations: Pacific Ocean at San Nicolas Island, Calif.; Restricted Anchorage Areas" in the **Federal Register** (78 FR 67300). That rule announced our intent to amend the restricted anchorage areas of San Nicolas Island, California, by removing the west area anchorage restriction and decreasing the size of the east area anchorage restriction.

In the direct final rule we notified the public of our intent to make the rule effective on February 10, 2014, unless an adverse comment, or notice of intent to submit an adverse comment, was received on or before January 13, 2014. We did not receive any adverse comments or notices of intent to submit an adverse comment on the rule. Therefore, under 33 CFR 1.05-55(d), we

now confirm that the amendments to the restricted anchorage areas of San Nicolas Island, California, will become effective, as scheduled, on February 10, 2014.

Dated: January 16, 2014.

K.L. Schultz,

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

[FR Doc. 2014-02214 Filed 2-5-14; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 117**

[Docket No. USCG-2014-0028]

Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Galveston, TX

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the operation of the Galveston Causeway Railroad Vertical Lift Bridge across the Gulf Intracoastal Waterway, mile 357.2 west of Harvey Locks, at Galveston, Galveston County, Texas. The deviation is necessary in order to conduct repairs to the bridge. These repairs are essential for the continued safe operation of the bridge. This deviation allows the bridge to remain temporarily closed to navigation for three hours in the morning and three hours in the afternoon with an opening in the middle of the day to allow for the passage of vessels.

DATES: This deviation is effective from 8 a.m. to 3:30 p.m. on Thursday, February 27, 2014.

ADDRESSES: The docket for this deviation, [USCG-2014-0028] is available at <http://www.regulations.gov>. Type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this deviation. You may also visit the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email David Frank, Bridge Administration Branch, Coast

Guard; telephone 504-671-2128, email David.M.Frank@uscg.mil. If you have questions on viewing the docket, call Cheryl F. Collins, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION: The BNSF Railway Company requested a temporary deviation from the operating schedule on the Galveston Causeway Railroad Vertical Lift Bridge across the Gulf Intracoastal Waterway, mile 357.2 west of Harvey Locks, at Galveston, Galveston County, Texas.

The bridge has a vertical clearance of 8 feet above mean high water, elevation 3.0 feet NAVD88, in the closed-to-navigation position and 73 feet above mean high water in the open-to-navigation position. In accordance with 33 CFR 117.5, the draw shall open on signal for the passage of vessels.

This temporary deviation allows the vertical lift bridge to remain closed to navigation from 8 a.m. until 11 a.m. and from 12:30 p.m. to 3:30 p.m. on Thursday, February 27, 2014. During this time, the bridge owner will troubleshoot the bridge to attempt to correct a popping noise when trains cross the bridge.

Navigation at the site of the bridge consists mainly of tows with barges and some recreational pleasure craft. Due to prior experience, as well as coordination with waterway users, it has been determined that this closure will not have a significant effect on these vessels. No alternate routes are available.

In accordance with 33 CFR 117.35, the draw bridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation.

This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: January 27, 2014.

David M. Frank,
Bridge Administrator.

[FR Doc. 2014-02577 Filed 2-5-14; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 211

Real Estate Activities of the Corps of Engineers in Connection With Civil Works Projects

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Direct final rule.

SUMMARY: The U.S. Army Corps of Engineers is rescinding its regulation addressing Real Estate Activities of the Corps of Engineers in Connection with Civil Works Projects. Each rescinded section is obsolete, exempt from publication, or otherwise covers internal agency operations that have no public compliance component or adverse public impact. Regulations governing internal agency operations can be found on file with the agency.

DATES: This rule is effective April 7, 2014 without further notice, unless the Corps receives adverse comment by March 10, 2014. If we receive such adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: You may submit comments, identified by docket number COE-2014-0001, by any of the following methods:

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

Email: tom.angel@usace.army.mil.

Include the docket number, COE-2014-0001, in the subject line of the message.

Mail: Department of the Army, U.S. Army Corps of Engineers, ATTN: CECC-R (Tom Angel), 441 G Street NW., Washington, DC 20314-1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE-2014-0001. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through www.regulations.gov or email. The www.regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend 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 we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to www.regulations.gov. All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Mr. J. Thomas Angel at (202) 761-7426 or by email at tom.angel@usace.army.mil.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Army Corps of Engineers is rescinding 33 CFR Part 211, Real Estate Activities of the Corps of Engineers in Connection with Civil Works Projects. Each rescinded section is obsolete, exempt from publication, or otherwise covers internal agency operations that have no public compliance component or adverse public impact. Regulations governing internal agency operations can be found on file with the agency.

Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, regarding plain language, this preamble is written using plain language. The use of "we" in this rule refers to the Corps and the use of "you" refers to the reader. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

This action does not impose any new information collection burden under the provisions of the Paperwork Production Act, 44 U.S.C. 3501 et seq. Therefore, this action is not subject to the Paperwork Reduction Act.

Executive Order 12866 and Executive Order 13563, "Improving Regulation and Regulatory Review"

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Corps must

determine whether the regulatory action is “significant” and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

Pursuant to the terms of Executive Order 12866, we have determined that this rule is not a “significant regulatory action” because it does not meet any of these four criteria.

Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.” The phrase “policies that have Federalism implications” is defined in the Executive Order to include regulations that 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.”

This rule does not have Federalism implications. We do not believe that this action will have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not impose new substantive requirements. In addition, this rule will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this rule.

Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, we believe that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the Corps to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was

not adopted. Before the Corps establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, they must have developed under Section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. This rule removes regulations that are obsolete, exempt from publication, or otherwise cover internal agency operations that have no public compliance component or adverse public impact. This rule does not impose new substantive requirements and therefore does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, this rule is not subject to the requirements of Section 203 of UMRA.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs us to use voluntary consensus standards in our regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, we did not

consider the use of any voluntary consensus standards.

Executive Order 13045

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

This rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this rule.

Environmental Documentation

This action will not have any adverse environmental impact and therefore environmental documentation under the National Environmental Policy Act is not required for this rule.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin. This rule is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts.

Executive Order 13211

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 33 CFR Part 211

Claims, Flood control, Public lands, Real property acquisition, Reservoirs, Rights-of-way, Waterways.

Dated: January 31, 2014.

Scott Whiteford,

Director of Real Estate.

PART 211—[REMOVED]

For the reasons set out in the preamble, under the authority of 5

U.S.C. 301, the Corps amends 33 CFR chapter II by removing part 211.

[FR Doc. 2014-02604 Filed 2-5-14; 8:45 am]

BILLING CODE 3720-58-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2012-0746; FRL-9902-49-Region 8]

Approval and Promulgation of Implementation Plans; Utah; Revisions to Utah Rule R307-107; General Requirements; Breakdowns

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving changes to Utah's rule R307-107, which pertains to source emissions during breakdowns. Utah's prior version of rule R307-107 had several deficiencies related to the treatment of excess emissions from sources during malfunction events. On April 18, 2011, EPA finalized a rulemaking which found that the Utah State Implementation Plan (SIP) was substantially inadequate to attain or maintain the national ambient air quality standards (NAAQS) or to otherwise comply with the requirements of the Clean Air Act (CAA) because it included rule R307-107. Concurrent with this finding, EPA issued a SIP call that required the State to revise its SIP by either removing R307-107 or correcting its deficiencies, and to submit the revised SIP to EPA by November 18, 2012. On August 16, 2012, the State submitted to EPA revisions to R307-107. EPA is approving these revisions because they correct the identified SIP deficiencies concerning the treatment of excess emissions during malfunctions and, therefore, satisfy EPA's April 18, 2011 SIP call. This final approval eliminates all potential clocks for sanctions and for EPA to promulgate a federal implementation plan (FIP) related to the April 18, 2011 SIP call.

DATES: This final rule is effective March 10, 2014.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2012-0746. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as

copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Adam Clark, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-7104, clark.adam@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
- II. Response to Comments
- III. Final Action
- IV. Statutory and Executive Order Reviews

Definitions

For the purpose of this document, the following definitions apply:

- i. The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
- ii. The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.
- iii. The initials *FIP* mean or refer to federal implementation plan.
- iv. The initials *NAAQS* mean or refer to National Ambient Air Quality Standards.
- v. The initials *NESHAPS* mean or refer to National Emission Standards for Hazardous Air Pollutants.
- vi. The initials *NSPS* mean or refer to New Source Performance Standards.
- vii. The initials *SIP* mean or refer to state implementation plan.
- viii. The words *State* or *Utah* mean the State of Utah, unless the context indicates otherwise.
- ix. The initials *UDAQ* mean or refer to the Utah Division of Air Quality, Utah Department of Environmental Quality.

I. Background

On April 18, 2011, EPA published a final rulemaking in the **Federal Register** (76 FR 21639) that found that the Utah SIP was substantially inadequate to attain or maintain the NAAQS or to otherwise comply with the requirements of the CAA because it included rule R307-107. As explained in more detail

in that rulemaking, we evaluated R307-107 to determine whether it was consistent with CAA requirements for SIP provisions. EPA's longstanding interpretation of CAA requirements applicable to SIP provisions related to the treatment of excess emissions during startup, shutdown, and malfunction (SSM) events is reflected in a series of EPA guidance documents and rulemaking actions. In particular, we explained that R307-107: (1) Did not treat all exceedances of SIP and permit limits as violations; (2) could have been interpreted to grant the Utah executive secretary exclusive authority to decide whether excess emissions constituted a violation; and (3) improperly applied to Federal technology-based standards such as New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS). We concluded that R307-107 undermined EPA's, Utah's, and citizens' ability to enforce emission limitations that have been relied on in the SIP to ensure attainment and maintenance of the NAAQS or meet other CAA requirements. 76 FR 21640, April 18, 2011. The failure to meet fundamental CAA requirements for SIP provisions rendered R307-107 substantially inadequate.

Accordingly, we issued a SIP call under CAA sections 110(a)(2)(H) and 110(k)(5) which required the State to revise its SIP by either removing R307-107 or correcting its deficiencies, and to submit the revised SIP to us by November 18, 2012. *Id.* We also explained that if the State failed to submit a complete SIP revision by November 18, 2012, or if we disapproved a submitted SIP revision intended to address the deficiencies identified in the SIP call, clocks would be triggered for mandatory sanctions and for EPA to promulgate a FIP. *Id.* at 21640-41.

On June 17, 2011, U.S. Magnesium challenged our finding of substantial inadequacy and SIP call in the United States Court of Appeals for the 10th Circuit. In particular, U.S. Magnesium argued that we had failed to base the finding of substantial inadequacy on specific factual findings concerning the impacts of the excess emissions that occurred during the events affected by the deficient SIP provision on attainment and maintenance of the NAAQS. On August 6, 2012, the 10th Circuit upheld EPA's finding of substantial inadequacy and SIP call.

On August 16, 2012, the State submitted to EPA revisions to R307-107 for the purpose of correcting the deficiencies described in the SIP call. In this SIP revision, the State specifically

eliminated the exemption for excess emissions during malfunction events that was inconsistent with fundamental requirements of the CAA for emission limitations in SIP provisions. The State likewise revised prior regulatory language that appeared to grant state personnel the exclusive authority to determine whether a violation had occurred, thereby precluding independent enforcement by EPA and citizens if the State made a non-violation determination. As revised, R307-107 now only pertains to the State's exercise of its own enforcement discretion in the case of violations that occur due to excess emissions during malfunctions, and that exercise of discretion by the State will have no bearing upon potential enforcement by EPA or citizens. The State's August 16, 2012, SIP submission thus eliminated the deficiencies in R307-107 and made it consistent with fundamental CAA requirements for SIP provisions applicable to excess emissions during malfunction events. Accordingly, we proposed to approve the State's revisions on May 9, 2013. 78 FR 27165.

II. Response to Comments

We received one comment letter on our proposed approval from the organizations Western Resource Advocates and Utah Physicians for a Healthy Environment. The letter primarily expressed support for our proposed approval, but requested that the State's revised R307-107 "include a requirement that any reports of excess emissions be posted on the Division of Air Quality Web site in a manner readily available to public review."

We acknowledge the commenters' support for our proposed action. Regarding the comment that the State's rule should require that reports of excess emissions be posted on the Utah Division of Air Quality (UDAQ) Web site, the commenters do not indicate whether they think the lack of such a requirement constitutes a deficiency under the CAA that warrants our disapproval of the rule now, or whether they would like the State to revise the rule in the future to provide for such posting. The totality of the commenters' letter suggests that they would like us to approve revised R307-107 now.

Regardless of the commenters' intent, we do not find that the revised rule's lack of such a requirement for posting of excess emissions reports on a State Web site requires our disapproval of the revised rule. The commenters have not specified, and we are not aware of, a CAA or regulatory provision that specifically requires a state to post excess emissions reports on an internet

Web site in order to meet SIP requirements. CAA section 110(a) generally requires that SIP provisions be legally and practicably enforceable, but such requirements long predate the advent of the internet. CAA section 110(a)(2)(F) only requires that emissions reports be available at reasonable times for public inspection. So long as the information in these reports is treated as emissions data, available to the public by other means, posting the reports on the internet is not necessary. While we agree that it may be helpful for a state to post such reports on a Web site, at this time we do not interpret CAA section 110(a) as requiring it. Were the State to revise R307–107 to include such a requirement for posting of excess emissions reports on a State Web site, however, this could serve to strengthen and enhance compliance with applicable SIP emission limits.

We find that the revised R307–107 submitted by the State addresses the deficiencies we identified in our April 18, 2011 SIP call and, consistent with CAA section 110(l), our approval of the revised rule will not interfere with any applicable requirement of the CAA. Our approval of the revised rule will enhance the State's, our, and citizens' ability to enforce the Utah SIP.

III. Final Action

For the reasons discussed in our notice of proposed rulemaking (78 FR 27165) and in our response to comments, we are approving the revisions to rule R307–107 of the Utah SIP that the State submitted to us on August 16, 2012. We are approving these revisions because they correct the deficiencies identified in our April 18, 2011 SIP call. We wish to emphasize one point we discussed in our notice of proposed rulemaking. Revised R307–107 only addresses the State's exercise of its enforcement discretion and contains no language that suggests that a State decision not to pursue an enforcement action for a particular violation bars EPA or citizens from taking an enforcement action. Therefore, EPA interprets revised R307–107, consistent with EPA's interpretations of the CAA, as not barring EPA and citizen enforcement of violations of applicable requirements when the State decides not to undertake enforcement.

This approval eliminates all potential clocks for mandatory sanctions and for EPA to promulgate a FIP related to the April 18, 2011 SIP call.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 7, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2) of the Clean Air Act.)

List of Subjects in 40 CFR Part 52

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

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

Dated: October 23, 2013.

Howard M. Cantor,

Acting Regional Administrator, Region 8.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart TT—[AMENDED]

- 2. Section 52.2320 is amended by adding paragraph (c)(74) to read as follows:

§ 52.2320 Identification of plan.

* * * * *

(c) * * *

(74) On August 16, 2012 the State of Utah submitted as a SIP revision a

revised version of its breakdown rule, Utah Administrative Code (UAC) R307-107, which replaces the prior version of UAC R307-107.

(i) Incorporation by reference.

(A) Title R307 of the Utah Administrative Code, *Environmental Quality, Air Quality*, Rule R307-107, *General Requirements: Breakdowns*. Effective July 31, 2012; as published in the Utah State Bulletin on March 1, 2012, modified on July 1, 2012, and August 15, 2012. Note: The August 15, 2012 publication contains a typographical error in the title of Rule R307-107.

[FR Doc. 2014-02079 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2012-0300; FRL-9903-27-Region 8]

Approval and Promulgation of State Implementation Plans; Utah: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving revisions to the Utah State Implementation Plan (SIP) relating to regulation of Greenhouse Gases (GHGs) under Utah's Prevention of Significant Deterioration (PSD) program and other SIP provisions. These revisions were submitted to EPA on April 14, 2011 by the Governor. The GHG-related SIP revisions are designed to align Utah's regulations with the GHG emission thresholds established in EPA's "PSD and Title V Greenhouse Gas Tailoring Final Rule," which EPA issued by notice dated June 3, 2010. In today's action, EPA is approving the GHG (as it relates to the PSD program) revisions because the Agency has determined that this SIP revision, which is already adopted by Utah as a final effective rule, is in accordance with the Clean Air Act (CAA or Act) and EPA regulations regarding PSD permitting for GHGs.

DATES: This final rule is effective March 10, 2014.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R08-OAR-2012-0300. All documents in the docket are listed in the www.regulations.gov

index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop St., Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jody Ostendorf, Air Program, Mailcode 8P-AR, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop St., Denver, Colorado 80202-1129, (303) 312-7814, ostendorf.jody@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," or "our" refer to EPA.

Table of Contents

- I. Background for Our Final Action
- II. What final action is EPA taking?
- III. Statutory and Executive Order Reviews

I. Background for Our Final Action

The background for today's final rule and EPA's national actions pertaining to GHGs is discussed in detail in our September 5, 2013 proposal (see 78 FR 54602). The comment period was open for 21 days and we received no written comments. However, we did receive a phone call of clarification from the State of Utah, which is explained below and documented in a Memo to the Docket dated September 30, 2013.

II. What final action is EPA taking?

Utah has adopted and submitted regulations that are substantively similar to the federal requirements for the permitting of GHG-emitting sources subject to PSD. As presented in our proposed notice, we conclude that the revisions are consistent with the requirements of 40 CFR 51.166, in particular the requirements set out in EPA's final GHG Tailoring Rule, and that the revisions should be approved into Utah's SIP.

R307-401-9 (Small Source Exemption), was revised by the State to exclude sources from the requirement to obtain an approval order if their GHG emissions are below the thresholds established by EPA, and adopted into the State rules (R307-401-9(5)).

Therefore, preconstruction permits for GHGs are only required under the PSD permitting program, thus exempting minor sources from GHG permitting. We are approving the rule amendment as submitted by the State and this revision.

R307-405-3 (Definitions), was also revised by the State to amend the definition of "subject to regulation" to include "greenhouse gases (GHGs)" as defined in 40 CFR 86.1818-12(a). R307-405-3 was modified to establish thresholds for permitting of GHGs under the PSD program. Definitions for the terms "GHGs", "emissions increase" and "tpy CO₂ equivalent emissions (CO₂e)", were added to this rule. Applicability thresholds for several different types of permitting scenarios were also added. Therefore, we are approving the state's additions to R307-405-3(9) as they are consistent with the federal rule provisions in 40 CFR 51.166(b)(48).

Our final review determines that there are eight provisions in the R307-405-3 in the State submittal that are identical in rule number and language to the definitions we approved in our July 15, 2011 approval (76 FR 41712) and we are approving these definitions as resubmitted. These provisions include: R307-405-3(1)(adopting by reference the definitions in 40 CFR 52.21(b) with exceptions as noted in the rules); R307-405-3(2)(c)(definition of "Reviewing Authority"); R307-405-3(2)(d)(definition of "Administrator"); R307-405-3(2)(e)(definitions or portions of definitions vacated by the DC Circuit Court of Appeals on March 17, 2006); R307-405-3(3)(definition of "Air Quality Related Values"); R307-405-3(4)(definition of "Heat Input"); R307-405-3(7)(definition of "Good Engineering Practice"); and R307-405-3(8)(definition of "Dispersion Technique").

We proposed to approve R307-405-3(2)(e) and indicated in our proposal that this is a new rule that is not currently in the SIP. The rule explains that "certain definitions or portions of definitions that apply to the equipment repair and replacement provisions are not incorporated into the SIP because these provisions were vacated by the DC Circuit Court of Appeals." Upon further research we found that we previously approved this rule in our final action on July 15, 2011 (76 FR 41712). Therefore, we are reapproving the resubmittal of this provision.

Additionally, in our proposed action we indicated there is a definition that had a new rule number, and upon further research we found that we had previously approved the definition with that rule number in our July 15, 2011

approval, R307-405-3(3)(definition of “Air Quality Related Values”). Therefore, we are reapproving the resubmittal of this provision.

We are not acting on four provisions in R307-405-3 because we took final action on these provisions on October 25, 2013 (78 FR 63883). Specifically, these provisions include: R307-405-3(2)(a)(definitions of “major source baseline area” and “minor source baseline area”); R307-405-3(b)(definition of “baseline area”); R307-403-3(f)(definition of “regulated NSR pollutant”).

We are not acting on rule provisions related to the Title V program. There are two specific definitions we are not acting on: R307-405-3(5)(definition of “Title V Permit”) and R307-405-3(6)(definition of “Title V Operating Permit Program”). The State also submitted R307-415-3 (all the definitions for the Operating Permit Program). We are not acting on these definitions and rule in this notice because approval of the Title V program revisions is handled separately and Title V is not part of the SIP.

Additionally, consistent with our June 12, 2013 proposal (78 FR 35181), we are disapproving the State’s submittal of R307-401-7 (Permit: New and Modified Sources, Public Notice), which was effective in the Utah Administrative Code on December 1, 2010.¹

Also consistent with our June 2013 proposal we are partially approving and partially disapproving R307-401-9 (Permit: New and Modified Sources, Small Source Exemption). We are approving R307-401-9(5), which excludes sources whose GHG emission are below established EPA thresholds for GHG from the requirement to obtain an Approval Order. However, we are disapproving paragraph (b) and the portions of paragraph (c) that reference paragraph (b). We are disapproving R307-401-9(b) and the phrase “or (b)” in paragraph (c) because EPA lacks authority in an action on a SIP revision under CAA section 110 to approve

¹ As we explained in our June 12, 2013 notice of proposed rulemaking, R307-401-7 revised Utah’s public notice procedures to allow for a 10-day public comment period for an approval or disapproval order issued under R307-401-8. The rule allows for the public comment period to be increased to 30 days under certain conditions. We note that the public comment period for an approval or disapproval order currently in Utah’s federally approved SIP is 30 days. (See R307-1-3.1.3) Federal regulations for Public Availability of Information found at 40 CFR 51.161(b)(2) require at a minimum a 30-day public comment period for the permitting of a source, including minor source permits. In addition, the 30-day comment period is important to allow adequate opportunity for comment by other affected states, federal agencies, and the public.

provisions addressing hazardous air pollutants. Thus, we are disapproving these specific provisions.

Finally, we proposed to disapprove R307-405-3(2)(a)(i), consistent with our final action on July 15, 2011 (76 FR 41712), because it defines “Major Source Baseline Date” in a manner inconsistent with the federal definition. However, as the State explained to us in a phone call,² Utah removed the Major Source Baseline Date in a subsequent March 19, 2012 SIP submittal. In our October 25, 2013 final action (78 FR 63883) on that submittal, we incorporated into the SIP the required definition for State programs at 40 CFR 51.166(b)(14). Therefore, we are not taking action on the State’s definition of Major Source Baseline Date in this final action.

III. Statutory and Executive Order Reviews

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

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999); is not an economically significant regulatory action based on health or

² Information regarding the phone conversation with the State appears in the Docket in the Memo dated September 30, 2013.

safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 7, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations,

Reporting and recordkeeping requirements.

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

Dated: November 7, 2013.

Shaun L. McGrath,

Regional Administrator, Region 8.

For the reasons set forth above, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart TT—[AMENDED]

■ 2. Amend § 52.2320 by adding paragraph (c)(76) to read as follows:

§ 52.2320 Identification of plan.

* * * * *

(c) * * *

(76) On April 14, 2011 the State of Utah submitted revisions to its State Implementation Plan (SIP) that contained revised rules, submitted in their entirety, pertaining to regulation of Greenhouse Gases (GHGs) under the State's Prevention of Significant Deterioration (PSD) program.

(i) Incorporation by reference.

(A) Title R307 of the Utah Administrative Code (UAC), *Environmental Quality, Air Quality, R307-401, Permit: New and Modified Sources*, R307-401-9, *Small Source Exemption*, (5); and R307-405, *Permits: Major Sources in Attainment or Unclassified Areas (PSD)*, R307-405-3, *Definitions*, except (2)(a), (b), (f), (5), and (6); effective January 1, 2011, as published in the Utah State Bulletin on September 15, 2010 and December 15, 2010.

[FR Doc. 2014-02083 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2013-0395; FRL-9904-24-Region 8]

Approval and Promulgation of Air Quality Implementation Plans; Utah; Revisions to Utah Administrative Code—Permit: New and Modified Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to partially approve and partially disapprove State Implementation Plan (SIP) revisions submitted by the State of Utah on September 15, 2006. The September 15, 2006 revisions contain new, amended and renumbered rules in Utah Administrative Code (UAC) Title R-307 that pertain to the issuance of Utah air quality permits. The September 15, 2006 revisions supersede and entirely replace an October 9, 1998 submittal that initially revised provisions in Utah's air quality permit program, and partially supersede and replace a September 20, 1999 submittal. In this action, we are fully approving the SIP revisions in the September 15, 2006 submittal with the following exceptions: we are disapproving the State's rules R307-401-7 (Public Notice), R307-401-9(b) and portions of (9)(c) (Small Source Exemption), R307-401-12 (Reduction in Air Contaminants), and R307-410-5 (Documentation of Ambient Air Impacts for Hazardous Air Pollutants); we are limitedly approving and limitedly disapproving R307-410-6 (Stack Heights and Dispersion Techniques); and we are not acting on R307-101-2, R307-401-14, R307-401-15, and R307-401-16 for the reasons explained in this action. This action is being taken under section 110 of the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective March 10, 2014.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2013-0395. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kevin Leone, Air Program, Mailcode 8P-AR, Environmental Protection Agency, Region 8, 1595 Wynkoop

Street, Denver, Colorado 80202-1129, (303) 312-6227, or leone.kevin@epa.gov.

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The words *Minor NSR* mean NSR established under section 110 of the Act and 40 CFR 51.160.

(iv) The initials *NSR* mean new source review, a phrase intended to encompass the stationary source regulatory programs that regulate the construction and modification of stationary sources as provided under CAA section 110(a)(2)(C), CAA Title I, parts C and D, and 40 CFR 51.160 through 51.166.

(v) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Utah* mean the State of Utah, unless the context indicates otherwise.

I. Background

The CAA (section 110(a)(2)(C)) and 40 CFR 51.160 require states to have legally enforceable procedures in their SIPs to prevent construction or modification of a source if it would violate any SIP control strategies or interfere with attainment or maintenance of the national ambient air quality standards (NAAQS). Such minor new source review (NSR) programs are for pollutants from stationary sources that do not require Prevention of Significant Deterioration (PSD) or nonattainment NSR permits. A state may customize the requirements of its minor NSR program as long as the program meets minimum requirements.

On September 15, 2006, Utah submitted revisions to its minor source NSR program. The September 15, 2006 revisions supersede and entirely replace an October 9, 1998 submittal that initially revised provisions in Utah's air quality permit program, and partially supersede and replace a September 20, 1999 submittal that renumbered the provisions in the October 9, 1998 submittal. A cross-walk table comparing

the provisions from the October 9, 1998, September 20, 1999, and September 15, 2006 submittals is included in the docket for this action.

Utah's September 15, 2006 submittal: (1) Revised R307-101-2 (Definitions); (2) added a new section R307-401 (Notice of Intent and Approval Order); (3) added a new section R307-410 (Permits: Emission Impact Analysis); and (4) moved rules in State rule section R307-413 (Permit: Exemptions and Special Provisions) to R307-401.¹ The purpose of the September 15, 2006 submittal was to separate minor source permitting and modeling requirements from major source permitting and modeling requirements within Title R307.

On June 12, 2013 (78 FR 35181), we proposed to act on Utah's September 15, 2006 submittal, with the following exceptions: (1) R307-101-2 (Definitions); and (2) R307-401-14 (Used Oil Fuel Burned for Energy Recovery), R307-401-15 (Air Strippers and Soil Venting Projects), and R307-401-16 (*De minimis* Emissions From Soil Aeration Projects). As we explained in our notice of proposed rulemaking (78 FR 35183), we need not act on R307-101-2 as submitted on September 15, 2006, because on September 2, 2008, we approved a superseding version of R307-101-2 that Utah adopted on February 6, 2008. See 73 FR 51222. We need not act on R307-401-14 through 16 in this action because we previously acted on such provisions. See 77 FR 37859 (June 25, 2012) (notice of proposed rulemaking); notice of final rulemaking, signed October 19, 2012, copy included in the docket for this action.²

In our June 12, 2013 proposed action, we proposed to: (1) Approve R307-401-1 through 6, R307-401-8, R307-401-9 (except for paragraph (b) and the portions of paragraph (c) that reference paragraph (b)), R307-401-10 through 11, R307-401-13, R307-401-17 through 20; and R307-410-1 through 4; (2) disapprove R307-401-7, R307-401-9(b) and portions of 9(c) that reference 9(b), R307-401-12, and R307-410-5; and (3) partially approve and partially disapprove R307-410-6.³ We provided

a detailed explanation of the bases for our proposal. See 78 FR 35183-35188. We invited comment on all aspects of our proposal and provided a 30-day comment period. The comment period ended on July 12, 2013.

In this action, we are responding to the comments we received and taking final rulemaking action on the enumerated rules from the State's September 15, 2006 submittal.

II. Response to Comments

In response to our June 12, 2013 proposed rulemaking, we received one comment letter from Joro Walker and Rob Dubuc on behalf of Utah Physicians for a Healthy Environment and Western Resource Advocates (collectively "Utah Physicians"). In this section, we summarize their comments and provide our responses.

Comment: R307-401-1 Utah Physicians support EPA's proposal to approve this provision.

Response: We acknowledge receipt of this comment and the support for our approval.

Comment: R307-401-2 Utah Physicians take no position on EPA's proposal relative to this provision.

Response: We acknowledge receipt of this comment.

Comment: R307-401-3 Utah Physicians support EPA's proposal to approve this provision.

Response: We acknowledge receipt of this comment and the support for our approval.

Comment: R307-401-4 Utah Physicians support EPA's proposal to approve this provision with the following exception:

401-4(1), which currently states that "[a]ny control apparatus installed on an installation shall be adequately and properly maintained," should be revised to state: "[a]ny control apparatus installed on an installation shall be adequately and properly maintained and operated[.]" After all, unless a control apparatus is properly operated, maintenance is likely to be of little consequence.

Response: We conclude that the comment does not provide a basis for EPA to disapprove the regulation. While the language suggested by the commenters might strengthen the regulation, we find no basis to conclude that the language is required by the Act or our regulations. For example, CAA section 110(a)(2)(C) requires that the SIP include a program for the regulation of the modification and construction of any stationary source as necessary to assure the NAAQS are achieved. We do

and non-compliant rule provisions are not separable.

not find that the addition of the words "and operated" is necessary to assure the NAAQS are achieved. Similarly, our minor source NSR regulations, at 40 CFR 51.160 and 51.161 are relatively general in nature. They do not require that a state's minor source NSR regulations require any specific operation and maintenance procedures. Furthermore, to a substantial degree, it is the permit process itself, embodied in Utah's regulations, that provides the vehicle to identify and make enforceable specific measures necessary to protect the NAAQS. Any measures established through the SIP-approved permit process become federally enforceable, and specific emission limits are likely to be a more effective measure to ensure proper source operation than a general requirement to operate properly. We note, for example, that Utah's regulations include a requirement that sources meet BACT. See R307-401-8(1)(a). Finally, we think that the language "shall be adequately and properly maintained" could be interpreted broadly enough to include the ongoing operation of the control apparatus.

Comment: R307-401-5 Utah Physicians support EPA's proposal to approve this provision with the following two exceptions:

1. 40 CFR 160(c)(1) requires that the legal provisions in question "must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on . . . [t]he nature and amounts of emissions to be emitted by it or emitted by associated mobile sources." This requirement is missing from Rule 401-5.

2. 401-5 should include a requirement that the source identify, including by providing flow or process diagrams, the location and characteristics of each emission unit that is a part of the building, facility, structure, or installation. The rule should mandate that source provide the "[e]xpected composition and physical characteristics of [the] effluent stream both before and after treatment by any control apparatus, including emission rates, volume, temperature, air contaminant types, and concentration of air contaminants" for each emission unit. Without this information, the public is not in a position to provide meaningful comment on the adequacy of the proposed permits, particularly whether the permits will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of the NAAQS. Similarly, without this information, Utah is not in a position to determine whether the project will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of the NAAQS.

Response: 1. 40 CFR 51.160(c)(1) requires the state program to provide for the owner or operator of the building,

¹ Utah repealed R307-413 in 2006.

² Our notice of final rulemaking has not been published yet in the *Federal Register*.

³ It would have been more appropriate to say we were proposing to limitedly approve and limitedly disapprove R307-410-6. Limited approval/disapproval is the approach EPA has used historically where a rule provision meets some of the statutory and regulatory requirements and will strengthen the SIP, but does not meet all of the statutory and regulatory requirements, thus warranting disapproval. It is used in lieu of partial approval/partial disapproval where the compliant

facility, structure, or installation to submit “such information on . . . [t]he nature and amounts of emissions to be emitted by it or emitted by associated mobile sources . . . as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.” EPA concludes that R307–401 complies with this requirement. R307–401 applies to indirect sources as well as direct sources of pollution. R307–401–3(1)(a) and (b). R307–401–2 defines indirect source as “a building, structure, facility or installation which attracts or may attract mobile source activity that results in emission of a pollutant for which there is a national standard.” R307–401–5 requires any person subject to R307–401 to submit a notice of intent to the executive secretary. The notice of intent must include, among other things, “a description of the nature of the processes involved,” “the type and quantity of fuels employed,” the “[e]xpected composition and physical characteristics of [the] effluent stream both before and after treatment by any control apparatus, including emission rates, volume, temperature, air contaminant types, and concentration of air contaminants,” and “other information necessary to appraise the possible effects of the effluent.” R307–401–5(2)(a), (b), and (e). Finally, R307–401–5(k) requires that the notice of intent include “[a]ny other information necessary to determine if the proposed source or modification will be in compliance with Title R307.” As required by 40 CFR 51.160(c)(1), the language of R307–401–5 clearly requires the notice of intent to include information on the nature and amount of the proposed source’s emissions. Given that R307–401 specifically applies to indirect sources and requires them to submit notices of intent as well, we find that the language of R307–401–5 applies to information regarding the nature and amount of emissions from associated mobile sources as well. We also note that the requirement in 40 CFR 51.160(c)(1) is modified by the language following 40 CFR 51.160(c)(2), which reads, “as may be necessary to permit the State or local agency” to determine whether the construction or modification would violate the control strategy or interfere with attainment or maintenance of the NAAQS.

2. We do not agree that the regulation must explicitly require the information the commenters describe or that the lack of the desired specificity renders the regulation deficient. Neither the CAA nor our minor source NSR regulations specifically dictate the level of

specificity the commenters seek. We note, however, that the language of the State’s regulation is broad enough to encompass much of the type of information the commenters seek, and that the State often may need unit-by-unit information to properly conduct the required analysis. Also, the commenters have a voice through the State’s public participation process. If they believe more specific information is needed regarding a particular application, they can inform the State of their views. We conclude that R307–401–5 adequately addresses the requirements of 40 CFR 51.160(c)(1) and (2).

Comment: R307–401–6 Utah Physicians take no position on EPA’s proposal relative to this provision.

Response: We acknowledge receipt of this comment.

Comment: R307–401–7 Utah Physicians support EPA’s proposal to disapprove this provision.

Response: We acknowledge receipt of this comment and the support for our disapproval of this provision.

Comment: R307–401–8 Utah Physicians support EPA’s proposal to approve this provision with the following two exceptions:

1. 401–8(2), which currently states that the “approval order will require that all pollution control equipment be adequately and properly maintained.” As indicated above, proper operation of the equipment should also be required.

2. 401–8(4) is improper and does not adequately provide Utah with the opportunity to determine whether the project will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of the NAAQS. This is because approval of an initial stage may prevent the imposition of requirements on later stages that have been precluded by that initial construction, thereby biasing the outcome of the permitting process. For example, the completion of the initial stage may influence what is BACT for the subsequent stages.

Response: 1. For the reasons stated in our response to the comment above regarding R307–401–4(1), EPA disagrees that R307–401–8(2) is deficient or that disapproval is required.

2. EPA disagrees that 401–8(4) is improper and does not adequately provide Utah with the opportunity to determine whether a staged project will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of the NAAQS. All phases of a staged construction project are still required to submit a notice of intent, as outlined in R307–401–5, which provides the public and the State the opportunity to determine whether the

project will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of the NAAQS. In addition, R307–401–8(4) requires previous determinations under R307–401–8(1) and (2) to be reviewed and modified as appropriate prior to the commencement and construction of each individual phase of the proposed source or modification. This would allow the State the opportunity to review the most recent plans and information in order to determine the most appropriate control requirements during subsequent phases of the project.

Comment: R307–401–9 Utah

Physicians support EPA’s proposal to disapprove aspects of this provision. Utah Physicians disagree with EPA’s position that: “R307–401–9 contains a safeguard that a source shall no longer be exempt and is required to submit a notice of intent if its actual emissions exceed the thresholds listed in R307–401–9(1)(a).” The commenters state that R307–401–9 does not require the source to monitor or report actual emissions. Rather, under R307–401–9(3), the source need only provide: a description of the nature of the processes involved, equipment, anticipated quantities of materials used, the type and quantity of fuel employed and nature and quantity of the finished product; identification of expected emissions; estimated annual emission rates; any control apparatus used; and typical operating schedule. The commenters state that the rule does not require the reporting of actual emissions or specify that the information in the “registry” be updated, for example, annually. The commenters state that R307–401–9 does not give the state the opportunity to determine whether the project—or changes to the project—will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of the NAAQS.

Response: We disagree with the commenters that the provisions of the regulation that we are approving are not sufficient. Under our minor source NSR regulations, a state’s regulation must identify the types and sizes of facilities, buildings, structures, or installations which will be subject to review and must discuss the basis for determining which facilities will be subject to review. 40 CFR 51.160(e). We have reviewed the thresholds that Utah has established in R307–401–9 and the basis for those thresholds and determined they are reasonable based on a number of factors. See our proposal at 78 FR 35184–35185. In our proposal, we noted that an exempt source whose actual

emissions later exceed the thresholds would be required to submit a notice of intent. The State's registration program for sub-threshold minor sources will allow the State to track such sources to some degree. However, there is no requirement in our minor source NSR regulations that sources whom the State has appropriately determined should not be subject to review due to their small size must monitor and report actual emissions. Insisting on such action for such small sources would tend to defeat the purpose of the exemption and overwhelm the State with unnecessary information. Like numerous other standards and permitting requirements, sources are expected to self-determine whether they are subject to the applicable requirements of the regulation and comply with them. If a source ignores the requirements of the regulation, or erroneously concludes it is not subject to them, the source is subject to potential enforcement action. We are not convinced that the State is required to alter this approach for purposes of R307-401-9.

Comment: R307-401-10 Utah Physicians take no position on EPA's proposal relative to this provision.

Response: We acknowledge receipt of this comment.

Comment: R307-401-11 Utah Physicians take no position on EPA's proposal relative to this provision.

Response: We acknowledge receipt of this comment.

Comment: R307-401-12 Utah Physicians agree with EPA's proposal to disapprove this provision for the reasons EPA provides. Utah Physicians further note that the public must be provided with the opportunity to provide meaningful comment on the determination of whether the project does indeed reduce or eliminate air contaminants. Therefore, public notice should be required. Similarly, the public must be able to participate in the decision to modify any existing permit or to ensure that the reductions or eliminations are enforceable.

Response: We acknowledge receipt of this comment and the support for our disapproval of this provision.

Comment: R307-401-13 Utah Physicians agree with EPA's proposal to approve this provision.

Response: We acknowledge receipt of this comment and the support for our approval of this provision.

Comment: R307-401-18 Utah Physicians take no position on this provision.

Response: We acknowledge receipt of this comment.

Comment: R307-401-19 Utah Physicians support EPA's proposal to approve this provision.

Response: We acknowledge receipt of this comment and the support for our approval of this provision.

Comment: R307-401-20 Utah Physicians support EPA's proposal to approve this provision.

Response: We acknowledge receipt of this comment and the support for our approval of this provision.

Comment: R307-410 Utah Physicians support EPA's proposal to disapprove aspects of this rule for the reasons EPA states. In addition, Utah Physicians urge EPA to disapprove other aspects of this provision because they do not provide Utah with the opportunity to determine whether a project will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of the NAAQS. Utah has repeatedly maintained that sources in nonattainment areas do not need to undertake emission impact analysis and do not need to model the impact of any nonattainment pollution on the airshed. For example, Utah does not require a source located in a PM_{2.5} nonattainment area to model the impact of an increase in PM_{2.5} emissions. EPA must disapprove the rule so it can be rewritten to more clearly require modeling of emissions in nonattainment areas. EPA has always understood R307-410 to apply to all sources, including those in nonattainment areas, and has repeatedly indicated that emission impact analysis in nonattainment areas for nonattainment pollutants is required by the Clean Air Act. Without such modeling, Utah cannot ensure compliance with a nonattainment area control strategy and cannot determine whether there will be additional NAAQS exceedances or violations. Thus, R307-410 does not comply with 40 CFR 51.160 or the Clean Air Act and fails to protect human health and the environment from air pollution.

Response: We do not agree that disapproval of other aspects of R307-410 is warranted. EPA has recognized that the CAA provides states a broad degree of discretion in developing their minor source programs. EPA's regulations at 40 CFR 51.160(c) require that a source provide sufficient information on the nature and amount of its emissions and its location, design, construction, and operation to enable the state to determine whether the source will cause a violation of the control strategy or interfere with attainment or maintenance of a NAAQS. The Utah SIP requires a notice of intent

from each source above an exemption threshold describing the source's operation, location, control technology and emission stream, "including emission rates, volume, temperature, air contaminant types, and concentration of air contaminants." R307-401-5(1)-(2). The notice of intent must also provide additional permitting information complying with offset requirements for ozone in two counties (R307-401-5(2)(j)(v)) and for PM 10 in two counties (R307-401-5(2)(j)(vi)). This information enables the state to prevent violations of the control strategy or threats to attainment or reasonable further progress.

The commenters express concern with potential emissions increases related to growth in PM_{2.5} nonattainment areas. We do not read the CAA or our regulations as requiring modeling or impact analysis for every instance of minor source construction or modification, particularly in nonattainment areas, where it is generally assumed that any new emissions growth must be addressed to ensure attainment of the NAAQS. In our view, generally, the nonattainment area SIP will provide the more appropriate and more efficient venue to address minor source growth in nonattainment areas. The nonattainment area SIP will project minor source growth as part of any approvable attainment demonstration. Essentially, this should provide a buffer against future emissions growth from minor construction and modification projects. In the context of Utah's development of its PM_{2.5} SIPs, we have suggested that Utah either adopt an offset program, as it has done for PM₁₀, or a minor source growth tracking program to help ensure that such growth does not exceed the attainment demonstration's projections. We anticipate working with Utah regarding the details of either approach, or another effective approach.

We also note that the language of the State's minor NSR regulations is broad enough to allow the State to require modeling or other form of impact analysis for applications for minor construction or modification projects in nonattainment areas, if necessary. R307-401-5(2)(k) requires the notice of intent to include "[a]ny other information necessary to determine if the proposed source or modification will be in compliance with Title R307." We think it is reasonable to allow the State some flexibility in determining when such impact analysis may be necessary for minor construction or modification projects in nonattainment areas.

Comment: R307-410 Utah Physicians state that R307-410 conflicts with the Utah SIP, citing the following from Utah's PSD program, Section VIII:

"In addition to the PSD permitting program, Utah also requires new minor sources and minor modifications to all sources to apply best available control technology. R307-410 establishes modeling requirements to ensure that minor sources and modifications will not cause or contribute to a violation of the NAAQS."

The commenters state that "this provision is not limited to areas attaining the NAAQS and instead applies in locations where NAAQS are being violated, but where emissions may further contribute to that violation." Thus, the commenters assert that R307-410 does not comply with the Utah SIP.

Response: We understand Utah SIP Section VIII to apply to Utah's Prevention of Significant Deterioration (PSD) program, which applies in attainment areas, not nonattainment areas. Reading the quoted passage in the comment, we understand the language to be explaining that Utah requires best available control technology for minor sources as an additional requirement beyond what is required by the PSD program. Nothing in the language of the quoted passage indicates to us that Utah intended the language to modify the requirements of R307-410. We do not agree that R307-410 conflicts with this SIP language.

III. Changes From our Proposed Action and Basis for our Final Action

We have made one change from our proposed action. In our proposed action, we proposed to approve the provisions of R307-410, with the exception of R307-410-5, which we proposed to disapprove, and R307-410-6, which we proposed to partially approve and partially disapprove. In this final action, we are changing our proposed partial approval/partial disapproval of R307-410-6 to a limited approval/limited disapproval. This does not alter the intent behind our proposal, but changes the terminology and the approach to those that EPA has historically used when a provision meets some, but not all, of the statutory and regulatory requirements, approval of the provision would strengthen the SIP, and the compliant elements within the provision cannot be separated from the noncompliant elements.

We have fully considered the comments we received, and with the exception of the change noted above, have concluded that no changes from our proposal are warranted. Our action is based on an evaluation of Utah's rules

against the requirements of CAA section 110(a)(2)(C) and our minor source NSR regulations at 40 CFR 51.160 through 51.164. We have also applied CAA section 110(l) in our evaluation of any changes Utah made in its September 15, 2006 submittal to the prior SIP-approved version of its minor source NSR program. Section 110(l) provides that EPA shall not approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in CAA section 171), or any other applicable requirement of the CAA. This is particularly relevant to R307-401-9, which establishes de minimis thresholds below which sources need not obtain an approval order under R307-401. The State submitted a 110(l) demonstration for the de minimis thresholds contained in R307-401-9, and we evaluated that demonstration as part of our evaluation of Utah's rules.

We are approving those rules that meet the relevant requirements and disapproving those rules that do not meet the relevant requirements, or are not appropriate for inclusion in the SIP (the rules addressing hazardous air pollutants). Where a rule meets some requirements but not all, either we are partially approving and partially disapproving the compliant and noncompliant portions of the rule or limitedly approving and limitedly disapproving the rule. We have concluded that R307-401-9's establishment of de minimis thresholds will not interfere with attainment or reasonable further progress toward attainment of any NAAQS, or any other CAA requirement. Thus, our partial approval of R307-401-9 is consistent with CAA section 110(l).

For a detailed description of the bases for our actions on the individual rules, please refer to our notice of proposed rulemaking (78 FR 35181) and our response to comments in section II of this action.

IV. Final Action

From Utah's September 15, 2006 submittal, we are approving the following rules or parts of rules: R307-401-1 through 6; R307-401-8; R307-401-9 (except for paragraph (b) and the portions of paragraph (c) that reference paragraph (b)); R307-401-10 through 11; R307-401-13; R307-401-17 through 20; and R307-410-1 through 4. We are disapproving the following rules or parts of rules: R307-401-7; R307-401-9(b) and the portions of 9(c) that reference 9(b); R307-401-12; and R307-410-5. We are limitedly approving and limitedly disapproving

R307-410-6—that is, we are approving this provision because it will strengthen the SIP but are simultaneously disapproving it because it does not fully comply with applicable requirements.

V. Statutory and Executive Orders Review

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

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

Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *April 7, 2014*. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

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

Dated: December 4, 2013.

Debra H. Thomas,

Acting Regional Administrator, Region 8.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart TT—[AMENDED]

■ 2. Section 52.2320 is amended by adding paragraph (c)(75) to read as follows:

§ 52.2320 Identification of plan.

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(c) * * *
(75) On September 15, 2006, the Governor submitted revisions to the Utah State Implementation Plan (SIP) permitting rules. The September 15, 2006 submittal contains new, amended and renumbered rules in Utah Administrative Code (UAC) Title R-307 that pertain to the issuance of Utah air quality permits. EPA is approving the following rules or parts of rules from the September 15, 2006 submittal: R307-401-1 through 6; R307-401-8; R307-401-9 (except for paragraph (b) and the portions of paragraph (c) that reference paragraph (b)); R307-401-10 through 11; R307-401-13; R307-401-17 through 20; and R307-410-1 through 4. EPA is disapproving the following rules or parts of rules from the September 15, 2006 submittal: R307-401-7; R307-401-9(b) and the portions of 9(c) that reference 9(b); R307-401-12; and R307-410-5. EPA is limitedly approving and limitedly disapproving R307-410-6 from the September 15, 2006 submittal—this means EPA is approving this rule because it will strengthen the SIP but is simultaneously disapproving it because it does not fully comply with applicable requirements. EPA is not acting on the revisions to UAC R307-101-2 because the revisions have been superseded by later revisions to the rule, which EPA approved at § 52.2320(c)(67) (see 73 FR 51222). EPA is not acting on R307-401-14 through 16 because EPA previously acted on such provisions (notice of final rulemaking signed October 19, 2012).

(i) Incorporation by reference.

(A) Title R307 of the Utah Administrative Code, *Environmental Quality, Air Quality*, Rule R307-401, *Permits: New and Modified Sources*, Rule R307-401-1, *Purpose*; Rule R307-401-2, *Definitions*; Rule R307-401-3, *Applicability*; Rule R307-401-4, *General Requirements*; Rule R307-401-5, *Notice of Intent*; Rule R307-401-6, *Review Period*; Rule R307-401-8, *Approval Order*; R307-401-9, *Small Source Exemption* except for R307-401-9(1)(b) and the phrase "or (b)" in R307-401-9(1)(c); Rule R307-401-10, *Source Category Exemptions*; Rule R307-401-11, *Replacement-in-Kind Equipment*; Rule R307-401-13, *Plantwide Applicability Limits*; Rule R307-401-17, *Temporary Relocation*; Rule R307-401-18, *Eighteen Month Review*; Rule R307-

401-19, *Analysis of Alternatives*; and Rule R307-401-20, *Relaxation of Limitations*. Title R307 of the Utah Administrative Code, *Environmental Quality, Air Quality*, Rule R307-410, *Permits: Emissions Impact Analysis*, Rule R307-410-1, *Purpose*; Rule R307-410-2, *Definitions*; Rule R307-410-3, *Use of Dispersion Models*; R307-410-4, *Modeling of Criteria Pollutant Impacts in Attainment Areas*; and R307-410-6, *Stack Heights and Dispersion Techniques*. Effective June 16, 2006, as published in the Utah State Bulletin on December 1, 2005, modified on April 1, 2006, and July 15, 2006. **Note:** The July 15, 2006 publication contains a typographical error in the title for Rule R307-410.

[FR Doc. 2014-02080 Filed 2-5-14; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 1039, 1042, and 1068

[EPA-HQ-OAR-2012-0102; FRL-9905-35-OAR]

RIN 2060-AR48; 2127-AL31

Nonroad Technical Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is adopting amendments to the technical hardship provisions under the Transition Program for Equipment Manufacturers related to the Tier 4 standards for nonroad diesel engines, and to the replacement engine exemption generally applicable to new nonroad engines. These provisions may have minor impacts on the costs and emission reductions of the underlying regulatory programs amended in this action, though in most cases these are simple technical amendments. For those provisions that may have a minor impact on the costs or benefits of the amended regulatory program, any potential impacts would be small and we have not attempted to quantify the potential changes.

DATES: This final rule is effective on March 10, 2014, except for § 1039.625(m) which will be effective on February 6, 2014.

FOR FURTHER INFORMATION CONTACT: Alan Stout, Environmental Protection Agency, Office of Transportation and Air Quality, Assessment and Standards Division, 2000 Traverwood Drive, Ann Arbor, Michigan 48105; telephone number: (734) 214-4805; email address: stout.alan@epa.gov.

SUPPLEMENTARY INFORMATION:

This action affects companies that manufacture or remanufacture nonroad

engines and equipment in the United

States. Regulated categories and entities include the following:

Category	NAICS Code ^a	Examples of potentially affected entities
Industry	333618	Manufacturers of new nonroad engines.
Industry	333111	Manufacturers of farm machinery.
Industry	333120	Manufacturers of construction equipment.
Industry	336611	Manufacturers of marine vessels.
Industry	811310	Engine repair, remanufacture, and maintenance.

Note:

^aNorth American Industry Classification System (NAICS)

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely covered by these rules. This table lists the types of entities that the agencies are aware may be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in the referenced regulations. You may direct questions regarding the applicability of this action to the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

I. Background

EPA published a direct final rule on June 17, 2013, to amend various aspects of the regulations that apply for heavy-duty highway engines and vehicles and for nonroad engines and equipment (78 FR 36370). For most of those changes, we did not receive adverse comment and most of the amendments became effective as published. We received adverse comments on certain amendments, which led us to withdraw those regulatory changes in a notice published August 16, 2013 (78 FR 49963).

On the same day that we published the direct final rule, we published a companion proposed rule that included all the content of the direct final rule (78 FR 36135). This final rule follows up on two broad areas from the proposed rule that were the subject of adverse comment—the replacement engine exemption for nonroad engines, and the technical hardship and related provisions for nonroad diesel engine and equipment manufacturers transitioning to Tier 4 compliance.

II. Replacement Engine Exemption

In 1996, EPA adopted a provision allowing manufacturers in limited circumstances to produce new engines for replacing failed engines that are exempt from the requirement to be certified to current emission standards (61 FR 58102, November 12, 1996). With

this approach, manufacturers have been able to make new, exempt engines in cases where engines certified to current standards do not have the physical or performance characteristics needed to power equipment that was originally equipped with an older engine. Without this provision, some equipment owners would have been forced to prematurely scrap otherwise working equipment (sometimes worth millions of dollars) because no engine meeting current emission standards could be adapted for installation within the space occupied by the original engine.

EPA later amended the replacement engine exemption provisions to address complications related to producing partially complete engines for replacement purposes and to address the need to produce and sell replacement engines such that they would be available to operators with a critical need to avoid extended downtime in the case of engine failure (73 FR 59034, October 8, 2008). These revisions allowed manufacturers to sell a limited number of new, exempt replacement engines without taking the steps that would otherwise be required to document the need for the exemption and to arrange for the proper disposition of the old engine. The amendments also included anti-circumvention provisions to clarify the overall purpose of the replacement engine exemption in an attempt to prevent manufacturers and operators from using exempted engines in ways that were unnecessary and/or detrimental to the environment.

In the June 2013 direct final rule and companion proposed rule, EPA amended these provisions to remove the overly restrictive anti-circumvention provisions and replaced them with a variety of more specific conditions and requirements that were intended to more effectively ensure that the exemption would be used appropriately. We received adverse comment on some of the most recent amendments in § 1068.240(b). Based on these comments, we withdrew all the amendments to § 1068.240(a) through

(d), leaving intact the change to remove the anti-circumvention provisions in § 1068.240(g), with the understanding that we would revisit all the intended changes from § 1068.240(a) through (d) in this subsequent final rule.

EPA continues to believe that new, exempt replacement engines should be used only in cases where a currently certified engine cannot practically be installed to power the old equipment. EPA believes the proposed regulatory language in § 1068.240 serves this purpose without the unintended consequences described above associated with the anti-circumvention provisions. EPA expects manufacturers and operators following the regulations to continue to use the exemption provisions appropriately and not for the purpose of circumventing the emission standards. EPA is adding language to explicitly limit this provision to equipment that has been in service 40 years or less (at the point of installation) so that manufacturers and operators do not use this provision to keep older dirtier equipment in operation beyond its normal lifetime by continually using new, exempt engines to replace old engines. EPA has adopted a similar restriction for stationary engines under 40 CFR 60.4210(i), except that the maximum equipment age is 15 years for stationary engines. EPA will continue to monitor compliance with the amended exemption provisions and will consider any appropriate changes to the regulation in the future to ensure that the exemption is properly used toward this purpose. This 40-year limit does not apply for marine diesel engines, since those engines are subject to separate replacement engine provisions.

We included a 25-year limit in the proposed rule, but four commenters weighed in on this age limit. The California Air Resources Board stated that it did not oppose the proposal and appreciated the intent of the provision to ensure against older technology engines being available indefinitely. However, CARB did not believe it was necessary to incorporate the limit into

the California program because the state's in-use programs are expected to require fleet modernization for most nonroad applications well in advance of the proposed 25 year cut-off. The Northeast States for Coordinated In-Use Management supported the 25-year limit as a reasonable measure to address circumvention concerns. The National Groundwater Association objected to the 25-year limit, noting that their members have thousands of powered drilling units with an expected lifetime of 50 years or more. They stated that limiting access to the replacement engine exemption and thereby requiring operators to prematurely buy expensive new equipment would cause significant economic hardship. They acknowledged that a 40-year limit for groundwater drilling applications would be more appropriate. Case New Holland also described the potential for significant adverse impacts if the 25-year limit were applied to agricultural equipment; they favored simply removing the age specification but also stated that changing to a 40-year limit would provide substantial relief. As a result, we are replacing the proposed 25-year limit with a 40-year limit.

The "tracked option" specified in § 1068.240(b) also includes an additional step to qualify for the replacement engine exemption for equipment not experiencing premature engine failure. In particular, manufacturers would need to make a determination that the replacement engine is designed with the greatest degree of emission control that is available for the particular application (i.e., "cleanest available"). For example, consider an engine being replaced that was built before the Tier 1 standards started to apply and that engines of its power category are currently subject to Tier 4 standards. In addition to the exemption provision requiring the manufacturer to determine that a Tier 4 engine does not have the necessary physical or performance characteristics, the manufacturer must also consider whether any Tier 1, Tier 2, or Tier 3 engines are being produced with the appropriate physical and performance characteristics for replacing the old engine. If a Tier 3 engine is available with the appropriate physical and performance characteristics for a given installation, Tier 1 and Tier 2 engines emitting at levels above the Tier 3 standards would not qualify for an exemption for that equipment. This requirement to use the cleanest available engine fits with the intent of the amendments facilitating voluntary incentive programs involving

replacement engine upgrades toward the goal of reducing emissions from in-use equipment, but without imposing a requirement that would involve new technology development or impractical equipment design changes. A provision similar to this has already been in place for marine diesel engines in § 1042.615. In the case of equipment experiencing premature engine failure, we will continue to apply the simpler requirement that the replacement engine must meet emission standards that are the same as or better than the standards that applied to the old engine. We received no adverse comment on this provision.

We are also revising the provisions related to the disposition of the old engine in § 1068.240(b). The engine manufacturer making the exempt new replacement engine must take possession of the old engine or confirm that it has been destroyed. Although this is not a new requirement, we are including an additional new provision to explicitly allow the re-use of the old engine block, but to limit such re-use. Specifically, to be re-introduced into U.S. commerce, the old engine must either meet current emission standards or qualify for an exemption as if it were a new engine. For example, the old engine could be re-used as a replacement engine for a different piece of equipment under certain circumstances. Under this approach, an engine made with a used engine block and any mix of new or used additional parts would be treated in a consistent way. For example, the recycled replacement engine would be subject to all the demonstrations and documentation requirements of § 1068.240(b), or it could alternatively count toward the engine manufacturer's allowance to produce a limited number of exempt replacement engines under § 1068.240(c). For engines covered by the "tracked option" under § 1068.240(b) that are not re-introduced into U.S. commerce, the engine manufacturer making the new exempt engine must destroy the old engine or confirm that it has been destroyed. We note that destroying an engine means altering it so it can never be used again in any form as a working engine. However, we believe manufacturers will rarely choose to destroy an engine that could be remanufactured as a replacement engine under § 1068.240.

North American Repower provided comments describing their objection to the amendments related to the disposition of the engines being replaced. Their comments focused primarily on their desire for a steady source of old engine blocks to supply

their remanufacturing activities. However, their objection seems to be directed at the existing restriction rather than the proposed flexibility regarding the disposition of engine cores. The existing requirement for the engine manufacturer to take possession of the old engine (or confirm that it was destroyed) has never allowed replaced engines under the "tracked option" in § 1068.240(b) to be reused by other parties. This restriction was put in place in the past because the "tracked option" does not limit the number of exempt replacement engines a manufacturer may produce. Thus, it is important to restrict the re-use of these replaced engines so this option cannot be used to significantly increase the number of older-technology engines in use. To the extent that the provision in question has any impact on the availability of these engine cores, it can only make them more available. The revised regulations explicitly allow for re-use of the replaced engines if they are modified to meet current emission standards, or if they qualify for exemptions that apply for new engines. For example, a manufacturer taking possession of a replaced engine may remanufacture that engine in a certified configuration, or they may sell it as an exempt replacement engine if they take the steps and meet the conditions that apply under § 1068.240. The manufacturer may also sell the engine core to another remanufacturing company under the provisions of § 1068.262; such a transaction was not specifically authorized under the previous regulation. Additionally, we note that these provisions do not limit the ability of remanufacturing companies to recover engine cores from scrapped equipment or from engines replaced by used engines. Because of limits on producing exempt new replacement engines, it is likely that the number of these other engines will typically be much higher than the number of engines replaced with new exempt replacement engines under § 1068.240(b) in any given year. We are finalizing these provisions as proposed. Note that a more detailed discussion of North American Repower's comments can be found in the docket for this rulemaking.¹

EPA is also adding some clarification to the replacement engine regulations to address questions that have arisen, as well as making the following changes that did not receive adverse comment:

¹ Response to Comments from North American Repower Regarding Engine Core Recovery." EPA memo to Docket EPA-HQ-OAR-2012-0102 from Alan Stout, January 10, 2014.

- Revising the labeling requirements to account for the possibility of using a new replacement engine to replace a previously exempted replacement engine. To the extent that the revised label statement differs from that specified by California ARB, we would expect to approve an adjusted statement that allows for a single, 50-state label under § 1068.201(c).

- Adjusting the reporting deadline for untracked replacement engines under § 1068.240(c). This change would allow manufacturers some time after the end of the calendar year to make the determinations and to take the required steps to fulfill the tracking requirements for replacement engines under § 1068.240(b). Any engines for which these steps and determinations are incomplete by the deadline for the report would need to be counted as untracked replacement engines. Further, to account for prevailing practices and typical timelines for replacement engines, we are moving back the deadline for this annual report from February 15 to March 31.

- Adding language to allow manufacturers to redesignate their exempt replacement engines before submitting the annual report. The regulation already specifies that it is acceptable to qualify for a tracked exemption under § 1068.240(b), even if that wasn't the original plan, as long as all the applicable conditions and requirements are met. We are adding language to allow the converse as well. Specifically, if manufacturers plan to use a tracked exemption, but find in the end that they don't want to deal with the limitations on what can be done with the old engine (or if any of the other conditions or requirements are not met), they may count that as an untracked exemption for that reporting period.

- Revising § 1068.240(c)(1) to specify that manufacturers may base sales limits for the untracked option on total U.S. production of certified and exempted engines together (including stationary engines).

- Clarifying that the provisions in § 1068.240(d) related to partially complete engines also apply for "current-tier" replacement engines exempted under § 1068.240(e).

- Adding a statement to § 1042.615 for marine diesel engines to clarify our pre-determination that certified Tier 4 engines do not have the appropriate physical and performance characteristics for replacing older non-Tier 4 engines in marine vessels. This policy was established in our final rule from June 30, 2008 (see 73 FR 37157).

III. Nonroad Diesel Engine Technical Hardship Program

EPA adopted Tier 4 standards for nonroad diesel engines under 40 CFR part 1039 in 2004 (69 FR 38958, June 29, 2004). To meet these standards, engine manufacturers are pursuing development of advanced technologies, including new approaches for exhaust aftertreatment. Equipment manufacturers will need to modify their equipment designs to accommodate these new engine technologies and the corresponding changes to engine operating parameters (such as operating temperatures and heat rejection rates). To provide flexibility for equipment manufacturers in their efforts to respond to these engine design changes, the Tier 4 standards included the Transition Program for Equipment Manufacturers. Flexibilities allowed under this program include delaying compliance for small-volume equipment models for several years or using allowances in the first year to manage the transition to the Tier 4 engines. While a certain number of allowances are available to all companies, the regulation provides additional relief for nonroad diesel equipment manufacturers under certain limited circumstances we refer to as "technical hardship". EPA is amending this technical hardship program to facilitate EPA granting exemptions to address certain hardship circumstances that were not contemplated when the original 2004 final rule was published.

The Transition Program for Equipment Manufacturers is intended to allow nonroad equipment manufacturers wide discretion to manage their product development timeline. Equipment manufacturers may comply either based on a percent of their production (generally for high-volume manufacturers, as described in § 1039.625(b)(1)), or based on a maximum number of exempted pieces of equipment (generally for low-volume manufacturers, as described in § 1039.625(b)(2)). At the same time, the regulations include at § 1039.625(m) an acknowledgement that equipment manufacturers might face a wide range of circumstances, including cases where engine manufacturers might be late in providing compliant engines to nonintegrated equipment manufacturers, such that the specified allowances are insufficient to avoid a disruption in the equipment manufacturer's production schedule. The technical hardship provision at § 1039.625(m) allows EPA to make a judgment that an equipment manufacturer that buys engines from another company, through no fault of its

own, needs additional allowances to manage the transition to Tier 4 products. The regulation as originally adopted specifies a maximum allowance of 150 percent of a manufacturer's annual production (relative to § 1039.625(b)(1)), or a total of 1,100 allowances (relative to § 1039.625(b)(2)). The regulation also allows for economic hardship provisions under § 1068.255; however, that eligibility depends on manufacturers showing that their solvency is in jeopardy without relief. Economic hardship therefore serves as a flexibility provision of last resort.

As the compliance dates for the Tier 4 standards approach, equipment manufacturers have described scenarios where the technical hardship provisions are too restrictive for EPA to address their circumstances. For example, engine manufacturers have in some cases delayed delivery of Tier 4 engines until six or even twelve months after the Tier 4 standards start to apply, which is forcing equipment manufacturers to use up all their allowances under § 1039.625(b) in the first year of the new standards. Some equipment manufacturers have expressed the concern that engine manufacturers in some cases have chosen to take advantage of these program allowances for their own benefit, even though they were intended to provide relief to equipment manufacturers. Not only have there been cases in which engine manufacturers did not have certain engines ready for production when required by the standards, but there have also been cases in which engine manufacturers had not provided prototype engines or even dimensional drawings for certain engine models for equipment manufacturers to use to redesign their equipment. Whether or not this is the result of engine manufacturers acting in bad faith, it seems clear that this questionable planning by engine manufacturers has created the potential for significant hardship to some equipment manufacturers. Although at this point the maximum number of additional allowances available for EPA to grant under § 1039.625(m) would cover a good portion of the second year of the Tier 4 standards, we now understand that this too may be inadequate to allow equipment manufacturers to respond to the engine manufacturers' very late deliveries of compliant engines.

In these cases, the maximum allowable relief under § 1039.625(m) may be insufficient to allow equipment manufacturers to transition to meeting Tier 4 requirements without disrupting their ability to continue producing their equipment models. There have also

been cases where a company would meet the criteria to qualify for consideration for technical hardship under § 1039.625(m) except that the regulation disallowed technical hardship relief for all engines above 560 kW and provided only limited relief for engines above 37 kW. The regulation also provided only limited relief for companies that are not small businesses. In these cases, no additional relief was available under § 1039.625(m), which again would leave equipment manufacturers unable to continue producing their equipment models. To address these circumstances, we proposed to amend the Transition Program for Equipment Manufacturers in three ways to address these concerns.

First, we proposed to remove some of the qualifying criteria so that any non-vertically integrated equipment manufacturer may apply for technical hardship relief under § 1039.625(m) for any size engine, rather than limiting the technical hardship relief to small businesses and to engines within certain power categories. We believe it is more appropriate to rely on our discretion to evaluate each hardship application on its merits rather than automatically precluding hardship relief based on certain characteristics of the engine or the company. If hardship relief is not appropriate because of an engine's power rating or a company's size or financial standing, we would not approve such a request.

Second, we initially removed the maximum number of allowances we can approve under § 1039.625(m). We also removed the deadlines for exercising those additional allowances. Specifically, we adjusted the provision for additional small-volume allowances under § 1039.625(b)(2) and (m)(4) by specifying that we may waive the annual limits on the number of allowances instead of or in addition to granting additional hardship allowances. We did this because there may be times when manufacturers only need approval to use up their regular allowances at a faster pace than the regulations originally allowed.

In response to these amendments, we received adverse comments from the California Air Resources Board and the Manufacturers of Emission Controls Association. They expressed concern about EPA allowing itself unlimited discretion in the total number of allowances we may grant to provide relief to manufacturers that qualified for technical hardship under § 1039.625(m). They also objected to the proposed approach, expressing a concern that we would be putting ourselves in a position to substantially undermine the expected

emission reductions from the Tier 4 program. Therefore, in this final rule we are only increasing the maximum number of percent-of-production hardship allowances EPA may grant from 70 to 200 percent, and the maximum number of and small-volume hardship allowances from 400 to 2,000 units.

Third, we initially removed all limitations for the higher FEL caps under § 1039.104(g). However, the California Air Resources Board and the Manufacturers of Emission Controls questioned the need for the revision and argued that allowing more engines with higher FELs would cause higher emissions where engines were operating, even though the net impact would be emissions-neutral due to the use of emissions credits. Subsequent to these comments, John Deere provided supplemental comments describing their product development efforts for engines in the 19–56 kW power category. They explained why the original limit on the higher FEL cap flexibility was not sufficient for them to complete their development and implementation of Tier 4 technologies in time.

To address the environmental concerns expressed while also accommodating the technology development needs that were explained, we are adopting revised the limits on the higher FEL caps, but isolated that to the 19–56 kW power category. Specifically, we are increasing this limitation for higher FEL caps from 20 to 40 percent annually, and from 40 to 80 percent over the specified four-year period. This expanded flexibility addresses similar technological readiness circumstances, as described in this section for transitioning to the Tier 4 standards. However, with this amendment there would be no net environmental impact since manufacturers would need to produce low-emission engines that generate emission credits to offset the additional credits used by transition engines certified to higher FELs.

We are also revising § 1039.104(g) to specify that the Temporary Compliance Adjustment Factor is the same whether an engine is subject to NO_x + NMHC standards or NO_x-only standards. This revision also addresses Tier 3 carry-over engines that would need to certify to the alternate FEL caps after the Tier 4 final standards take effect.

Finally, we are republishing § 1039.625(e)(3), which was inadvertently omitted in the withdrawal notice without the last sentence, which describes the alternative standards that

apply for engines below 56 kW and engines above 560 kW.

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. APA section 553(d) excepts from this provision any action that grants or recognizes an exemption or relieves a restriction. Since the provisions expanding the technical hardship relief in § 1039.625(m) increase access to an exemption from emission standards, EPA is making the revisions to § 1039.625(m) effective immediately upon publication. The expanded technical hardship provisions do not set new requirements, but rather create a streamlined path by which equipment manufacturers unable to install compliant Tier 4 engines may install previous-tier engines that they could not otherwise install without this final rule. Thus, the expanded technical hardship provisions of § 1039.625(m) promulgated in this final rule are effective on February 6, 2014.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). These provisions may have minor impacts on the costs and emission reductions of the underlying regulatory programs amended in this action. Where there may be a minor impact on the costs or benefits of the amended regulatory program, any potential impacts would be small and we have not attempted to quantify the potential changes. As such, a regulatory impact evaluation or analysis is unnecessary. EPA also does not expect this rule to have substantial Congressional or public interest.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The regulatory changes include changes to the way we implement the emission standards or exemption provisions to reduce burden or to streamline administrative procedures. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at

40 CFR parts 1039 and 1068 under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB Control Numbers 2060–0287 and 2060–0460. The OMB control numbers for EPA’s regulations in title 40 of the Code of Federal Regulations are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by Small Business Administration regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of these rules on small entities, we concluded that this action will not have a significant economic impact on a substantial number of small entities.

This final rule allows for greater flexibility and reduced burden for manufacturers and remanufacturers. There are no costs and therefore no regulatory burden associated with this rule. We have therefore concluded that this rule will not increase regulatory burden for affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory

requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Tribal governments would be affected only to the extent they purchase and use regulated vehicles. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Any potential environmental health or safety impacts of this final rule would be very small.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide

Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve application of new technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it merely makes minor revisions to existing regulatory programs.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). The changes to § 1039.625(m) are effective on February 6, 2014. All other provisions in this rule are effective on March 10, 2014.

V. Statutory Authority

Statutory authority for the vehicle controls is found in Clean Air Act section 213 (which authorizes standards for emissions of pollutants from new nonroad engines which emissions cause or contribute to air pollution which may reasonably be anticipated to endanger

public health or welfare), sections 203–209, 216, and 301 (42 U.S.C. 7522, 7523, 7524, 7525, 7541, 7542, 7543, 7547, 7550, and 7601).

List of Subjects

40 CFR Part 1039

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Imports, Labeling, Penalties, Reporting and recordkeeping requirements, Warranties.

40 CFR Part 1042

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Imports, Labeling, Penalties, Vessels, Reporting and recordkeeping requirements, Warranties.

40 CFR Part 1068

Environmental protection, Administrative practice and procedure, Confidential business information, Imports, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements, Warranties.

Dated: January 28, 2014.

Gina McCarthy,

Administrator.

For the reasons set forth in the preamble, the Environmental Protection Agency is amending title 40, chapter I of the Code of Federal Regulations as follows:

PART 1039—CONTROL OF EMISSIONS FROM NEW AND IN-USE NONROAD COMPRESSION-IGNITION ENGINES

■ 1. The authority citation for part 1039 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart B—[Amended]

■ 2. Section 1039.104 is amended by revising paragraph (g) to read as follows:

§ 1039.104 Are there interim provisions that apply only for a limited time?

* * * * *

(g) *Alternate FEL caps.* You may certify engines to the FEL caps in Table 1 of this section instead of the otherwise applicable FEL caps in § 1039.101(d)(1), § 1039.102(e), or § 1039.102(g)(2) for the indicated model years, subject to the following provisions:

(1) The provisions of this paragraph (g) apply for limited numbers of engines as specified in this paragraph (g)(1). If you certify an engine under an alternate FEL cap in this paragraph (g) for any pollutant, count it toward the allowed percentage of engines certified to the alternate FEL caps.

(i) Except as specified in paragraph (g)(1)(ii) of this section, the number of engines certified to the FEL caps in Table 1 of this section must not exceed 20 percent in any single model year in each power category, and the sum of percentages over the 4-year period must not exceed a total of 40 percent in each power category.

(ii) For the 19–56 kW power category, the number of engines certified to the FEL caps in Table 1 of this section must not exceed 40 percent in any single model year, and the sum of percentages over the 4-year period must not exceed a total of 80 percent.

(2) If your engine is not certified to transient emission standards under the provisions of § 1039.102(a)(1)(iii), you must adjust your FEL upward by a temporary compliance adjustment factor (TCAF) before calculating your negative emission credits under § 1039.705, as follows:

(i) The temporary compliance adjustment factor for NO_x and for NO_x + NMHC is 1.1.

(ii) The temporary compliance adjustment factor for PM is 1.5.

(iii) The adjusted FEL (FEL_{adj}) for calculating emission credits is determined from the steady-state FEL (FEL_{ss}) using the following equation:

$$FEL_{adj} = (FEL_{ss}) \times (TCAF)$$

(iv) The unadjusted FEL (FEL_{ss}) applies for all purposes other than credit calculation.

(3) These alternate FEL caps may not be used for phase-in engines.

(4) Do not apply TCAFs to gaseous emissions for phase-out engines that you certify to the same numerical standards (and FELs if the engines are certified using ABT) for gaseous pollutants as you certified under the Tier 3 requirements of 40 CFR part 89.

TABLE 1 OF § 1039.104—ALTERNATE FEL CAPS

Maximum engine power	PM FEL cap, g/kW-hr	Model years for the alternate PM FEL cap	NO _x FEL cap, g/kW-hr ¹	Model years for the alternate NO _x FEL cap
19 ≤ kW < 56	0.30	² 2012–2015	.....	.....
56 ≤ kW < 130 ³	0.30	2012–2015	3.8	⁴ 2012–2015
130 ≤ kW ≤ 560	0.20	2011–2014	3.8	⁵ 2011–2014
kW > 560 ⁶	0.10	2015–2018	3.5	2015–2018

¹ The FEL cap for engines demonstrating compliance with a NO_x + NMHC standard is equal to the previously applicable NO_x + NMHC standard specified in 40 CFR 89.112 (generally the Tier 3 standards).

² For manufacturers certifying engines under Option #1 of Table 3 of § 1039.102, these alternate FEL caps apply to all 19–56 kW engines for model years from 2013 through 2016 instead of the years indicated in this table. For manufacturers certifying engines under Option #2 of Table 3 of § 1039.102, these alternate FEL caps do not apply to 19–37 kW engines except in model years 2013 to 2015.

³ For engines below 75 kW, the FEL caps are 0.40 g/kW-hr for PM emissions and 4.4 g/kW-hr for NO_x emissions.

⁴ For manufacturers certifying engines in this power category using a percentage phase-in/phase-out approach instead of the alternate NO_x standards of § 1039.102(e)(1), the alternate NO_x FEL cap in the table applies only in the 2014–2015 model years if certifying under § 1039.102(d)(1), and only in the 2015 model year if certifying under § 1039.102(d)(2).

⁵ For manufacturers certifying engines in this power category using the percentage phase-in/phase-out approach instead of the alternate NO_x standard of § 1039.102(e)(2), the alternate NO_x FEL cap in the table applies only for the 2014 model year.

⁶ For engines above 560 kW, the provision for alternate NO_x FEL caps is limited to generator-set engines.

(5) You may certify engines under this paragraph (g) in any model year provided for in Table 1 of this section without regard to whether or not the engine family’s FEL is at or below the otherwise applicable FEL cap. For

example, a 200 kW engine certified to the NO_x + NMHC standard of § 1039.102(e)(3) with an FEL equal to the FEL cap of 2.8 g/kW-hr may nevertheless be certified under this paragraph (g).

(6) For engines you produce under this paragraph (g) after the Tier 4 final standards take effect, you may certify based on a NO_x + NMHC FEL as described in Table 1 of this section. Calculate emission credits for these

engines relative to the applicable NO_x standard in § 1039.101 or § 1039.102, plus 0.1 g/kW-hr.

* * * * *

Subpart G—[Amended]

■ 3. Section 1039.625 is amended by revising paragraphs (e)(3) and (m) to read as follows:

§ 1039.625 What requirements apply under the program for equipment-manufacturer flexibility?

* * * * *

(e) * * *

(3) In all other cases, engines at or above 56 kW and at or below 560 kW must meet the appropriate Tier 3 standards described in 40 CFR 89.112. Engines below 56 kW and engines above 560 kW must meet the appropriate Tier 2 standards described in 40 CFR 89.112.

* * * * *

(m) *Additional exemptions for technical or engineering hardship.* You may request additional engine allowances under paragraph (b) of this section; however, you may use these extra allowances only for those equipment models for which you, or an affiliated company, do not also produce the engine. Additional allowances under this paragraph (m) must be used within the specified seven-year period. After considering the circumstances, we may permit you to introduce into U.S. commerce equipment with such engines that do not comply with Tier 4 emission standards, as follows:

(1) We may approve additional exemptions if extreme and unusual circumstances that are clearly outside your control and that could not have been avoided with reasonable discretion have resulted in technical or engineering problems that prevent you from meeting the requirements of this part. You must show that you exercised prudent planning and have taken all reasonable steps to minimize the scope of your request for additional allowances.

(2) To apply for exemptions under this paragraph (m), send the Designated Compliance Officer a written request as soon as possible before you are in violation. In your request, include the following information:

(i) Describe your process for designing equipment.

(ii) Describe how you normally work cooperatively or concurrently with your engine supplier to design products.

(iii) Describe the engineering or technical problems causing you to request the exemption and explain why you have not been able to solve them. Describe the extreme and unusual

circumstances that led to these problems and explain how they were unavoidable.

(iv) Describe any information or products you received from your engine supplier related to equipment design—such as written specifications, performance data, or prototype engines—and when you received it.

(v) Compare the design processes of the equipment model for which you need additional exemptions and that for other models for which you do not need additional exemptions. Explain the technical differences that justify your request.

(vi) Describe your efforts to find and use other compliant engines, or otherwise explain why none is available.

(vii) Describe the steps you have taken to minimize the scope of your request.

(viii) Include other relevant information. You must give us other relevant information if we ask for it.

(ix) Estimate the increased percent of production you need for each equipment model covered by your request, as described in paragraph (m)(3) of this section. Estimate the increased number of allowances you need for each equipment model covered by your request, as described in paragraph (m)(4) of this section.

(3) We may approve your request to increase the allowances under paragraph (b)(1) of this section, subject to the following limitations:

(i) You must use up the allowances under paragraph (b)(1) of this section before using any additional allowances under this paragraph (m).

(ii) The additional allowances under this paragraph (m)(3) may not exceed 200 percent for each power category.

(iii) You may use these additional allowances only for the specific equipment models covered by your request.

(4) We may approve your request to increase the small-volume allowances under paragraph (b)(2) of this section, subject to the following limitations:

(i) You are eligible for additional allowances under this paragraph (m)(4) only if you do not use the provisions of paragraph (m)(3) of this section to obtain additional allowances within a given power category.

(ii) You must use up the allowances under paragraph (b)(2) of this section before using any additional allowances under this paragraph (m).

(iii) The additional allowances under this paragraph (m)(4) may not exceed 2,000 units.

(iv) We may approve additional allowances in the form of waiving the annual limits specified in paragraph

(b)(2) of this section instead of or in addition to increasing the total number of allowances under this paragraph (m)(4).

(v) If we increase the total number of allowances, you may use these allowances only for the specific equipment models covered by your request.

PART 1042—CONTROL OF EMISSIONS FROM NEW AND IN-USE MARINE COMPRESSION-IGNITION ENGINES AND VESSELS

■ 4. The authority citation for part 1042 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart G—[Amended]

■ 5. Section 1042.615 is amended as follows:

■ a. By revising the introductory text and paragraphs (a) introductory text and (a)(1).

■ b. By redesignating paragraphs (b) through (d) as paragraphs (c) through (e).

■ c. By adding a new paragraph (b).

§ 1042.615 Replacement engine exemption.

For Category 1 and Category 2 replacement engines, the provisions of 40 CFR 1068.240 apply except as described in this section. In unusual circumstances, you may ask us to allow you to apply these provisions for a new Category 3 engine.

(a) This paragraph (a) applies instead of the provisions of 40 CFR 1068.240(b)(2). The prohibitions in 40 CFR 1068.101(a)(1) do not apply to a new replacement engine if all the following conditions are met:

(1) You use good engineering judgment to determine that no engine certified to the current requirements of this part is produced by any manufacturer with the appropriate physical or performance characteristics to repower the vessel. We have determined that engines certified to Tier 4 standards do not have the appropriate physical or performance characteristics to replace uncertified engines or engines certified to emission standards that are less stringent than the Tier 4 standards.

* * * * *

(b) The 40-year limit specified in 40 CFR 1068.240(a) does not apply for engines subject to this part 1042. You may accordingly omit the statement on the permanent labels specified in 40 CFR 1068.240 describing this limitation.

* * * * *

PART 1068—GENERAL COMPLIANCE PROVISIONS FOR HIGHWAY, STATIONARY, AND NONROAD PROGRAMS

■ 6. The authority citation for part 1068 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart C—[Amended]

■ 7. Section 1068.240 is revised to read as follows:

§ 1068.240 What are the provisions for exempting new replacement engines?

The prohibitions in § 1068.101(a)(1) do not apply to a new engine if it is exempt under this section as a replacement engine. For purposes of this section, a replacement engine is a new engine that is used to replace an engine that has already been placed into service (whether the previous engine is replaced in whole or in part with a new engine).

(a) *General provisions.* You are eligible for the exemption for new replacement engines only if you are a certificate holder. Note that this exemption does not apply for locomotives (40 CFR 1033.601) and that unique provisions apply to marine compression-ignition engines (40 CFR 1042.615).

(1) Paragraphs (b), (c), and (d) of this section describe different approaches for exempting new replacement engines where the engines are specially built to correspond to an engine model from an earlier model year that was subject to less stringent standards than those that apply for current production (or is no longer covered by a certificate of conformity). You must comply with the requirements of paragraph (b) of this section for any number of replacement engines you produce in excess of what we allow under paragraph (c) of this section. You must designate engines you produce under this section as tracked engines under paragraph (b) of this section or untracked engines under paragraph (c) of this section by the deadline for the report specified in paragraph (c)(3) of this section.

(2) Paragraph (e) of this section describes a simpler approach for exempting partially complete new replacement engines that are built under a certificate of conformity that is valid for producing engines for the current model year.

(3) For all the different approaches described in paragraphs (b) through (e) of this section, the exemption applies only for equipment that is 40 years old or less at the time of installation.

(b) *Previous-tier replacement engines with tracking.* You may produce any number of new engines to replace an engine already placed into service in a piece of equipment, as follows:

(1) The engine being replaced must have been either not originally subject to emission standards or originally subject to less stringent emission standards than those that apply to a new engine meeting current standards. The provisions of this paragraph (b) also apply for engines that were originally certified to the same standards that apply for the current model year if you no longer have a certificate of conformity to continue producing that engine configuration.

(2) The following requirements and conditions apply for engines exempted under this paragraph (b):

(i) You must determine that you do not produce an engine certified to meet current requirements that has the appropriate physical or performance characteristics to repower the equipment. If the engine being replaced was made by a different company, you must make this determination also for engines produced by this other company.

(ii) In the case of premature engine failure, if the old engine was subject to emission standards, you must make the new replacement engine in a configuration identical in all material respects to the old engine and meet the requirements of § 1068.265. You may alternatively make the new replacement engine in a configuration identical in all material respects to another certified engine of the same or later model year as long as the engine is not certified with a family emission limit higher than that of the old engine.

(iii) For cases not involving premature engine failure, you must make a separate determination for your own product line addressing every tier of emission standards that is more stringent than the emission standards for the engine being replaced. For example, if the engine being replaced was built before the Tier 1 standards started to apply and engines of that power category are currently subject to Tier 3 standards, you must also consider whether any Tier 1 or Tier 2 engines that you produce have the appropriate physical and performance characteristics for replacing the old engine; if you produce a Tier 2 engine with the appropriate physical and performance characteristics, you must use it as the replacement engine.

(iv) You must keep records to document your basis for making the determinations in paragraphs (b)(2)(i) and (iii) of this section.

(3) An old engine block replaced by a new engine exempted under this paragraph (b) may be reintroduced into U.S. commerce as part of an engine that meets either the current standards for new engines, the provisions for new replacement engines in this section, or another valid exemption. Otherwise, you must destroy the old engine block or confirm that it has been destroyed.

(4) If the old engine was subject to emission standards, the replacement engine must meet the appropriate emission standards as specified in § 1068.265. This generally means you must make the new replacement engine in a previously certified configuration.

(5) Except as specified in paragraph (d) of this section, you must add a permanent label, consistent with § 1068.45, with your corporate name and trademark and the following additional information:

(i) Add the following statement if the new engine may only be used to replace an engine that was not subject to any emission standards under this chapter:

THIS REPLACEMENT ENGINE IS EXEMPT UNDER 40 CFR 1068.240. SELLING OR INSTALLING THIS ENGINE FOR ANY PURPOSE OTHER THAN TO REPLACE AN UNREGULATED ENGINE MAY BE A VIOLATION OF FEDERAL LAW SUBJECT TO CIVIL PENALTY. THIS ENGINE MAY NOT BE INSTALLED IN EQUIPMENT THAT IS MORE THAN 40 YEARS OLD AT THE TIME OF INSTALLATION.

(ii) Add the following statement if the new engine may replace an engine that was subject to emission standards:

THIS ENGINE COMPLIES WITH U.S. EPA EMISSION REQUIREMENTS FOR [Identify the appropriate emission standards (by model year, tier, or emission levels) for the replaced engine] ENGINES UNDER 40 CFR 1068.240. SELLING OR INSTALLING THIS ENGINE FOR ANY PURPOSE OTHER THAN TO REPLACE A [Identify the appropriate emission standards for the replaced engine, by model year(s), tier(s), or emission levels]] ENGINE MAY BE A VIOLATION OF FEDERAL LAW SUBJECT TO CIVIL PENALTY. THIS ENGINE MAY NOT BE INSTALLED IN EQUIPMENT THAT IS MORE THAN 40 YEARS OLD AT THE TIME OF INSTALLATION.

(6) Engines exempt under this paragraph (b) may not be introduced into U.S. commerce before you make the determinations under paragraph (b)(2) of this section, except as specified in this paragraph (b)(6). We may waive this restriction for engines excluded under paragraph (c)(5) of this section that you ship to a distributor. Where we waive this restriction, you must take steps to ensure that the engine is installed consistent with the requirements of this paragraph (b). For example, at a minimum you must report to us

annually whether engines we allowed you to ship to a distributor under this paragraph (b)(6) have been placed into service or remain in inventory. After an engine is placed into service, your report must describe how the engine was installed consistent with the requirements of this paragraph (b). Send these reports to the Designated Compliance Officer by the deadlines we specify.

(c) *Previous-tier replacement engines without tracking.* You may produce a limited number of new replacement engines that are not from a currently certified engine family under the provisions of this paragraph (c). If you produce new engines under this paragraph (c) to replace engines subject to emission standards, the new replacement engine must be in a configuration identical in all material respects to the old engine and meet the requirements of § 1068.265. You may make the new replacement engine in a configuration identical in all material respects to another certified engine of the same or later model year as long as the engine is not certified with a family emission limit higher than that of the old engine. The provisions of this paragraph (c) also apply for engines that were originally certified to the same standards that apply for the current model year if you no longer have a certificate of conformity to continue producing that engine configuration. This would apply, for example, for engine configurations that were certified in an earlier model year but are no longer covered by a certificate of conformity. The following provisions apply to engines exempted under this paragraph (c):

(1) You may produce a limited number of replacement engines under this paragraph (c) representing 0.5 percent of your annual production volumes for each category and subcategory of engines identified in Table 1 to this section (1.0 percent through 2013). Calculate this number by multiplying your annual U.S.-directed production volume by 0.005 (or 0.01 through 2013) and rounding to the nearest whole number. Determine the appropriate production volume by identifying the highest total annual U.S.-directed production volume of engines from the previous three model years for all your certified engines from each category or subcategory identified in Table 1 to this section, as applicable. In unusual circumstances, you may ask us to base your production limits on U.S.-directed production volume for a model year more than three years prior. You may include stationary engines and exempted engines as part of your U.S.-

directed production volume. Include U.S.-directed engines produced by any parent or subsidiary companies and those from any other companies you license to produce engines for you.

(2) Count every exempted new replacement engine from your total U.S.-directed production volume that you produce in a given calendar year under this paragraph (c), including partially complete engines, except for the following:

(i) Engines built to specifications for an earlier model year under paragraph (b) of this section.

(ii) Partially complete engines exempted under paragraph (e) of this section.

(3) Send the Designated Compliance Officer a report by March 31 of the year following any year in which you produced exempted replacement engines under this paragraph (c). In your report include the total number of replacement engines you produce under this paragraph (c) for each category or subcategory, as appropriate, and the corresponding total production volumes determined under paragraph (c)(1) of this section. If you send us a report under this paragraph (c)(3), you must also include the total number of replacement engines you produced under paragraphs (b), (d), and (e) of this section. You may include this information in production reports required under the standard-setting part.

(4) Add a permanent label as specified in paragraph (b)(5) of this section. For partially complete engines, you may alternatively add a permanent or removable label as specified in paragraph (d) of this section.

(5) You may not use the provisions of this paragraph (c) for any engines in the following engine categories or subcategories:

(i) Land-based nonroad compression-ignition engines we regulate under 40 CFR part 1039 with a per-cylinder displacement at or above 7.0 liters.

(ii) Marine compression-ignition engines we regulate under 40 CFR part 1042 with a per-cylinder displacement at or above 7.0 liters.

(iii) Locomotive engines we regulate under 40 CFR part 1033.

(d) *Partially complete engines.* The following requirements apply if you ship a partially complete replacement engine under this section:

(1) Provide instructions specifying how to complete the engine assembly such that the resulting engine conforms to the applicable certificate of conformity or the specifications of § 1068.265. Where a partially complete engine can be built into multiple different configurations, you must be

able to identify all the engine models and model years for which the partially complete engine may properly be used for replacement purposes. Your instructions must make clear how the final assembler can determine which configurations are appropriate for the engine they receive.

(2) You must label the engine as follows:

(i) If you have a reasonable basis to believe that the fully assembled engine will include the original emission control information label, you may add a removable label to the engine with your corporate name and trademark and the statement: "This replacement engine is exempt under 40 CFR 1068.240." This would generally apply if all the engine models that are compatible with the replacement engine were covered by a certificate of conformity and they were labeled in a position on the engine or equipment that is not included as part of the partially complete engine being shipped for replacement purposes. Removable labels must meet the requirements specified in § 1068.45.

(ii) If you do not qualify for using a removable label in paragraph (d)(1) of this section, you must add a permanent label in a readily visible location, though it may be obscured after installation in a piece of equipment. Include on the permanent label your corporate name and trademark, the engine's part number (or other identifying information), and the statement: "THIS REPLACEMENT ENGINE IS EXEMPT UNDER 40 CFR 1068.240. THIS ENGINE MAY NOT BE INSTALLED IN EQUIPMENT THAT IS MORE THAN 40 YEARS OLD AT THE TIME OF INSTALLATION."

If there is not enough space for this statement, you may alternatively add: "REPLACEMENT" or "SERVICE ENGINE." For purposes of this paragraph (d)(2), engine part numbers permanently stamped or engraved on the engine are considered to be included on the label.

(e) *Partially complete current-tier replacement engines.* The provisions of paragraph (d) of this section apply for partially complete engines you produce from a current line of certified engines or vehicles. This applies for engine-based and equipment-based standards as follows:

(1) Where engine-based standards apply, you may introduce into U.S. commerce short blocks or other partially complete engines from a currently certified engine family as replacement components for in-use equipment powered by engines you originally produced. You must be able to identify all the engine models and model years

for which the partially complete engine may properly be used for replacement purposes.

(2) Where equipment-based standards apply, you may introduce into U.S. commerce engines that are identical to engines covered by a current certificate of conformity by demonstrating

compliance with currently applicable standards where the engines will be installed as replacement engines. These engines might be fully assembled, but we would consider them to be partially complete engines because they are not yet installed in the equipment.

(f) *Emission credits.* Replacement engines exempted under this section may not generate or use emission credits under the standard-setting part nor be part of any associated credit calculations.

TABLE 1 TO § 1068.240—ENGINE CATEGORIES AND SUBCATEGORIES FOR NEW REPLACEMENT ENGINES EXEMPTED WITHOUT TRACKING

Engine category	Standard-setting part ¹	Engine subcategories
Highway CI	40 CFR part 86	disp. < 0.6 L/cyl. 0.6 ≤ disp. < 1.2 L/cyl. disp. ≥ 1.2 L/cyl.
Nonroad CI, Stationary CI, and Marine CI	40 CFR part 1039, or 40 CFR part 1042	disp. < 0.6 L/cyl. 0.6 ≤ disp. < 1.2 L/cyl. 1.2 ≤ disp. < 2.5 L/cyl. 2.5 ≤ disp. < 7.0 L/cyl.
Marine SI	40 CFR part 1045	outboard. personal watercraft. all engines.
Large SI, Stationary SI, and Marine SI (sterndrive/inboard only).	40 CFR part 1048 or 40 CFR part 1045	
Recreational vehicles	40 CFR part 1051	off-highway motorcycle. all-terrain vehicle. snowmobile.
Small SI and Stationary SI	40 CFR part 1054	handheld. Class I. Class II.

¹ Include an engine as being subject to the identified standard-setting part if it will eventually be subject to emission standards under that part. For example, if you certify marine compression-ignition engines under part 94, count those as if they were already subject to part 1042.

[FR Doc. 2014-02612 Filed 2-5-14; 8:45 am]
BILLING CODE 6560-50-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA-2013-0002; Internal Agency Docket No. FEMA-8319]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and

a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at <http://www.fema.gov/fema/csb.shtm>.

DATES: Effective Dates: The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646-2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public

body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR Part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction

or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from

the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have

federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR Part 64 is amended as follows:

PART 64—[AMENDED]

- 1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

- 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region II				
New York:				
Chestnut Ridge, Village of, Rockland County.	361615	November 30, 1987, Emerg; September 16, 1988, Reg; March 3, 2014, Susp.	March 3, 2014 ..	March 3, 2014.
Clarkstown, Town of, Rockland County	360679	October 24, 1974, Emerg; March 2, 1983, Reg; March 3, 2014, Susp.	.....do *	Do.
Grand View-On-Hudson, Village of, Rockland County.	360680	July 7, 1975, Emerg; October 15, 1981, Reg; March 3, 2014, Susp.	.....do	Do.
Haverstraw, Town of, Rockland County	360681	December 13, 1974, Emerg; January 6, 1982, Reg; March 3, 2014, Susp.	.....do	Do.
Haverstraw, Village of, Rockland County.	360682	November 28, 1975, Emerg; September 2, 1981, Reg; March 3, 2014, Susp.	.....do	Do.
Hillburn, Village of, Rockland County	360683	June 18, 1975, Emerg; January 6, 1982, Reg; March 3, 2014, Susp.	.....do	Do.
Kaser, Village of, Rockland County	365376	February 13, 2009, Emerg; N/A, Reg; March 3, 2014, Susp.	.....do	Do.
Montebello, Village of, Rockland County	361617	June 5, 1987, Emerg; January 18, 1989, Reg; March 3, 2014, Susp.	.....do	Do.
New Hempstead, Village of, Rockland County.	361618	April 23, 1987, Emerg; December 16, 1988, Reg; March 3, 2014, Susp.	.....do	Do.
New Square, Village of, Rockland County.	360684	March 15, 1976, Emerg; September 22, 1978, Reg; March 3, 2014, Susp.	.....do	Do.
Nyack, Village of, Rockland County	360685	May 15, 1975, Emerg; May 25, 1978, Reg; March 3, 2014, Susp.	.....do	Do.
Orangetown, Town of, Rockland County	360686	August 16, 1974, Emerg; August 2, 1982, Reg; March 3, 2014, Susp.	.....do	Do.
Piermont, Village of, Rockland County	360687	November 8, 1974, Emerg; August 3, 1981, Reg; March 3, 2014, Susp.	.....do	Do.
Pomona, Village of, Rockland County ..	360688	December 13, 1974, Emerg; April 15, 1982, Reg; March 3, 2014, Susp.	.....do	Do.
Ramapo, Town of, Rockland County	365340	October 29, 1971, Emerg; August 31, 1973, Reg; March 3, 2014, Susp.	.....do	Do.
Sloatsburg, Village of, Rockland County	360690	July 7, 1975, Emerg; January 6, 1982, Reg; March 3, 2014, Susp.	.....do	Do.
South Nyack, Village of, Rockland County.	360691	August 15, 1975, Emerg; November 4, 1981, Reg; March 3, 2014, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Spring Valley, Village of, Rockland County.	365344	October 29, 1971, Emerg; August 31, 1973, Reg; March 3, 2014, Susp.	.....do	Do.
Stony Point, Town of, Rockland County	360693	May 8, 1975, Emerg; September 30, 1981, Reg; March 3, 2014, Susp.	.....do	Do.
Suffern, Village of, Rockland County	360694	July 5, 1973, Emerg; March 28, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
Upper Nyack, Village of, Rockland County.	360695	July 3, 1975, Emerg; October 28, 1977, Reg; March 3, 2014, Susp.	.....do	Do.
Wesley Hills, Village of, Rockland County.	361616	April 23, 1987, Emerg; September 16, 1988, Reg; March 3, 2014, Susp.	.....do	Do.
West Haverstraw, Village of, Rockland County.	360696	June 10, 1975, Emerg; September 30, 1981, Reg; March 3, 2014, Susp.	.....do	Do.
Region III				
Pennsylvania:				
Cherry, Township of, Sullivan County ...	422058	January 26, 1976, Emerg; August 1, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Colley, Township of, Sullivan County	422059	May 11, 1976, Emerg; December 1, 1986, Reg; March 3, 2014, Susp.	.....do	Do.
Davidson, Township of, Sullivan County	422060	August 20, 1975, Emerg; February 6, 1991, Reg; March 3, 2014, Susp.	.....do	Do.
Dushore, Borough of, Sullivan County ..	420810	March 11, 1975, Emerg; June 18, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Elkland, Township of, Sullivan County ..	422061	December 29, 1975, Emerg; March 1, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Forks, Township of, Sullivan County	422062	August 25, 1975, Emerg; November 2, 1990, Reg; March 3, 2014, Susp.	.....do	Do.
Forksville, Borough of, Sullivan County	420811	April 21, 1975, Emerg; March 1, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Fox, Township of, Sullivan County	422063	January 22, 1976, Emerg; July 1, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Hillsgrove, Township of, Sullivan County.	422064	December 8, 1975, Emerg; November 2, 1990, Reg; March 3, 2014, Susp.	.....do	Do.
Laporte, Township of, Sullivan County	422065	August 11, 1975, Emerg; July 1, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Shrewsbury, Township of, Sullivan County.	422066	August 22, 1975, Emerg; August 1, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Region IV				
Kentucky:				
Alexandria, City of, Campbell County ...	210391	N/A, Emerg; December 8, 2009, Reg; March 3, 2014, Susp.	.....do	Do.
Bellevue, City of, Campbell County	210035	May 1, 1974, Emerg; April 15, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
California, City of, Campbell County	210036	July 3, 1975, Emerg; April 3, 1978, Reg; March 3, 2014, Susp.	.....do	Do.
Campbell County, Unincorporated Areas.	210034	February 19, 1975, Emerg; September 30, 1981, Reg; March 3, 2014, Susp.	.....do	Do.
Cold Spring, City of, Campbell County	210395	N/A, Emerg; May 11, 2007, Reg; March 3, 2014, Susp.	.....do	Do.
Dayton, City of, Campbell County	210037	August 21, 1974, Emerg; August 15, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
Fort Thomas, City of, Campbell County	210038	June 30, 1997, Emerg; September 1, 1998, Reg; March 3, 2014, Susp.	.....do	Do.
Lexington-Fayette Urban County Government, Fayette County.	210067	August 17, 1973, Emerg; September 28, 1979, Reg; March 3, 2014, Susp.	.....do	Do.
Melborne, City of, Campbell County	210250	September 12, 1974, Emerg; March 28, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
Mentor, City of, Campbell County	210275	February 21, 1975, Emerg; March 4, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
Newport, City of, Campbell County	210039	March 26, 1975, Emerg; November 5, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
Silver Grove, City of, Campbell County	210040	October 15, 1974, Emerg; October 15, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
Southgate, City of, Campbell County	210276	N/A, Emerg; July 8, 2008, Reg; March 3, 2014, Susp.	.....do	Do.
Wilder, City of, Campbell County	210041	October 24, 1974, Emerg; October 15, 1980, Reg; March 3, 2014, Susp.	.....do	Do.
Woodlawn, City of, Campbell County ...	210318	N/A, Emerg; June 27, 2013, Reg; March 3, 2014, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region V				
Indiana:				
Ohio County, Unincorporated Areas	180406	January 20, 1975, Emerg; September 4, 1987, Reg; March 3, 2014, Susp.	.....do	Do.
Owen County, Unincorporated Areas ...	180481	February 6, 1991, Emerg; April 1, 1993, Reg; March 3, 2014, Susp.	.....do	Do.
Rising Sun, City of, Ohio County	180407	January 20, 1975, Emerg; October 18, 1983, Reg; March 3, 2014, Susp.	.....do	Do.
Spencer, Town of, Owen County	180191	July 10, 1975, Emerg; September 1, 1989, Reg; March 3, 2014, Susp.	.....do	Do.

*-do- = Ditto.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: January 16, 2014.

David L. Miller,

Associate Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2014-02514 Filed 2-5-14; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 541

[Docket No. NHTSA-2012-0073]

Final Theft Data; Motor Vehicle Theft Prevention Standard

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Publication of 2011 final theft data.

SUMMARY: This document publishes the final data on thefts of model year (MY) 2011 passenger motor vehicles that occurred in calendar year (CY) 2011. The 2011 final theft data shows a decrease in the vehicle theft rate experienced in CY/MY 2011 compared to CY/MY 2010. The final theft rate for MY 2011 passenger vehicles stolen in CY 2011 is 0.99 thefts per thousand vehicles, a decrease of 15.38 percent from the rate of 1.17 thefts per thousand in 2010. Publication of these data fulfills NHTSA's statutory obligation to periodically obtain accurate and timely theft data and publish the information for review and comment.

DATES: *Effective Date:* February 6, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Mazyck, Office of International Policy, Fuel Economy and Consumer

Programs, NHTSA, 1200 New Jersey Avenue SE., Washington, DC 20590. Ms. Mazyck's telephone number is (202) 366-4139. Her fax number is (202) 493-2990.

SUPPLEMENTARY INFORMATION: NHTSA administers a program for reducing motor vehicle theft. The central feature of this program is the Federal Motor Vehicle Theft Prevention Standard, 49 CFR Part 541. The standard specifies performance requirements for inscribing and affixing vehicle identification numbers (VINs) onto certain major original equipment and replacement parts of high-theft lines of passenger motor vehicles.

The agency is required by 49 U.S.C. 33104(b)(4) to periodically obtain, from the most reliable source, accurate and timely theft data and publish the data for review and comment. To fulfill this statutory mandate, NHTSA has published theft data annually beginning with MYs 1983/84. Continuing to fulfill the section 33104(b)(4) mandate, this document reports the final theft data for CY 2011, the most recent calendar year for which data are available.

In calculating the 2011 theft rates, NHTSA followed the same procedures it used in calculating the MY 2010 theft rates. (For 2010 theft data calculations, see 77 FR 58500, September 21, 2012). As in all previous reports, NHTSA's data were based on information provided to NHTSA by the National Crime Information Center (NCIC) of the Federal Bureau of Investigation (FBI). The NCIC is a government system that receives vehicle theft information from nearly 23,000 criminal justice agencies and other law enforcement authorities throughout the United States. The NCIC data also include reported thefts of self-insured and uninsured vehicles, not all of which are reported to other data sources.

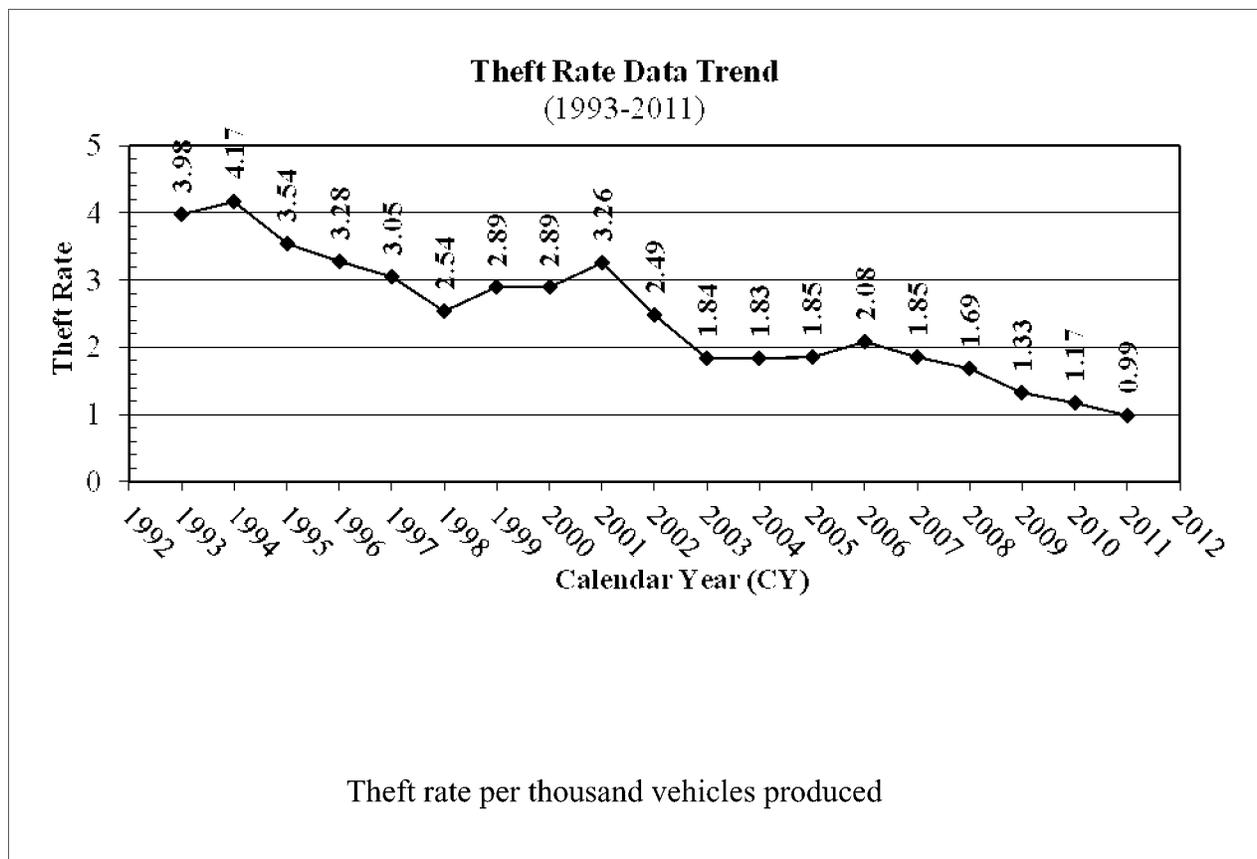
The 2011 theft rate for each vehicle line was calculated by dividing the number of reported thefts of MY 2011 vehicles of that line stolen during CY 2011 by the total number of vehicles in that line manufactured for MY 2011, as reported to the Environmental Protection Agency (EPA).

The 2011 final theft data show a decrease in the vehicle theft rate when compared to the theft rate experienced in CY/MY 2010. The final theft rate for MY 2011 passenger vehicles stolen in CY 2011 decreased to 0.99 thefts per thousand vehicles produced, a decrease of 15.38 percent from the rate of 1.17 thefts per thousand vehicles experienced by MY 2010 vehicles in CY 2010. A similar decreasing trend in vehicle thefts was reported in the FBI's 2011 Uniform Crime Report showing a 3.3% reduction in motor vehicle thefts (automobiles, trucks, buses and other vehicles) from 2010 to 2011.

For MY 2011 vehicles, out of a total of 225 vehicle lines, four lines had a theft rate higher than 3.5826 per thousand vehicles, the established median theft rate for MYs 1990/1991. (See 59 FR 12400, March 16, 1994). All four are passenger car lines.

NHTSA's data show that the MY 2011 theft rate reduction is consistent with the general decreasing trend of theft rates over the past 18 years as indicated by Figure 1. The agency continues to believe that the theft rate reduction is the result of several factors including the increased use of standard anti-theft devices (i.e., immobilizers) and vehicle parts marking as well as the effectiveness of combined measures used by federal agencies, law enforcement, vehicle manufacturers and the insurance industry to help combat vehicle theft.

Figure 1: Theft Rate Data Trend (1993-2011)



On August 16, 2013, NHTSA published the preliminary theft rates for CY 2011 passenger motor vehicles in the **Federal Register** (78 FR 50014, August 16, 2013). The agency tentatively ranked each of the MY 2011 vehicle lines in descending order of theft rate. The public was requested to comment on the accuracy of the data and to provide final production figures for individual vehicle lines. The agency used written comments to make the necessary adjustments to its data. As a result of the adjustments, some of the final theft rates and rankings of vehicle lines changed from those published in the August 2013 notice.

The agency received a written comment from Volvo Cars of America (Volvo). In its comments, Volvo informed the agency that the production

volume for the Volvo XC60 was incorrect. In response to this comment, the production volume for the Volvo XC60 has been corrected and the final theft data has been revised accordingly. As a result of the correction, the Volvo XC60 previously ranked No. 135 with a theft rate of 0.5241 is now ranked No. 162 with a theft rate of 0.3319.

Further review of the final theft list revealed that the model name of the Hyundai Genesis was erroneously listed in the agency's August 2013 correction publication of preliminary data. The correct name designation for the vehicle ranked No. 83 (General Motorssis) should be changed to the Hyundai Genesis. The final theft rate list has been revised to reflect the correct model name.

Reanalysis of the preliminary theft data revealed that the numbering sequence of the vehicle lines was incorrect. The sequence omitted row No. 100. The final theft data has been revised to reflect the correct numbering sequence. As a result of the changes in the numbering sequence, the theft data reflects 225 vehicles for MY 2011.

The following list represents NHTSA's final calculation of theft rates for all 2011 passenger motor vehicle lines. This list is intended to inform the public of calendar year 2011 motor vehicle thefts of model year 2011 vehicles and does not have any effect on the obligations of regulated parties under 49 U.S.C. Chapter 331, Theft Prevention.

BILLING CODE 4910-59-P

FINAL REPORT OF THEFT RATES FOR MODEL YEAR 2011 PASSENGER MOTOR VEHICLES STOLEN IN
CALENDAR YEAR 2011

	Manufacturer	Make/model (line)	Thefts 2011	Production (Mfr's) 2011	2011 Theft rate (per 1,000 vehicles produced)
1	CHRYSLER	DODGE CHARGER	216	44,849	4.8162
2	MITSUBISHI	GALANT	71	16,728	4.2444
3	GENERAL MOTORS	CADILLAC STS	18	4,637	3.8818
4	LAMBORGHINI	GALLARDO	1	259	3.8610
5	HYUNDAI	ACCENT	106	30,231	3.5063
6	GENERAL MOTORS	CHEVROLET IMPALA	591	172,098	3.4341
7	GENERAL MOTORS	CHEVROLET HHR	230	68,454	3.3599
8	GENERAL MOTORS	CHEVROLET AVEO	142	42,367	3.3517
9	NISSAN	INFINITI FX35	21	6,711	3.1292
10	NISSAN	GT-R	1	326	3.0675
11	KIA	RIO	51	18,803	2.7123
12	PORSCHE	PANAMERA	22	8,144	2.7014
13	CHRYSLER	DODGE CHALLENGER	60	24,237	2.4756
14	NISSAN	VERSA	229	97,410	2.3509
15	FORD MOTOR CO	MERCURY GRAND MARQUIS	23	10,050	2.2886
16	NISSAN	SENTRA	213	95,341	2.2341
17	NISSAN	ALTIMA	387	179,269	2.1588
18	AUDI	AUDI A8	10	4,751	2.1048
19	MAZDA	6	52	25,456	2.0427
20	GENERAL MOTORS	CHEVROLET CAMARO	196	97,518	2.0099
21	MERCEDES-BENZ	S-CLASS	19	9,652	1.9685
22	TOYOTA	MATRIX	9	4,588	1.9616
23	GENERAL MOTORS	CHEVROLET MALIBU	400	211,025	1.8955
24	MITSUBISHI	ENDEAVOR	22	12,018	1.8306
25	CHRYSLER	DODGE AVENGER	73	41,013	1.7799
26	CHRYSLER	DODGE CALIBER	65	37,104	1.7518
27	KIA	FORTE	91	52,119	1.7460
28	FORD MOTOR CO	MUSTANG	107	61,620	1.7365
29	SAAB	9-3	3	1,750	1.7143
30	GENERAL MOTORS	CADILLAC DTS	28	17,146	1.6330
31	NISSAN	MAXIMA	101	62,836	1.6074
32	TOYOTA	CAMRY/SOLARA	781	486,288	1.6060
33	FORD MOTOR CO	TAURUS	118	76,821	1.5360
34	TOYOTA	YARIS	38	24,850	1.5292
35	AUDI	AUDI A3	10	6,734	1.4850
36	CHRYSLER	300	42	28,373	1.4803
37	FORD MOTOR CO	CROWN VICTORIA	27	19,244	1.4030
38	JAGUAR LAND ROVER	XJ	4	2,852	1.4025
39	FORD MOTOR CO	MERCURY MARINER	12	8,656	1.3863
40	FORD MOTOR CO	FOCUS	127	91,762	1.3840
41	MERCEDES-BENZ	CLS-CLASS	2	1,472	1.3587

	Manufacturer	Make/model (line)	Thefts 2011	Production (Mfr's) 2011	2011 Theft rate (per 1,000 vehicles produced)
42	HONDA	ACURA ZDX	1	737	1.3569
43	NISSAN	INFINITI G25/G37	72	53,917	1.3354
44	MAZDA	RX-8	1	768	1.3021
45	MASERATI	GRANTURISMO	2	1,545	1.2945
46	MAZDA	3	123	97,252	1.2648
47	BENTLEY MOTORS	CONTINENTAL	1	809	1.2361
48	MERCEDES-BENZ	C-CLASS	74	60,373	1.2257
49	SUZUKI	SX4	16	13,280	1.2048
50	KIA	SEDONA VAN	20	16,717	1.1964
51	HYUNDAI	ELANTRA	119	99,916	1.1910
52	NISSAN	CUBE	17	14,294	1.1893
53	HYUNDAI	SONATA	350	301,276	1.1617
54	HONDA	CIVIC	158	136,721	1.1556
55	TOYOTA	SCION XB	23	19,909	1.1553
56	VOLVO	S40	5	4,352	1.1489
57	SUZUKI	KIZASHI	7	6,110	1.1457
58	CHRYSLER	JEEP LIBERTY	65	57,104	1.1383
59	FORD MOTOR CO	FUSION	239	211,964	1.1276
60	AUDI	AUDI A6	8	7,108	1.1255
61	CHRYSLER	200	72	64,140	1.1225
62	CHRYSLER	DODGE NITRO	40	35,638	1.1224
63	KIA	SPORTAGE	50	45,604	1.0964
64	NISSAN	INFINITI M37/M56	16	14,818	1.0798
65	BMW	7	13	12,087	1.0755
66	TOYOTA	SCION TC	20	18,637	1.0731
67	KIA	OPTIMA	69	64,320	1.0728
68	FORD MOTOR CO	LINCOLN TOWN CAR	15	14,209	1.0557
69	HONDA	CR-Z	17	16,421	1.0353
70	MERCEDES-BENZ	GLK-CLASS	21	21,303	0.9858
71	TOYOTA	COROLLA	215	223,032	0.9640
72	FORD MOTOR CO	LINCOLN MKT	4	4,274	0.9359
73	VOLVO	S80	4	4,281	0.9344
74	BMW	M3	7	7,575	0.9241
75	GENERAL MOTORS	GMC CANYON PICKUP	6	6,510	0.9217
76	TOYOTA	LEXUS GS	5	5,485	0.9116
77	FORD MOTOR CO	LINCOLN MKS	12	13,171	0.9111
78	VOLVO	C30	5	5,530	0.9042
79	JAGUAR LAND ROVER	LAND ROVER LR2	3	3,333	0.9001
80	MITSUBISHI	ECLIPSE	5	5,610	0.8913
81	GENERAL MOTORS	CHEVROLET CORVETTE	11	12,353	0.8905
82	HYUNDAI	SANTA FE	62	69,685	0.8897
83	HYUNDAI	GENESIS	26	29,398	0.8844
84	GENERAL MOTORS	BUICK LUCERNE	28	31,887	0.8781

	Manufacturer	Make/model (line)	Thefts 2011	Production (Mfr's) 2011	2011 Theft rate (per 1,000 vehicles produced)
85	SUZUKI	VITARA/GRAND VITARA	5	5,704	0.8766
86	VOLKSWAGEN	JETTA/GLI	128	148,313	0.8630
87	PORSCHE	CAYMAN	1	1,199	0.8340
88	KIA	SOUL	80	96,970	0.8250
89	JAGUAR LAND ROVER	XK/XKR	3	3,662	0.8192
90	MERCEDES-BENZ	E-CLASS	61	74,557	0.8182
91	BMW	B7	10	12,493	0.8005
92	GENERAL MOTORS	BUICK LACROSSE/ALLURE	49	62,533	0.7836
93	FORD MOTOR CO	EDGE	105	134,206	0.7824
94	HONDA	ACURA TL	10	12,807	0.7808
95	HONDA	ACCORD	173	221,250	0.7819
96	CHRYSLER	JEEP PATRIOT	41	53,153	0.7714
97	GENERAL MOTORS	CADILLAC CTS	43	57,930	0.7423
98	VOLVO	C70	5	6,867	0.7281
99	HONDA	ACCORD CROSS TOUR	9	12,388	0.7265
100	KIA	SORENTO	121	168,443	0.7183
101	TOYOTA	LEXUS IS	22	30,811	0.7140
102	FORD MOTOR CO	FIESTA	55	77,183	0.7126
103	AUDI	AUDI R8	1	1,416	0.7062
104	HONDA	ACURA MDX	36	51,201	0.7031
105	NISSAN	PATHFINDER	22	31,439	0.6998
106	GENERAL MOTORS	BUICK REGAL	35	50,439	0.6939
107	BMW	1	9	13,131	0.6854
108	AUDI	AUDI A4/A5	29	42,875	0.6764
109	NISSAN	370Z	4	6,218	0.6433
110	FORD MOTOR CO	ESCAPE	133	207,528	0.6409
111	CHRYSLER	JEEP WRANGLER	66	103,837	0.6356
112	GENERAL MOTORS	CHEVROLET COLORADO PICKUP	16	25,283	0.6328
113	BMW	5	42	66,525	0.6313
114	MERCEDES-BENZ	SL-CLASS	2	3,188	0.6274
115	HONDA	INSIGHT	8	12,924	0.619
116	HONDA	ELEMENT	7	11,460	0.6108
117	BMW	3	100	164,060	0.6095
118	MAZDA	2	11	18,108	0.6075
119	TOYOTA	SCION XD	4	6,609	0.6052
120	JAGUAR LAND ROVER	XF	7	11,734	0.5966
121	AUDI	AUDI Q5	14	23,731	0.5900
122	CHRYSLER	JEEP COMPASS	25	42,921	0.5825
123	MAZDA	CX-9	17	29,203	0.5821
124	VOLKSWAGEN	TIGUAN	15	25,785	0.5817
125	TOYOTA	TACOMA PICKUP	71	122,520	0.5795
126	HONDA	ACURA RDX	9	15,590	0.5773
127	GENERAL MOTORS	CHEVROLET CRUZE	100	177,381	0.5638

	Manufacturer	Make/model (line)	Thefts 2011	Production (Mfr's) 2011	2011 Theft rate (per 1,000 vehicles produced)
128	MAZDA	CX-7	21	37,655	0.5577
129	BMW	Z4/M	3	5,450	0.5505
130	TOYOTA	RAV4	100	181,785	0.5501
131	GENERAL MOTORS	CADILLAC SRX	32	59,077	0.5417
132	VOLKSWAGEN	CC	7	13,003	0.5383
133	CHRYSLER	DODGE JOURNEY	17	32,094	0.5297
134	VOLKSWAGEN	EOS	1	1,908	0.5241
135	NISSAN	ROGUE	72	138,221	0.5209
136	FORD MOTOR CO	FLEX	17	32,847	0.5176
137	AUDI	AUDI S4/S5	4	7,820	0.5115
138	PORSCHE	911	3	5,892	0.5092
139	NISSAN	FRONTIER PICKUP	23	47,081	0.4885
140	SUBARU	IMPREZA	24	49,315	0.4867
141	VOLVO	XC90	5	10,641	0.4699
142	TOYOTA	SIENNA VAN	87	187,467	0.4641
143	TOYOTA	4RUNNER	26	56,942	0.4566
144	TOYOTA	HIGHLANDER	38	87,503	0.4343
145	TOYOTA	VENZA	18	42,351	0.4250
146	SUBARU	LEGACY	21	50,878	0.4128
147	HYUNDAI	TUCSON	32	78,643	0.4069
148	FORD MOTOR CO	LINCOLN MKX	11	27,119	0.4056
149	MITSUBISHI	LANCER	11	28,316	0.3885
150	HONDA	PILOT	63	163,910	0.3844
151	NISSAN	JUKE	16	42,380	0.3775
152	NISSAN	MURANO	21	56,539	0.3714
153	HYUNDAI	AZERA	1	2,699	0.3705
154	FORD MOTOR CO	LINCOLN MKZ	9	24,752	0.3636
155	TOYOTA	FJ CRUISER	4	11,018	0.3630
156	HONDA	ACURA TSX	8	22,189	0.3605
157	GENERAL MOTORS	CHEVROLET EQUINOX	67	188,476	0.3555
158	BMW	MINI COOPER	17	48,663	0.3493
159	FORD MOTOR CO	RANGER PICKUP	34	99,043	0.3433
160	MITSUBISHI	OUTLANDER	12	35,054	0.3423
161	VOLVO	S60	1	2,951	0.3389
162	VOLVO	XC60	4	12,051	0.3319
163	FORD MOTOR CO	MERCURY MILAN	2	6,291	0.3179
164	VOLKSWAGEN	GOLF/RABBIT/GTI	10	31,726	0.3152
165	NISSAN	QUEST VAN	5	16,012	0.3123
166	MAZDA	TRIBUTE	1	3,206	0.3119
167	HONDA	FIT	13	41,694	0.3118
168	HYUNDAI	EQUUS	1	3,305	0.3026
169	TOYOTA	AVALON	17	56,692	0.2999
170	SUBARU	OUTBACK	37	129,071	0.2867

	Manufacturer	Make/model (line)	Thefts 2011	Production (Mfr's) 2011	2011 Theft rate (per 1,000 vehicles produced)
171	MERCEDES-BENZ	SMART FORTWO	1	3,542	0.2823
172	HONDA	CR-V	70	255,339	0.2742
173	NISSAN	XTERRA	6	21,983	0.2729
174	GENERAL MOTORS	GMC TERRAIN	22	83,531	0.2634
175	BMW	X3	6	23,188	0.2588
176	HONDA	ODYSSEY VAN	25	103,550	0.2414
177	TOYOTA	LEXUS RX	18	76,526	0.2352
178	TOYOTA	LEXUS ES	10	44,249	0.2260
179	FORD MOTOR CO	TRANSIT CONNECT VAN	6	28,091	0.2136
180	TOYOTA	LEXUS LS	2	9,861	0.2028
181	TOYOTA	LEXUS CT	2	10,216	0.1958
182	MAZDA	MX-5 MIATA	1	5,464	0.1830
183	TOYOTA	PRIUS	22	133,660	0.1646
184	NISSAN	INFINITI EX35	1	6,118	0.1635
185	SUBARU	FORESTER	11	74,829	0.1470
186	HYUNDAI	VERACRUZ	1	10,861	0.0921
187	LOTUS	EVORA	0	347	0.0000
188	ASTON MARTIN	DB9	0	86	0.0000
189	ASTON MARTIN	V8 VANTAGE	0	259	0.0000
190	ASTON MARTIN	DBS	0	104	0.0000
191	ASTON MARTIN	RAPIDE	0	317	0.0000
192	AUDI	AUDI TT	0	1,434	0.0000
193	AUDI	AUDI S6	0	159	0.0000
194	BENTLEY MOTORS	MULSANNE	0	235	0.0000
195	BMW	X5	0	37,865	0.0000
196	BMW	X6	0	4,430	0.0000
197	BMW	ACTIVE HYBRID 7L	0	584	0.0000
198	ROLLS ROYCE	DROPHEAD COUPE CONVERTIBLE	0	82	0.0000
199	FERRARI	458	0	662	0.0000
200	FERRARI	599	0	247	0.0000
201	FERRARI	612 SCAGLIETTI	0	1	0.0000
202	FERRARI	CALIFORNIA	0	518	0.0000
203	GENERAL MOTORS	CADILLAC FUNERAL COACH/HEARSE	0	752	0.0000
204	GENERAL MOTORS	CADILLAC LIMOUSINE	0	488	0.0000
205	GENERAL MOTORS	PONTIAC G3	0	243	0.0000
206	GENERAL MOTORS	CHEVROLET VOLT	0	4,370	0.0000
207	HONDA	ACURA RL	0	1,012	0.0000
208	KIA	RONDO	0	109	0.0000
209	KIA	BORREGO	0	14	0.0000
210	LOTUS	ELISE	0	232	0.0000
211	MASERATI	QUATTROPORTE	0	635	0.0000
212	MERCEDES-BENZ	SLK-CLASS	0	1,288	0.0000
213	MERCEDES-BENZ	CL-CLASS	0	723	0.0000

	Manufacturer	Make/model (line)	Thefts 2011	Production (Mfr's) 2011	2011 Theft rate (per 1,000 vehicles produced)
214	MERCEDES-BENZ	F-CELL	0	44	0.0000
215	MERCEDES-BENZ	SLS-CLASS	0	863	0.0000
216	PORSCHE	BOXSTER	0	1,967	0.0000
217	ROLLS ROYCE	PHANTOM	0	67	0.0000
218	ROLLS ROYCE	GHOST	0	854	0.0000
219	SAAB	9-5	0	2,034	0.0000
220	SUBARU	B9 TRIBECA	0	2,780	0.0000
221	SUZUKI	EQUATOR PICKUP	0	2,160	0.0000
222	TOYOTA	LEXUS SC	0	45,155	0.0000
223	TOYOTA	LEXUS HS	0	2,356	0.0000
224	VOLVO	V50	0	865	0.0000
225	VOLVO	XC70	0	5,069	0.0000
	Theft rate per 1,000 vehicles produced =	$\left(\frac{\text{Total theft}}{\text{Total production}} \right) \times 1000$	9,570	9,676,738	0.9889

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2014-02548 Filed 2-5-14; 8:45 am]

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Proposed Rules

Federal Register

Vol. 79, No. 25

Thursday, February 6, 2014

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 39

[Docket No. FAA-2014-0012; Directorate Identifier 2012-NM-007-AD]

RIN 2120-AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2004-16-01, that applies to certain Airbus Model A330-200 and -300, and Model A340-200 and -300, series airplanes. AD 2004-16-01 currently requires repetitive inspections for cracking of the chromed area of the left and right piston rods for the main landing gear (MLG) retraction actuators, and related investigative and corrective actions if necessary. Since we issued AD 2004-16-01, we have determined that the presence of water in the internal volume of the piston rod can consequently lead to propagation of longitudinal cracking in the body of the piston rod. We have also determined through sampling that certain retraction actuator piston rods of the MLG need to be replaced. This proposed AD would require repetitive draining of any fluid from the retraction actuator piston rod internal volume and sealing of the vent hole; repetitive ultrasonic inspections of the upper end of the piston rods, and corrective actions if necessary; a one-time ultrasonic inspection (longitudinal and circumferential) of the full-length of the piston rod, and corrective actions if necessary; and a terminating modification of the left-hand and right-hand MLG retraction actuators. We are proposing this AD to prevent cracking of the piston rods for the MLG retraction actuators, which could result in rupture of a piston rod, non-damped extension

of the MLG, high loads on the fully extended MLG, and consequent reduced structural integrity of the MLG.

DATES: We must receive comments on this proposed AD by March 24, 2014.

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

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

For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email airworthiness.A330-A340@airbus.com; Internet <http://www.airbus.com>. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2014-0012; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone (425) 227-1138; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2014-0012; Directorate Identifier 2012-NM-007-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On July 23, 2004, we issued AD 2004-16-01, Amendment 39-13757 (69 FR 46979, August 4, 2004). AD 2004-16-01 requires actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2004-16-01, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2011-0178R1, dated March 6, 2012, corrected March 7, 2012 (for Model A340-200 and -300 series airplanes); and EASA AD 2011-0179R1, dated March 6, 2012 (for Model A330-200 and -300 series airplanes) (both referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”); to correct an unsafe condition for the specified products. EASA AD 2011-0178R1, dated March 6, 2012, corrected March 7, 2012, states:

During an approach phase, the flight crew of an A330 aeroplane had to perform a free-fall extension of the left-hand (LH) MLG.

Rupture of the LH MLG retraction actuator piston rod was found near the rod attachment point. The inspection revealed at the location of the rupture the presence of corrosion resulting from incorrect application of the anticorrosion protection, and circumferential cracks resulting from normal operational loading effects.

Since the above rupture, new cases of crack propagation along the length of the piston rod occurred. These ruptures led to a non-damped extension of the landing gear. Fully

extended, the landing gear assembly was submitted to high loads jeopardizing its structural integrity.

This condition, if not detected and corrected, could lead to MLG failure during landing or roll-out and consequent damage to the aeroplane and injury to occupants.

DGAC France issued AD F-2005-098 (EASA approval 2005-5887) [and AD F-2005-099 (EASA approval 2005-5888)] to address this unsafe condition [the FAA issued AD 2004-16-01, Amendment 39-13757 (69 FR 46979, August 4, 2004)]. Since that [DGAC France] AD was issued, the results of extensive investigation determined that the presence of water in the internal volume of the piston rod can lead to the formation of ice which represents a potential source of high magnitude tensile hoop stresses in the material of the rod, leading to propagation of longitudinal crack in the body of the piston rod.

Prompted by these findings, EASA issued AD 2006-0301, partially retaining the requirements of DGAC France AD F-2005-099, which was superseded, and to revise the inspection requirements as follows:

- a. Extend the repetitive inspections interval for the removal of fluid from the internal volume of the piston rod using flight cycles in lieu of flight hours as this better represents the mechanism for the accumulation of water within the piston rod.
- b. Remove the preliminary visual inspection from the ultrasonic longitudinal inspection of the upper end of the piston rod.
- c. Add a new one-time ultrasonic longitudinal and circumferential inspection of the full piston rod length to eliminate any parts that exhibit severe corrosion along the internal length of the piston rod.
- d. Require installation of new design hollow piston rod Part Number (P/N) 114256328 (Airbus mod. 52980—SB A340-32-4222 Revision 01) without a vent hole, thus eliminating moisture ingress as the terminating action.

EASA AD 2006-0301 was later revised:

- at revision 01, to correct a number of typographical errors and to add reference to Airbus SB A340-32-4212 Revision 04, and
- at revision 02 to extend the inspections threshold from 3 to 6 years in service usage for retraction actuator piston rod P/N 114256321 issue 06 which was re-identified to P/N 114256326 issue 01 in accordance with the instructions of Airbus SB A340-32-4260.

More recently, the sampling of piston rod P/N 114256326 issue 1 and P/N 114256321 issue 06 have confirmed the need to replace all retraction actuator piston rods with a piston rod P/N 114256328.

For the reasons described above, this [EASA] AD at original issue retained the requirements of EASA AD 2006-0301R2 (http://ad.easa.europa.eu/blob/easa_ad_2006_0301_R2_superseded.pdf/AD_2006-0301R2_1), which is superseded, and required the replacement of all retraction actuator piston rods with a piston rod P/N 114256328, which constitutes terminating action to the repetitive requirements of this AD.

This [EASA] AD is revised to clarify that aeroplanes on which Airbus mod. 52980 has

been embodied in production are not required to accomplish the reidentification of MLG retraction actuator P/N 114256002-055 which is mentioned in the accomplishment instructions of Airbus SB A340-32-4222 Revision 03.

This [EASA] AD has been republished to correct a typographical mistake of the applicable Airbus SB number in the Applicability (in the Note) and in the Reason sections of this [EASA] AD.

You may examine the MCAI in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating it in Docket No. FAA-2014-0012.

Relevant Service Information

Airbus has issued the following service bulletins.

- Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008.
- Airbus Mandatory Service Bulletin A330-32-3180, Revision 03, dated January 28, 2011.
- Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008.
- Airbus Mandatory Service Bulletin A340-32-4222, Revision 03, dated January 28, 2011.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

EASA AD 2011-0178R1, dated March 6, 2012, corrected March 7, 2012 (for Model A340-200 and -300 series airplanes); and AD 2011-0179R1, dated March 6, 2012 (for Model A330-200 and -300 series airplanes); require replacement of the retraction actuator within 10 flight cycles if the findings of the ultrasonic inspection of the retraction actuator piston rod end are between 75% and 90% FSH (full screen height) and between 5 and 7 in time base. However, paragraph (n) of this proposed AD would require

replacement of the retraction actuator before further flight if the findings of the ultrasonic inspection of the retraction actuator piston rod end are higher than 75% and between 5 and 7 in time base.

EASA AD 2011-0178R1, dated March 6, 2012, corrected March 7, 2012 (for Model A340-200 and -300 series airplanes); and AD 2011-0179R1, dated March 6, 2012 (for Model A330-200 and -300 series airplanes); require replacement of the retraction actuator within 10 landings if the findings of the one-time ultrasonic circumferential inspection of the full-length chromed part of the piston rod give an indication between 75% and 90% FSH and between 7 and 9.5 in time base. However, paragraph (p)(2) of this proposed AD would require replacement of the retraction actuator before further flight if inspection findings are higher than 75% FSH and between 7 and 9.5 in time base.

We have determined that, because of the safety implications and consequences associated with those findings, the actuator must be replaced before further flight. These differences have been coordinated with EASA.

Costs of Compliance

We estimate that this proposed AD affects 24 Model A330-200 and -300 series airplanes of U.S. registry. There are no Model A340-200 and -300 series airplanes of U.S. registry.

We estimate that it would take about 67 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Required parts would cost about \$56,000 per product (2 actuators). Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be \$1,480,680, or \$61,695 per product.

In addition, we estimate that any necessary follow-on actions would take about 38 work-hours and require parts costing \$56,000 (2 actuators), for a cost of \$59,230 per product. We have no way of determining the number of aircraft that might need these actions.

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the

requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this proposed AD is 2120–0056. The paperwork cost associated with this proposed AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this proposed AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave. SW., Washington, DC 20591, ATTN: Information Collection Clearance Officer, AES–200.

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 proposed regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative,

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2004–16–01, Amendment 39–13757 (69 FR 46979, August 4, 2004), and adding the following new AD:

Airbus: Docket No. FAA–2014–0012; Directorate Identifier 2012–NM–007–AD.

(a) Comments Due Date

We must receive comments by March 24, 2014.

(b) Affected ADs

This AD supersedes AD 2004–16–01, Amendment 39–13757 (69 FR 46979, August 4, 2004).

(c) Applicability

This AD applies to Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–211, –212, and –213, –311, –312, and –313 airplanes; certificated in any category; all manufacturer serial numbers, except for those airplanes that have had Airbus Modification 52980 incorporated in production on both main landing gear (MLG) units, or airplanes that have had Airbus Modification 54500 incorporated in production.

(d) Subject

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

(e) Reason

This AD was prompted by reports of the piston rods for the MLG retraction actuators rupturing during flight. We are issuing this AD to prevent cracking of the piston rods for the MLG retraction actuators, which could result in rupture of a piston rod, non-damped extension of the MLG, high loads on the fully extended MLG, and consequent reduced structural integrity of the MLG.

(f) Compliance

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

(g) Repetitive Detailed Inspections

At the applicable time specified in paragraph (g)(1) or (g)(2) of this AD: Do a detailed inspection for cracking of the visible chromed area of the MLG retraction actuator piston rods in the fully extended position, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–32–3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340–32–4212, Revision 05, dated September 26, 2008 (for Model A340–200 and –300 series airplanes). Repeat the inspection thereafter at intervals not to exceed 8 days until the actions required by paragraphs (j) and (o) of this AD are accomplished.

(1) For MLG retraction actuator piston rods that have not had a detailed inspection accomplished as of the effective date of this AD, as described in any applicable service information specified in paragraph (h)(1) or (h)(2) of this AD: At the applicable time specified in paragraph (g)(1)(i) or (g)(1)(ii) of this AD.

(i) For MLG retraction actuator piston rods having part number (P/N) 114256309, or P/N 114256321 issue 03: Do the inspection within 60 days after the effective date of this AD, or before the MLG retraction actuator has been in service 36 months, whichever occurs later.

(ii) For MLG retraction actuator piston rods having P/N 114256326 issue 01, or P/N 114256321 issue 06: Do the inspection within 60 days after the effective date of this AD, or before the MLG retraction actuator has been in service 72 months, whichever occurs later.

(2) For MLG retraction actuator piston rods having P/N 114256309, P/N 114256321 issue 03, P/N 114256326 issue 01, or P/N 114256321 issue 06, that have had a detailed inspection accomplished as of the effective date of this AD, as described in the applicable service information specified in paragraph (h)(1) or (h)(2) of this AD: Inspect within 8 days after the effective date of this AD.

(h) Service Information To Determine Airplane Configuration for Paragraph (g) of This AD

(1) For Model A330 airplanes:

(i) Airbus Mandatory Service Bulletin A330–32–3173, Revision 01, dated June 16, 2004;

(ii) Airbus Mandatory Service Bulletin A330–32–3173, Revision 02, dated May 11, 2005;

(iii) Airbus Mandatory Service Bulletin A330–32–3173, Revision 03, dated March 13, 2006;

(iv) Airbus Mandatory Service Bulletin A330–32–3173, Revision 04, dated June 12, 2006; or

(v) Airbus Mandatory Service Bulletin A330–32–3173, Revision 05, dated September 26, 2008.

(2) For Model A340–200 and –300 series airplanes:

(i) Airbus Mandatory Service Bulletin A340–32–4212, Revision 01, dated June 16, 2004;

(ii) Airbus Mandatory Service Bulletin A340–32–4212, Revision 02, dated May 11, 2005;

(iii) Airbus Mandatory Service Bulletin A340-32-4212, Revision 03, dated March 13, 2006;

(iv) Airbus Mandatory Service Bulletin A340-32-4212, Revision 04, dated June 12, 2006; or

(v) Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008.

(i) Corrective Action for Cracking

If any cracking is found during any inspection required by paragraph (g) of this AD: Before further flight, replace the MLG retraction actuator with a new or serviceable part, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes).

(j) Repetitive Fluid Draining and Vent Hole Sealing

At the applicable time specified in paragraph (j)(1) or (j)(2) of this AD: Drain any fluid from the retraction actuator piston rod internal volume and seal the vent hole, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes). Repeat the draining and sealing thereafter at intervals not to exceed 1,000 flight cycles or 24 months, whichever occurs first.

(1) For MLG retraction actuator piston rods that have not been inspected and have not had the fluid drained as of the effective date of this AD, as described in the applicable service information specified in paragraph (k)(1) or (k)(2) of this AD: At the applicable time specified in paragraph (j)(1)(i) or (j)(1)(ii) of this AD.

(i) For MLG retraction actuator piston rods having P/N 114256309, or P/N 114256321 issue 03: Do the draining and sealing within 60 days after the effective date of this AD or before the MLG retraction actuator has been in service 36 months, whichever occurs later.

(ii) For MLG retraction actuator piston rods having P/N 114256326 issue 01, or P/N 114256321 issue 06: Do the draining and sealing within 60 days after the effective date of this AD or before the MLG retraction actuator has been in service 72 months, whichever occurs later.

(2) For MLG retraction actuator piston rods having P/N 114256309, P/N 114256321 issue 03, P/N 114256326 issue 01, or P/N 114256321 issue 06, that have been inspected and the fluid drained as of the effective date of this AD, as described in the applicable service information specified in paragraph (k)(1) or (k)(2) of this AD: Do the draining and sealing at the later of the times specified in paragraphs (j)(2)(i) and (j)(2)(ii) of this AD.

(i) Within 1,000 flight cycles or 24 months, whichever occurs first, from the last inspection and fluid drainage accomplished in accordance with the actions required in paragraph (j) of this AD.

(ii) Within 60 days after the effective date of this AD.

(k) Service Information To Determine Configuration for Paragraph (j) of This AD

(1) For Model A330 airplanes:

(i) Airbus Mandatory Service Bulletin A330-32-3173, Revision 02, dated May 11, 2005;

(ii) Airbus Mandatory Service Bulletin A330-32-3173, Revision 03, dated March 13, 2006;

(iii) Airbus Mandatory Service Bulletin A330-32-3173, Revision 04, dated June 12, 2006; or

(iv) Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008.

(2) For Model A340-200 and -300 series airplanes:

(i) Airbus Mandatory Service Bulletin A340-32-4212, Revision 02, dated May 11, 2005;

(ii) Airbus Mandatory Service Bulletin A340-32-4212, Revision 03, dated March 13, 2006;

(iii) Airbus Mandatory Service Bulletin A340-32-4212, Revision 04, dated June 12, 2006; or

(iv) Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008.

(l) Ultrasonic Inspection

At the applicable time specified in paragraph (l)(1) or (l)(2) of this AD: Do an ultrasonic longitudinal inspection for cracking of the retraction actuator piston rod end, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes).

(1) For MLG retraction actuator piston rods that have not had a non-destructive test (NDT) inspection as of the effective date of this AD, as described in the applicable service information specified in paragraph (m)(1) or (m)(2) of this AD: At the applicable time specified in paragraph (l)(1)(i) or (l)(1)(ii) of this AD.

(i) For MLG retraction actuator piston rods having P/N 114256309, or P/N 114256321 issue 03: Do the inspection within 60 days after the effective date of this AD, or before the MLG retraction actuator has been in service 36 months, whichever occurs later.

(ii) For MLG retraction actuator piston rods having P/N 114256326 issue 01, or P/N 114256321 issue 06: Do the inspection within 60 days after the effective date of this AD, or before the MLG retraction actuator has been in service 72 months, whichever occurs later.

(2) For MLG retraction actuator piston rods having P/N 114256309, P/N 114256321 issue 03, P/N 114256326 issue 01, or P/N 114256321 issue 06, that have had an NDT inspection as of the effective date of this AD, as described in the applicable service information specified in paragraph (m)(1) or (m)(2) of this AD: Do the inspection at the later of the times specified in paragraphs (l)(2)(i) and (l)(2)(ii) of this AD.

(i) Within 1,400 flight hours, 250 flight cycles, or 4 months, whichever occurs first after the date of the last ultrasonic longitudinal inspection performed as described in the applicable service information specified in paragraph (m)(1) or (m)(2) of this AD.

(ii) Within 60 days after the effective date of this AD.

(m) Service Information To Determine Configuration for Paragraph (l) of This AD

(1) For Model A330 airplanes:

(i) Airbus Mandatory Service Bulletin A330-32-3173, dated December 17, 2003;

(ii) Airbus Mandatory Service Bulletin A330-32-3173, Revision 01, dated June 16, 2004;

(iii) Airbus Mandatory Service Bulletin A330-32-3173, Revision 02, dated May 11, 2005;

(iv) Airbus Mandatory Service Bulletin A330-32-3173, Revision 03, dated March 13, 2006;

(v) Airbus Mandatory Service Bulletin A330-32-3173, Revision 04, dated June 12, 2006; or

(vi) Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008.

(2) For Model A340-200 and -300 series airplanes:

(i) Airbus Mandatory Service Bulletin A340-32-4212, dated December 17, 2003;

(ii) Airbus Mandatory Service Bulletin A340-32-4212, Revision 01, dated June 16, 2004;

(iii) Airbus Mandatory Service Bulletin A340-32-4212, Revision 02, dated May 11, 2005;

(iv) Airbus Mandatory Service Bulletin A340-32-4212, Revision 03, dated March 13, 2006;

(v) Airbus Mandatory Service Bulletin A340-32-4212, Revision 04, dated June 12, 2006; or

(vi) Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008.

(n) Corrective Action for Ultrasonic Inspection; Repetitive Interval

(1) If the finding of the inspection required by paragraph (l) of this AD gives an indication of 75% or higher of full screen height (FSH) and between 5 and 7 in time base: Before further flight, replace the MLG retraction actuator with a new or serviceable part, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes).

(2) If the finding of the inspection required by paragraph (l) of this AD gives an indication of less than 75% FSH and between 5 and 7 in time base: Repeat the inspection required by paragraph (l) of this AD thereafter at intervals not to exceed 1,400 flight hours, 250 flight cycles, or 4 months, whichever occurs first.

(o) One-Time Ultrasonic Inspections of the Full-Length of the Piston Rod

At the applicable time specified in paragraph (o)(1) or (o)(2) of this AD: Do a full-length ultrasonic longitudinal and a full-length circumferential inspection of the chromium-plated area of the piston rod for cracking, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes).

(1) For MLG retraction actuator piston rods having P/N 114256309, or P/N 114256321 issue 03: Inspect at the later of the times specified in paragraphs (o)(1)(i) and (o)(1)(ii) of this AD.

(i) Within 1,750 flight hours, 315 flight cycles, or 5 months after the effective date of this AD, whichever occurs first.

(ii) Before the MLG retraction actuator has been in service 36 months.

(2) For MLG retraction actuator piston rods having P/N 114256326 issue 01, or P/N 114256321 issue 06: Inspect at the later of the times specified in paragraphs (o)(2)(i) and (o)(2)(ii) of this AD.

(i) Within 1,750 flight hours, 315 flight cycles, or 5 months after the effective date of this AD, whichever occurs first.

(ii) Before the MLG retraction actuator has been in service 72 months.

(p) Corrective Action for One-time Ultrasonic Inspections of the Full-Length of the Piston Rod

(1) If the finding of the full-length ultrasonic longitudinal inspection required by paragraph (o) of this AD gives an indication of 75% or higher FSH and between 5 and 7 in time base: Before further flight, replace the MLG retraction actuator with a new or serviceable part, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes).

(2) If the finding of the full-length ultrasonic circumferential inspection required by paragraph (o) of this AD gives an indication of 75% or higher FSH and between 7 and 9.5 in time base: Before further flight, replace the MLG retraction actuator with a new or serviceable part, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes).

(q) Reporting Requirement

Report the results (regardless of findings) of the detailed inspection, the fluid drain/seal of the retraction actuator piston rod, the one-time ultrasonic longitudinal inspection of the upper end of the piston rod, and the one-time full-length ultrasonic

circumferential inspection required by this AD, and the findings of the actions required by this AD that cause an actuator to be replaced, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3173, Revision 05, dated September 26, 2008 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4212, Revision 05, dated September 26, 2008 (for Model A340-200 and -300 series airplanes). Submit the report to Airbus Customer Services Directorate, Attention: SEDCC1 Technical Data and Documentation Services fax: (+33) 5 61 93 28 06; email: *sb.reporting@airbus.com*, or via your resident customer support office. Submit the report at the applicable time specified in paragraph (q)(1) or (q)(2) of this AD.

(1) If the actions requiring reporting, as specified in paragraph (q) of this AD, are done on or after the effective date of this AD: Submit the report within 90 days after those actions have been done.

(2) If the actions requiring reporting, as specified in paragraph (q) of this AD, were done before the effective date of this AD: Submit the report within 90 days after the effective date of this AD.

(r) Terminating Actions for Repetitive Detailed Inspections

Accomplishment of the initial drainage of the fluid from the piston, as required by paragraph (j) of this AD, the full-length ultrasonic longitudinal inspection, and the full-length circumferential inspection, as required by paragraph (o) of this AD, constitutes terminating action for the repetitive detailed inspections required by paragraph (g) of this AD, provided no crack is found during the inspections.

(s) Terminating Modification

Within 48 months after the effective date of this AD: Modify the left-hand and right-hand MLG retraction actuators, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330-32-3180, Revision 03, dated January 28, 2011 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4222, Revision 03, dated January 28, 2011 (for Model A340-200 and -300 series airplanes). Accomplishment of the modification required by this paragraph terminates the repetitive requirements of this AD for the MLG retraction actuator that is modified.

(t) Exception to Re-Identification of the MLG Retraction Actuator

The re-identification of the MLG retraction actuator having P/N 114256002-055, which is described in Airbus Mandatory Service Bulletin A330-32-3180, Revision 03, dated January 28, 2011 (for Model A330 series airplanes); or Airbus Mandatory Service Bulletin A340-32-4222, Revision 03, dated January 28, 2011 (for Model A340-200 and -300 series airplanes); is not required on airplanes that have Airbus modification 52980 embodied in production.

(u) Optional Parts Installation

Installation of retraction actuator piston rod having P/N 114256323, in accordance with the Accomplishment Instructions of

Airbus Service Bulletin A330-32-3174, Revision 02, dated September 16, 2005 (for Model A330 series airplanes); or Airbus Service Bulletin A340-32-4213, Revision 01, dated September 16, 2005 (for Model A340-200 and -300 series airplanes); constitutes an acceptable method of compliance with the requirements of paragraphs (g), (j), (l), and (o) of this AD for that installed MLG retraction actuator.

(v) Parts Installation Limitation

As of the effective date of this AD, no person may install a piston rod having P/N 114256309, or 114256321, or 114256326 issue 01 for the MLG retraction actuator on any airplane, unless the part meets the applicable requirements of this AD at the specified times and intervals.

(w) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraphs (g), (j), (l), and (o) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (w)(1)(i) through (w)(1)(ix) of this AD.

(i) Airbus Mandatory Service Bulletin A330-32-3173, dated December 17, 2003; (for Model A330 series airplanes).

(ii) Airbus Mandatory Service Bulletin A330-32-3173, Revision 01, dated June 16, 2004 (for Model A330 series airplanes).

(iii) Airbus Mandatory Service Bulletin A330-32-3173, Revision 02, dated May 11, 2005 (for Model A330 series airplanes).

(iv) Airbus Mandatory Service Bulletin A330-32-3173, Revision 03, dated March 13, 2006 (for Model A330 series airplanes).

(v) Airbus Mandatory Service Bulletin A330-32-3173, Revision 04, dated June 12, 2006 (for Model A330 series airplanes).

(vi) Airbus Mandatory Service Bulletin A340-32-4212, dated December 17, 2003 (for Model A340-200 and -300 series airplanes).

(vii) Airbus Mandatory Service Bulletin A340-32-4212, Revision 01, dated June 16, 2004 (for Model A340-200 and -300 series airplanes).

(viii) Airbus Mandatory Service Bulletin A340-32-4212, Revision 02, dated May 11, 2005; Revision 03, dated March 13, 2006 (for Model A340-200 and -300 series airplanes).

(ix) Airbus Mandatory Service Bulletin A340-32-4212, Revision 04, dated June 12, 2006 (for Model A340-200 and -300 series airplanes).

(2) This paragraph provides credit for the actions required by paragraph (s) of this AD, if the modification was done before the effective date of this AD using the service bulletins specified in paragraphs (u)(2)(i) through (u)(2)(iv) of this AD.

(i) Airbus Service Bulletin A330-32-3180, Revision 01, dated August 15, 2005 for Model A330 series airplanes).

(ii) Airbus Mandatory Service Bulletin A330-32-3180, Revision 02, dated April 4, 2007 (for Model A330 series airplanes).

(iii) Airbus Service Bulletin A340-32-4222, Revision 01, dated August 15, 2005 (for Model A340-200 and -300 series airplanes).

(iv) Airbus Mandatory Service Bulletin A340-32-4222, Revision 02, dated April 4, 2007 (for Model A340-200 and -300 series airplanes).

(3) This paragraph provides credit for the actions required by paragraph (s) of this AD, if the modification was done before the effective date of this AD using Airbus Service Bulletin A340-32-4222, dated September 20, 2004; and re-identified using Airbus Service Bulletin A340-32-4222, Revision 01, dated August 15, 2005, or Airbus Mandatory Service Bulletin A340-32-4222, Revision 02, dated April 4, 2007.

(x) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone (425) 227-1138; fax (425) 227-1149. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product*: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent, or the DAH with a State of Design Authority's design organization approval). For a repair method to be approved, the repair approval must specifically refer to this AD. You are required to assure the product is airworthy before it is returned to service.

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

(y) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency Airworthiness Directive 2011-0178R1, dated March 6, 2012 (corrected March 7, 2012); and 2011-0179R1, dated March 6, 2012; for related information. These MCAIs may be found in the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2014-0012.

(2) For service information identified in this AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email airworthiness.A330-A340@airbus.com; Internet <http://www.airbus.com>. You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425-227-1221.

Issued in Renton, Washington, on January 29, 2014.

John P. Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014-02522 Filed 2-5-14; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2014-0053; Directorate Identifier 2013-NM-174-AD]

RIN 2120-AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 777 airplanes. This proposed AD was prompted by reports of corroded, migrated, or broken spring pins of the girt bar floor fitting; in one case the broken pins prevented a door escape slide from deploying during a maintenance test. This proposed AD would require replacing the existing spring pins at each passenger entry door at both girt bar floor fittings with new spring pins. We are proposing this AD to prevent broken or migrated spring pins of the girt bar floor fittings, which could result in improper deployment of the escape slide/raft and consequent delay and injury during evacuation of passengers and crew from the cabin in the event of an emergency.

DATES: We must receive comments on this proposed AD by March 24, 2014.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2014-0053; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Ana Martinez Hueto, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM-150S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057-3356; phone: 425-917-6592; fax: 425-917-6591; email: ana.m.hueto@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-

2014-0053; Directorate Identifier 2013-NM-174-AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received reports of a total of 23 corroded, migrated, or broken spring pins of the girt bar floor fitting on nine different airplanes; in one case the broken pins prevented a door escape slide from deploying during a maintenance test. Analysis of the broken spring pins revealed that the spring pins failed due to stress corrosion cracking. This condition, if not corrected, could result in improper deployment of the

escape slide/raft and consequent delay and injury during evacuation of passengers and crew from the cabin in the event of an emergency.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin 777-52A0050, dated June 18, 2013. For information on the procedures and compliance times, see this service information at <http://www.regulations.gov> by searching for Docket No. FAA-2014-0053.

FAA’s Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information identified previously, except as discussed under “Difference Between the Proposed AD and the Service Information.”

Difference Between the Proposed AD and the Service Information

Although Boeing Alert Service Bulletin 777-52A0050, dated June 18, 2013, recommends replacing the spring pins within 1,175 days (3 years, 80 days), we and Boeing have determined a 36-month compliance time is appropriate. We have advised Boeing to correct the compliance time statement in the next revision of the service information to specify a 36-month compliance time. In developing an appropriate compliance time for this AD, we considered the degree of urgency associated with the subject unsafe condition, and the average utilization of the affected fleet and time necessary to perform the replacement. In light of these factors, we find that a 36-month compliance time represents an appropriate interval of time for affected airplanes to continue to operate without compromising safety.

Costs of Compliance

We estimate that this proposed AD affects 189 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement	Up to 40 work-hours × \$85 per hour = Up to \$3,400	\$0	Up to \$3,400	Up to \$642,600.

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 proposed regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This

proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:
Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA-2014-0053; Directorate Identifier 2013-NM-174-AD.

(a) Comments Due Date

We must receive comments by March 24, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 777-200, -200LR, -300, -300ER, and

777F series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 777-52A0050, dated June 18, 2013.

(d) Subject

Air Transport Association (ATA) of America Code 52, Doors.

(e) Unsafe Condition

This AD was prompted by reports of corroded, migrated, or broken spring pins of the girt bar floor fitting; in one case the broken pins prevented a door escape slide from deploying during a maintenance test. We are issuing this AD to prevent broken or migrated spring pins of the girt bar floor fittings, which could result in improper deployment of the escape slide/raft and consequent delay and injury during evacuation of passengers and crew from the cabin in the event of an emergency.

(f) Compliance

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

(g) Spring Pin Replacement

Within 36 months after the effective date of this AD: Replace the spring pin at both girt bar floor fittings at each passenger entry door with a new spring pin, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777-52A0050, dated June 18, 2013.

(h) Parts Installation Prohibition

As of the effective date of this AD, no person may install a spring pin having part number MS39086-261 or MS16562-252 on any airplane.

(i) Alternative Methods of Compliance (AMOCs)

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

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

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

(j) Related Information

(1) For more information about this AD, contact Ana Martinez Hueto, Aerospace Engineer, Cabin Safety and Environmental

Systems Branch, ANM-150S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057-3356; phone: 425-917-6592; fax: 425-917-6591; email: ana.m.hueto@faa.gov.

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

Issued in Renton, Washington, on January 18, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014-02520 Filed 2-5-14; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 748, 750, 758, and 772

[Docket No. 121025583-2583-01]

RIN 0694-AF67

Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule clarifies the responsibilities under the Export Administration Regulations (EAR) of parties involved in export transactions where the foreign principal party in interest (FPPI) is responsible for the transportation out of the United States of items subject to the EAR. These transactions are currently referred to as “routed export transactions.” In such transactions, the U.S. principal party in interest (USPPI) may retain the responsibility and authority under the EAR to determine license requirements and, if necessary, to apply for a license from the Bureau of Industry and Security (BIS). Alternatively, if certain criteria are met, the USPPI may allow the FPPI, acting through a U.S. agent, to assume these responsibilities and authority. To enhance clarity, this proposed rule would remove the defined term “Routed Export Transaction” from the EAR and create a new term to better define certain

transactions of particular interest to BIS, specifically a “Foreign Principal Party Controlled Export Transaction” which is a transaction where an FPPI which is responsible for the export of items subject to the EAR, also assumes the authority and responsibility for licensing requirements. This proposed rule also would refine certain procedures for creating a “Foreign Principal Party Controlled Export Transaction”. These proposed changes are intended to facilitate enhanced public understanding of the EAR by eliminating perceived discrepancies between the EAR and the Bureau of the Census’s Foreign Trade Regulations (FTR) with respect to the definition of a “routed export transaction.” Specifically, this proposed rule will clarify the responsibilities of each party engaged in a transaction subject to the EAR and provide clearer instructions for USPPIs to delegate responsibility for license requirement determinations.

DATES: Comments must be received by April 7, 2014.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. The identification number for this rulemaking is BIS-2014-0004.

- By email directly to publiccomments@bis.doc.gov. Include RIN 0694-AF67 in the subject line.

- By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230. Refer to RIN 0694-AF67.

FOR FURTHER INFORMATION CONTACT: Robert Monjay, Office of Exporter Services, Bureau of Industry and Security, by telephone (202) 482-2440 or email: Robert.Monjay@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Overview

The Bureau of Industry and Security is proposing to amend the Export Administration Regulations (EAR) by removing the term “routed export transaction” from the EAR, including the definition of this term in § 772.1, and creating a new defined term, “Foreign Principal Party Controlled Export Transaction.” This new term would define the export transactions currently identified and permitted under § 758.3(b) of the EAR. This new term will better distinguish between the EAR’s concept described in § 758.3(b) and other regulations that use the term “routed export transaction.” In addition to improving the clarity of this EAR-specific term, this proposed rule will

also revise the procedures with which parties must comply to use § 758.3(b).

Currently, the Bureau of the Census (Census Bureau) determines through provisions in the Foreign Trade Regulations (FTR) (15 CFR Part 30), whether an export transaction is treated as a “routed export transaction” for the filing of electronic export information (EEI) in the Automated Export System (AES). However, this term risks creating confusion because while “routed export transaction” is defined in both the FTR and the EAR, each set of regulations has a different definition for that term. In order to provide greater clarity to exporters, the term “routed export transaction” would be removed from the EAR. That term would be replaced by a new term that more accurately describes transactions that are of particular interest to BIS, specifically, a subset of “routed export transactions” (as they are currently defined in the EAR) where the FPPI has assumed from the USPPPI responsibility for export license determinations and licensing. This change to the Regulations should facilitate enhanced public understanding, as the same term would no longer be used by both the EAR and FTR to refer to potentially different types of transactions.

This proposed rule would remove the terms “routed export transaction” and “routed transaction” in five sections of the EAR, specifically from §§ 748.4, 750.7, 758.1, 758.3 and 772.1, and add, as appropriate, the new term “Foreign Principal Party Controlled Export Transaction.” Each of these sections would be revised to clarify the responsibilities of each party to a transaction. BIS will still allow an FPPI to assume responsibility and authority for its U.S. agent to determine license requirements and apply for a license on behalf of the FPPI, subject to the revised terms and conditions set forth in § 758.3(b).

These revisions will clarify the responsibilities that accrue to each party engaged in a transaction subject to the EAR, and will provide clearer instructions for USPPPIs wishing to delegate responsibility for license requirement determinations and licensing to the FPPI and its U.S. agent. Further, this type of transaction would be defined as a “Foreign Principal Party Controlled Export Transaction.”

Background

On January 18, 2011, President Barack Obama issued Executive Order 13563, affirming general principles of regulation and directing government agencies to improve regulation and regulatory review. Among other things,

the President stressed the need for the regulatory system to allow for public participation and an open exchange of ideas, as well as promote predictability and reduce uncertainty. The President also emphasized that regulations must be accessible, consistent, written in plain language, and easy to understand.

On August 5, 2011, BIS issued “Notice of Inquiry: Retrospective Regulatory Review Under E.O. 13563,” 76 FR 47527, soliciting public comments on its existing regulations and proposed rules as part of BIS’s ongoing effort to ensure that its regulations are clear, effective, and up-to-date. BIS sought comments identifying any unnecessary compliance burden caused by rules that are unduly complex, outmoded, inconsistent, or overlapping, and comments identifying ways to make any aspect of the EAR more effective in protecting the national security or advancing the foreign policy interests of the United States. This proposed rule arose out of a public comment submitted in response to that notice of inquiry, which is summarized and responded to later in this preamble. In addition, BIS conducts various outreach seminars that include representatives from the U.S. Census Bureau. During some of these outreach seminars, questions arose related to “routed export transactions,” and in particular why the term “routed export transactions” can have different meanings in the EAR and FTR. This proposed rule seeks to address questions brought up during the public comment period and outreach seminars.

Routed Export Transaction

The Census Bureau collects certain information regarding nearly every export from the United States. One such piece of information is whether the transaction is a “routed export transaction.”

An export transaction generally has a U.S. seller, the USPPPI, and a foreign buyer, the FPPI. In a typical export transaction, the USPPPI ships an item out of the United States and is responsible for all license determinations and for obtaining export clearances, including applying for a license if one is required. The EAR defines a “routed export transaction” as a transaction where the FPPI agrees to terms of sale that include taking delivery of items inside the United States and assuming responsibility for transporting those items from the United States to a foreign destination. The FPPI, not being in the United States, generally takes possession and exports items through an agent in the United States.

The specific terms of sale between the USPPPI and the FPPI in a “routed export transaction” vary with respect to who the responsible party is for determining if a license is required for the transaction and which party will apply for a license if one is required. BIS structures its regulations to allow the parties in each transaction to structure the transaction as they see fit, provided the export is made in accordance with the EAR.

BIS imposes a general obligation on the USPPPI, as the exporter, to ensure that a transaction is conducted in full compliance with all export-licensing requirements. However, in a “routed export transaction,” § 758.3(b) of the EAR authorizes the USPPPI to allow the FPPI to expressly assume, in writing, responsibility from the USPPPI for determining license requirements and for obtaining export authorizations, when required. Under the EAR, an “exporter” must be in the United States. As a result, an FPPI must authorize a U.S. agent to obtain any necessary export authorization when required. The FPPI’s U.S. agent becomes the “exporter” for export control purposes. Without such a written authorization, the USPPPI remains the exporter, with all attendant responsibilities, regardless of which party, such as the FPPI or any other party, directs the export. When the USPPPI allows the FPPI to assume responsibility for export licensing determination and licensing, the USPPPI retains the responsibility to provide the FPPI with certain information, specifically: Any and all information the USPPPI knows could affect a licensing determination; upon request, an item’s export control classification number (ECCN); sufficient technical information about the item so that the ECCN can be determined.

Response to Comment

This rule is prompted, in part, by a public comment submitted in response to the August 5, 2011 Notice of Inquiry. The comment noted that the definitions of “routed export transaction” in the EAR and the Census Bureau’s Foreign Trade Regulations are different and that this causes confusion for exporters. The FTR’s definition contains two elements, namely that the FPPI’s U.S. agent is given authorization to (1) facilitate an export and (2) file the required export information through the Automated Export System (AES). The EAR definition, however, contains only one element, that the FPPI’s U.S. agent is given authorization to facilitate an export.

The comment stated that members of the trade community are confused

whether to indicate that a transaction is a “routed export transaction” when the FPPI’s U.S. agent is physically transporting the goods out of the United States, but the FPPI has not assumed responsibility for determining licensing requirements and obtaining a license. Members of the trade community are further confused whether the FPPI’s U.S. agent is authorized to prepare and file the electronic export information (EEI) in the AES.

The commenter suggests that BIS revise its definition of “routed export transaction” to include a second element: That the FPPI must authorize its U.S. agent to be responsible for determining and obtaining the export license authority. While this comment raises issues of significant concern to BIS, the suggested remedy would not fully resolve the issues. Therefore, BIS proposes the below changes to the EAR to clarify the parties’ obligations and more clearly distinguish the existing FTR “routed export transaction” definition from the new term that will be added to the EAR to replace the term “routed export transaction.”

Revisions to § 748.4, Basic Guidance Related To Applying for a License

Section 748.4, paragraph (a)(2) describes the licensing options available in a “routed export transaction.” It provides that either the USPPI or the FPPI’s U.S. agent may apply for an export license and specifies that the FPPI’s U.S. agent must have written authorization from the FPPI before submitting an application.

This rule proposes to revise § 748.4(a)(2) by changing the heading to “Foreign Principal Party Controlled Export Transaction.” It further proposes revising the text of § 748.4(a)(2) to provide that, unless authorized by § 758.3, the USPPI will be the exporter and the party responsible for applying to BIS for a license, when required, even if the FPPI is responsible for the export of the items out of the United States. When authorized by § 758.3, the FPPI’s designated U.S. agent may apply for a license to export items from the United States. This revision maintains and clarifies the obligations of each party and removes the potential confusion resulting from the use of the term “routed export transaction.”

This rule also proposes to revise § 748.4(b)(2)(i)(a) by removing the phrase “routed transaction” and replacing it with the phrase “Foreign Principal Party Controlled Export Transaction.”

Revisions to § 750.7, Issuance of Licenses

Section 750.7, paragraph (d) describes the responsibilities of the licensee, the person to whom the license is issued. It provides that in a reexport or routed export transaction, a U.S. agent, if there is one, for an FPPI will be the licensee and that both the U.S. agent and the FPPI are responsible for ensuring compliance with the license. This rule proposes to remove the phrase “routed export transaction” and replace it with “Foreign Principal Party Controlled Export Transaction.”

Revisions to § 758.1, Automated Export System (AES) Record

In section 758.1, which describes the Automated Export System (AES) record, the phrase “routed transaction” is used in paragraphs (f)(2) and (h)(1)(i). This term means the same as a “routed export transaction.” This rule proposes to remove both phrases and replace them with the phrase “Foreign Principal Party Controlled Export Transaction.”

Revisions to § 758.3, Responsibilities of Parties to the Transaction

Section 758.3 provides that all parties who participate in transactions subject to the EAR must comply with the EAR. It also describes the responsibilities of the parties to an export transaction and describes the requirements for delegating certain of those responsibilities to other parties to the transaction or to agents. This proposed rule would revise this section to clarify the responsibilities of the parties to the transaction and provide for increased information sharing. BIS is not proposing to alter the general responsibilities of the parties. This rule does, however, propose changes to the requirements for delegating the responsibility for licensing determination and licensing to the FPPI, by clarifying that the USPPI must agree to the delegation, through a written authorization, and that the FPPI must accept the delegation in writing and identify the U.S. agent authorized to act as the exporter, as described in detail below in the description of the proposed changes to § 758.3(b).

Section 758.3(a), Export Transactions

This rule proposes to revise § 758.3(a) by changing the first sentence to state: “The U.S. principal party in interest is the exporter, except in certain transactions and subject to certain requirements, described in paragraph (b) of this section.” Some exporters, freight forwarders, and foreign parties have misunderstood the current language to require the USPPI to allow the FPPI to

assume responsibility for determining licensing requirements and obtaining license authority in all routed export transactions, as defined by the Census Bureau, because the current language states that the USPPI is the exporter “except in certain routed transactions.” This change will clarify that the USPPI is the exporter in all export transactions, except when the specific requirements of § 758.3(b) are met to create a “Foreign Principal Party Controlled Export Transaction.” However, this does not change the USPPI’s responsibilities as defined in the Foreign Trade Regulations (15 CFR Part 30).

Section 758.3(b), Routed Export Transactions

This rule proposes to revise § 758.3(b) to state that when the agreement between the parties to a transaction allows the FPPI, through its U.S. agent, to take possession and control the movement of items sent out of United States, the USPPI may allow the FPPI to assume responsibility for determining licensing requirements and obtaining license authority if, and only if, the FPPI complies with certain requirements. These requirements will be described in three new paragraphs: §§ 758.3(b)(1)–(b)(3). These requirements will generally follow the documentary requirements in the current § 758.3(b) and § 758.3(d) and the information sharing requirements in the current § 758.3(c). These new sections will strengthen the requirements by providing greater detail on the required contents of the documentation and information sharing. This rule would also remove § 758.3(c) and § 758.3(d).

In addition, the heading for paragraph (b) to section 758.3 would also be revised to “Foreign Principal Party Controlled Export Transaction.” The end-use and end-user controls found in Part 744 of the EAR and the General Prohibitions found in Part 736 of the EAR would continue to be applicable to all transactions, including “Foreign Principal Party Controlled Export Transactions.”

Section 758.3(b)(1), Written Assumption of Responsibility

This rule proposes new § 758.3(b)(1), which would state that in order to transfer licensing responsibility, the USPPI must provide the FPPI with a written authorization (such as a contract, letter, facsimile, or email) which assigns to the FPPI responsibility for determining licensing requirements and obtaining license authority. The FPPI must provide the USPPI with a writing that acknowledges its assumption of those responsibilities,

and which identifies the U.S. agent of the foreign principal party in interest authorized to act as the exporter for EAR purposes. A single writing may still be used to cover multiple transactions between the same principals.

Section 758.3(b)(2), Power of Attorney or Other Written Authorization

This rule proposes new § 758.3(b)(2), which would state that prior to assuming responsibility from the USPPPI for determining licensing requirements and obtaining license authority, the FPPI would be required to designate an agent in the United States to represent the FPPI. The FPPI would also be required to provide a power of attorney or other written authorization to its U.S. agent to authorize the agent to act on its behalf. The FPPI's U.S. agent would be required to have the power of attorney or other written authorization before the agent may represent the FPPI or apply for a license on the FPPI's behalf. The FPPI would also be required to provide the USPPPI with a copy of the power of attorney or other written authorization prior to the FPPI's assuming responsibility from the USPPPI for determining licensing requirements and obtaining license authority.

Section 758.3(b)(3), Information Sharing Requirement

This rule proposes a new § 758.3(b)(3), with two sub-paragraphs. Section 758.3(b)(3)(i) would require the USPPPI to provide the FPPI and its U.S. agent with the correct Export Control Classification Number (ECCN), or with sufficient technical information to determine a classification, upon the request of the FPPI or its U.S. agent. The USPPPI would also be required to provide the FPPI and its U.S. agent with any information that the USPPPI "knows" may affect the determination of license requirements or export authorization. The USPPPI will be held to the "knowledge" standard defined in Part 772 of the EAR.

Section 758.3(b)(3)(ii) would require the FPPI to authorize the USPPPI to obtain from the FPPI's U.S. agent certain information related to the transaction, and direct the U.S. agent to provide such information to the USPPPI, upon request. Specifically, upon request, the FPPI's U.S. agent must provide the USPPPI with the date of export, port of export, country of ultimate destination and destination port, method of transportation and specific carrier identification, and export authorization (e.g., license number, license exemption, or NLR designation). This information sharing will enable the

USPPPI to confirm that the export was properly authorized.

Revisions to § 772.1, Responsibilities of Parties to the Transaction

This proposed rule would revise § 772.1 to remove the term "routed export transaction" from the list of definitions of terms used in the EAR, as this definition will become unnecessary. This rule would also revise the definitions of "Forwarding agent" to remove the term "routed export transaction" from that definition and to replace it with "Foreign Principal Party Controlled Export Transaction." Finally, the term, "Foreign Principal Party Controlled Export Transaction" is proposed to be added to § 772.1 and defined as a transaction meeting the requirements of § 758.3(b). It would also state that the FPPI may only assume the responsibility for determining licensing requirements and obtaining license authority when the FPPI is responsible for the movement of the items out of the United States.

Request for Comments

BIS seeks comments on this proposed rule. BIS will consider all comments received on or before April 7, 2014. All comments (including any personally identifying information or information for which a claim of confidentiality is asserted in either those comments or their transmittal emails) will be made available for public inspection and copying. Parties who wish to comment anonymously may do so by submitting their comments via Regulations.gov, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself.

Export Administration Act

Although the Export Administration Act of 1979, as amended, expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 C.F.R., 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 8, 2013, 78 FR 49107 (August 12, 2013), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "not significant regulatory action," under § 3(f) of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget Control Number. This rule does not affect any paperwork collection.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq., generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under § 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to § 605(b), the Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration that this proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities for the reasons explained below. Consequently, BIS has not prepared a regulatory flexibility analysis. A summary of the factual basis for the certification is provided below.

Number of Small Entities

The Bureau of Industry and Security (BIS) does not collect data on the size of entities that apply for and are issued export licenses. Although BIS is unable to estimate the exact number of small entities that would be affected by this

rule, it acknowledges that this rule would affect some unknown number.

Economic Impact

For the majority of businesses impacted by this rule, including the majority of small businesses, the likely effect of this rule will be a reduction in the burden associated with preparing export-related documents. This rule will reduce the burden on small entities by simplifying the regulatory burden on exporters when determining whether or not to mark the transaction as a “routed export transaction” as required in the Foreign Trade Regulations. This rule would accomplish this by reducing or eliminating potential confusion stemming from differences between the Foreign Trade Regulations and Export Administration Regulations (EAR) through the elimination of the term “routed export transaction” entirely from the EAR. In addition, to eliminate the use of the term “routed export transaction” under the EAR, this rule would refine certain procedures for creating a “Foreign Principal Party Controlled Export Transaction”. The USPPI would be required to authorize the delegation of the responsibility for licensing determination and licensing to the FPPI, through a written authorization, and the FPPI must accept the delegation in writing and identify the U.S. agent authorized to act as the exporter, although this may be accomplished within a single writing.

List of Subjects:

15 CFR Parts 748, 750, and 758

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

15 CFR Part 772

Exports.

Accordingly, Parts 748, 750, 758, and 772 of the EAR (15 CFR Parts 730–774) are proposed to be amended as follows:

PART 748—[AMENDED]

■ 1. The authority citation for Part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 8, 2013, 78 FR 49107 (August 12, 2013).

■ 2. Section 748.4 is amended by revising paragraph (a)(2) and (b)(2)(i)(A), to read as follows:

§ 748.4 Basic guidance related to applying for a license.

(a) * * *

(2) *Foreign Principal Party Controlled Export Transaction.* In an export transaction where the foreign principal party in interest is responsible for the movement of the items out of the United States, either the U.S. principal party in interest or, when authorized by § 758.3(b) of the EAR, the foreign principal party in interest’s designated U.S. agent may apply for a license to export items from the United States. Prior to submitting an application, the U.S. agent that applies for a license on behalf of the foreign principal party in interest must obtain a power of attorney or other written authorization from the foreign principal party in interest pursuant to § 758.3(b)(2) of the EAR.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(A) An agent, applicant, licensee and exporter for a foreign principal party in interest in a “Foreign Principal Party Controlled Export Transaction;” or

* * * * *

PART 750—[AMENDED]

■ 3. The authority citation for Part 750 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; Sec 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 8, 2013, 78 FR 49107 (August 12, 2013).

■ 4. Section 750.7 is amended by removing “routed export transactions” and adding in its place “Foreign Principal Party Controlled Export Transactions” in the third sentence of paragraph (d).

PART 758—[AMENDED]

■ 5. The authority citation for Part 758 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 8, 2013, 78 FR 49107 (August 12, 2013).

■ 6. Section 758.1 is amended by:

■ a. Removing “routed transactions” and adding in its place “Foreign Principal Party Controlled Export Transactions” in paragraph (f)(2); and

■ b. Removing “routed transaction” and adding in its place “Foreign Principal Party Controlled Export Transaction” in paragraph (h)(1)(i).

■ 7. Section 758.3 is revised to read as follows:

§ 758.3 Responsibilities of parties to the transaction.

All parties that participate in transactions subject to the EAR must comply with the EAR. Parties are free to structure transactions as they wish, and to delegate functions and tasks as they deem necessary, so long as the transaction complies with the EAR. However, acting through a forwarding or other agent, or delegating or redelegating authority, does not in and of itself relieve any party of responsibility for compliance with the EAR.

(a) *Export transactions.* The U.S. principal party in interest is the exporter, except in a “Foreign Principal Party Controlled Export Transaction” described in paragraph (b) of this Section. The exporter must determine licensing authority (License or License Exception) or that no license is required (NLR), and obtain the appropriate license or other authorization, if necessary, prior to exporting. The exporter may hire forwarding or other agents to perform these tasks, but doing so does not relieve the exporter of these responsibilities.

(b) *Foreign Principal Party Controlled Export Transaction.* In export transactions where the foreign principal party in interest is responsible for the movement of the items out of the United States, the U.S. principal party in interest may allow the foreign principal party in interest to assume responsibility for determining licensing requirements and, if necessary, obtaining a license or other export authorization, subject to the requirements set forth in the remainder of this paragraph. Absent full compliance with these requirements, the U.S. principal party in interest is the exporter for purposes of the EAR, and must determine licensing requirements and obtain the appropriate license or other export authorization, if necessary. All provisions of the EAR, including the end-use and end-user controls found in Part 744 of the EAR, and the General Prohibitions found in Part 736 of the EAR, apply to all parties to a Foreign Principal Party Controlled Export Transaction.

(1) *Written Assumption of Responsibility.* The U.S. principal party in interest may assign the foreign principal party in interest, in a writing, responsibility for determining licensing requirements and obtaining license authority, if necessary. The foreign principal party in interest must provide the U.S. principal party in interest a written document that acknowledges the foreign principal party in interest’s assumption of the responsibility and

identifies the U.S. agent of the foreign principal party in interest authorized to act as exporter for export licensing purposes. One writing may cover multiple transactions between the same principals.

(2) *Power of Attorney or Other Written Authorization.* The foreign principal party in interest must designate an agent in the United States for a “Foreign Principal Party Controlled Export Transaction.” The U.S. agent must obtain a power of attorney or other written authorization from the foreign principal party in interest before it may act on its behalf or apply for a license. Upon request, the foreign principal party in interest must provide the U.S. principal party in interest with a copy of the power of attorney or other written authorization.

(3) *Information Sharing Requirements.*
(i) The U.S. principal party in interest, upon request, must provide the foreign principal party in interest and its forwarding or other agent with the correct Export Control Classification Number (ECCN), or with sufficient technical information to determine classification. In addition, the U.S. principal party in interest must provide the foreign principal party in interest or the foreign principal’s agent any information that it knows may affect the determination of license requirements or export authorization.

(ii) The foreign principal party in interest must authorize the U.S. principal party in interest to obtain from the foreign principal party in interest’s U.S. agent the following information, and direct its U.S. agent to provide such information to the U.S. principal party in interest, upon request:

- (A) Date of export;
- (B) Port of export;
- (C) Country of ultimate destination;
- (D) Destination port;
- (E) Method of transportation;
- (F) Specific carrier identification; and
- (G) Export authorization (e.g., license number, license exemption, or NLR designation).

PART 772—[AMENDED]

■ 8. The authority citation for part 772 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 08, 2013, 78 FR 49107 (August 12, 2013).

■ 9. Section 772 is amended by:

- a. Adding the definition for “Foreign Principal Party Controlled Export Transaction” in alphabetical order, as set forth below;
- b. Revising the definition for “Forwarding agent”, as set forth below; and

■ c. Removing the definition of “Routed export transaction.”

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

* * * * *

Foreign Principal Party Controlled Export Transaction. A transaction meeting the requirements of § 758.3(b), where the foreign principal party in interest assumes responsibility for determining licensing requirements and obtaining license authority through its U.S. agent. The assumption of responsibility for determining licensing requirements and obtaining license authority is only authorized when the foreign principal party in interest is responsible for the movement of the items out of the United States.

* * * * *

Forwarding agent. The person in the United States who is authorized by a principal party in interest to perform the services required to facilitate the export of the items from the United States. This may include air couriers or carriers. In Foreign Principal Party Controlled Export Transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR.

* * * * *

Dated: January 15, 2014.

Kevin J. Wolf,
Assistant Secretary for Export Administration.

[FR Doc. 2014–01176 Filed 2–5–14; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–143874–10]

RIN 1545–BJ92

Calculation of UBTI for Certain Exempt Organizations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking and notice of proposed rulemaking.

SUMMARY: This document contains a new proposed regulation providing guidance on how certain organizations that provide employee benefits must calculate unrelated business taxable income (UBTI). This document also withdraws the notice of proposed rulemaking relating to UBTI that was published on February 4, 1986.

DATES: The notice of proposed rulemaking that was published on

February 4, 1986, at 51 FR 4391 is withdrawn as of February 6, 2014. Written or electronic comments and request for a public hearing must be received by May 7, 2014.

ADDRESSES: Send Submissions to: CC:PA:LPD:PR (REG–143874–10), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–143874–10), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG–143874–10).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulation, Dara Alderman or Janet Laufer at (202) 317–5500 (not a toll-free number); concerning submissions of comments and/or to request a hearing, Oluwafunmilayo (Fumni) Taylor at (202) 317–6901 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed Income Tax Regulations (26 CFR part 1) under section 512(a) of the Code. Organizations that are otherwise exempt from tax under section 501(a) are subject to tax on their unrelated business taxable income (UBTI) under section 511(a). Section 512(a) of the Code generally defines UBTI of exempt organizations and provides special rules for calculating UBTI for organizations described in section 501(c)(7) (social and recreational clubs), voluntary employees’ beneficiary associations described in section 501(c)(9) (VEBAs), supplemental unemployment benefit trusts described in section 501(c)(17) (SUBs), and group legal services organizations described in section 501(c)(20) (GLSOs).

Section 512(a)(1) provides a general rule that UBTI is the gross income from any unrelated trade or business regularly carried on by the organization, less certain deductions. Under section 512(a)(3)(A), in the case of social and recreational clubs, VEBAs, SUBs, and GLSOs, UBTI is defined as gross income, less directly connected expenses, but excluding “exempt function income.”

Exempt function income is defined in section 512(a)(3)(B) as gross income from two sources. The first type of exempt function income is amounts paid by members as consideration for providing the members or their dependents or guests with goods,

facilities, or services in furtherance of the organization's exempt purposes. The second type of exempt function income is all income (other than an amount equal to the gross income derived from any unrelated trade or business regularly carried on by the organization computed as if the organization were subject to section 512(a)(1)) that is set aside: (1) For a charitable purpose specified in section 170(c)(4); (2) in the case of a VEBA, SUB, or GLSO, to provide for the payment of life, sick, accident, or other benefits; or (3) for reasonable costs of administration directly connected with a purpose described in (1) or (2).

Section 512(a)(3)(E) generally limits the amount that a VEBA, SUB, or GLSO may set aside as exempt function income to an amount that does not result in an amount of total assets in the VEBA, SUB, or GLSO at the end of the taxable year that exceeds the section 419A account limit for the taxable year. For this purpose, however, the account limit does not take into account any reserve under section 419A(c)(2)(A) for post-retirement medical benefits.

Section 512(a)(3)(E) was added to the Code under the Tax Reform Act of 1984, Public Law 98-369 (98 Stat. 598 (1984)). Congress enacted section 512(a)(3)(E) to limit the extent to which a VEBA, SUB, or GLSO's income is exempt from tax, noting that "[p]resent law does not specifically limit the amount of income that can be set aside" by a VEBA, SUB, or GLSO on a tax-free basis. H.R. Rep. No. 98-432, pt. 2, at 1275.

To implement section 512(a)(3)(E), § 1.512(a)-5T was published in the **Federal Register** as TD 8073 on February 4, 1986 (51 FR 4312), with an immediate effective date. A cross-referencing Notice of Proposed Rulemaking (the 1986 Proposed Regulation) was issued contemporaneously with the temporary regulation. Written comments were received on the 1986 Proposed Regulation, and a public hearing was held on June 26, 1986. The 1986 Proposed Regulation is hereby withdrawn and replaced by the new proposed regulation that is published in this document. Section 1.512(a)-5T will continue to apply until it is removed by a final rule published in the **Federal Register**. This new proposed regulation contains some changes to improve clarity and respond to comments received on the 1986 Proposed Regulation, but otherwise generally has the same effect as the 1986 Proposed Regulation and § 1.512(a)-5T.

Explanation of Provisions

Covered Entity

This new proposed regulation uses the uniform term "Covered Entity" to describe VEBAs and SUBs subject to the UBTI computation rules of section 512(a)(3).¹ For taxable years beginning after June 30, 1992, GLSOs are no longer exempt as section 501(c)(20) organizations. See section 120(e). Therefore, a GLSO is no longer a Covered Entity. Effective July 1, 1992, a GLSO could, if it otherwise qualified, request a ruling or determination modifying the basis for its exemption from section 501(c)(20) to section 501(c)(9).

Limitation on Amounts Set Aside for Exempt Purposes

The 1986 Proposed Regulation and § 1.512(a)-5T provide that under section 512(a)(3)(E)(i), a Covered Entity's UBTI is generally the lesser of two amounts: (1) The investment income of the Covered Entity for the taxable year (excluding member contributions), or (2) the excess of the total amount set aside as of the close of the taxable year (including member contributions and excluding certain long-term assets) over the qualified asset account limit (calculated without regard to the otherwise permitted reserve for post-retirement medical benefits) for the taxable year. In the view of the Treasury Department and the IRS, this means that UBTI is calculated based on the extent to which the assets of a Covered Entity at the end of the year exceed the section 512 limitation, regardless of whether income was allocated to payment of benefits during the course of the year.

In *CNG Transmission Mgmt. VEBA v. U.S.*, 588 F.3d 1376 (Fed. Cir. 2009), *aff'g*, 84 Fed. Cl. 327 (2008), the Federal Circuit Court of Appeals decided in favor of the IRS on this issue. The Court said that the "language of section 512(a)(3)(E) is clear and unambiguous," and that a VEBA "may not avoid the limitation on exempt function income in [section] 512(a)(3)(E)(i) merely by allocating investment income toward the payment of welfare benefits during the course of the tax year." *CNG*, 588 F.3d at 1379, 1377-78; *accord Northrop Corp. Employee Insurance Benefit Plans Master Trust v. U.S.*, 99 Fed. Cl. 1 (2011), *aff'd*, 467 Fed. Appx. 886 (Fed. Cir. April 10, 2012), *cert. denied*, (Dec. 3, 2012).

Notwithstanding the view of the Treasury Department and the IRS and

¹ While section 501(c)(7) organizations are also subject to the UBTI computation rules of section 512(a)(3), this proposed regulation addresses only computations for VEBAs and SUBs.

support for that view in the foregoing cases, one court has applied a different interpretation. In *Sherwin-Williams Co. Employee Health Plan Trust v. Comm'r*, 330 F.3d 449 (6th Cir. 2003), *rev'g*, 115 T.C. 440 (2000), the Sixth Circuit Court of Appeals held that investment income that the taxpayer VEBA earmarked and claimed was spent before year-end on reasonable costs of administration was not subject to the section 512(a)(3)(E) limit on exempt function income.² The Treasury Department and the IRS believe that the decision in *Sherwin-Williams* is contrary to the statute, the legislative history of section 512(a)(3)(E), § 1.512(a)-5T, and the 1986 Proposed Regulation, and have determined that it is appropriate to issue this proposed regulation clarifying the proper way to make the calculation.³ If the final regulation follows the approach taken in this proposed regulation, the IRS will no longer recognize the precedential effect of *Sherwin-Williams* in the Sixth Circuit.

This new proposed regulation retains the formula set forth in the 1986 Proposed Regulation and § 1.512(a)-5T but modifies and clarifies the description and adds examples. This new proposed regulation specifically states that any investment income a Covered Entity earns during the taxable year is subject to unrelated business income tax (UBIT) to the extent the Covered Entity's year-end assets exceed the account limit, and clarifies that this rule applies regardless of how that income is used.

To further improve clarity, this new proposed regulation slightly modifies language from the prior version of Q&A-3, separates it into a new Q&A-2 and -3, and adds examples.

This new proposed regulation also reflects the rule under section

² As noted by the Federal Circuit in *CNG*, *Sherwin-Williams* can be viewed as distinguishable on its facts because the government there agreed to a stipulation that the investment income at issue had been spent on administrative costs, and in *CNG* there was not an equivalent stipulation. The Treasury Department and the IRS believe that the stipulation in *Sherwin-Williams* is not a distinction that should have affected the outcome. Specifically, the Treasury Department and the IRS believe that regardless of whether investment income is earmarked for (or otherwise traceable to) the payment of program benefits and administrative expenses during the year, the formula set forth in the 1986 Proposed Regulation and § 1.512(a)-5T, as well as the new proposed regulation, operates the same way.

³ The IRS's interpretation is set forth in its non-acquiescence to the *Sherwin-Williams* decision (AOD 2005-02, 2005-35 I.R.B. 422). In AOD 2005-02, the IRS recognized the precedential effect of the decision to cases appealable to the Sixth Circuit and indicated that it would follow *Sherwin-Williams* with respect to cases within that circuit if the opinion cannot be meaningfully distinguished.

512(a)(3)(B) that the UBTI of a Covered Entity includes UBTI derived by the Covered Entity from any unrelated trade or business (as defined in section 513) regularly carried on by it, computed as if the organization were subject to section 512(a)(1).

In addition, this new proposed regulation reflects the special rule under section 512(a)(3)(E)(iii). Accordingly, a Covered Entity is not subject to the limitation under section 512(a)(3)(E) if substantially all of the contributions to the Covered Entity are made by employers who were tax exempt throughout the five-year taxable period ending with the taxable year in which the contributions are made.

Special Rules Relating to Sections 419A(f)(5) and 419A(f)(6)

Some commenters on the 1986 Proposed Regulation requested that the regulations explicitly provide that the special account limits under section 419A(f)(5) for collectively bargained plans be used in determining the set aside limits under section 512. The 1986 Proposed Regulation contained a rule that references § 1.419A-2T for special rules relating to collectively bargained welfare benefit funds. The Treasury Department and the IRS are actively working on regulations under section 419A(f)(5) relating to collectively-bargained welfare benefit funds and believe it is appropriate to address issues related to collectively bargained welfare benefit funds in that project.

A number of commenters suggested that a VEBA that is part of a 10 or more employer plan described in section 419A(f)(6) should be exempted from the UBTI rules under section 512. However, after the 1986 Proposed Regulation and § 1.512(a)-5T were published, the Technical Corrections to the Tax Reform Act of 1984, which was part of the Tax Reform Act of 1986, Public Law 99-514, added language to section 512(a)(3)(E)(i) that specifically subjects 10 or more employer plans to the set aside limit described in that section. See section 1851(a)(10)(A) of Public Law 99-514. Consistent with this change in the law, this new proposed regulation provides that a Covered Entity that is part of a 10 or more employer plan is subject to the set aside limit, and that the account limit is determined as if the plan is not subject to the exception under section 419A(f)(6).

Treatment of Existing Reserves

A number of concerns were raised by commenters relating to the rules in the 1986 Proposed Regulation regarding existing reserves. For example, one commentator stated that the

requirement that an employer must charge all post-retirement claims paid on or after July 18, 1984 against any existing reserve as of July 18, 1984 (and earnings on existing reserves) is burdensome. However, this treatment of existing reserves is required under section 512(a)(3)(E)(ii)(III). Thus, this new proposed regulation retains the rules regarding existing reserves in the 1986 Proposed Regulation and adds a clarification to the example.

Proposed Effective Date

This regulation is proposed to apply to taxable years ending on or after the date of publication of the final regulation.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of this regulation are Dara Alderman and Janet Laufer, Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Treasury Department and the IRS participated in the development of this regulation.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to be read in part as follows:

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

■ **Par. 2.** Section 1.512(a)-5 is added to read as follows:

§ 1.512(a)-5 Questions and answers relating to the unrelated business taxable income of organizations described in paragraphs (9) or (17) of section 501(c).

Q-1. What does section 512(a)(3) provide with respect to organizations described in paragraphs (9) or (17) of section 501(c)?

A-1. (a) In general, section 512(a)(3) provides rules for determining the unrelated business income tax of voluntary employees' beneficiary associations (VEBAs) and supplemental unemployment benefit trusts (SUBs). Under section 512(a)(3)(A), a Covered Entity's "unrelated business taxable income" means all income except exempt function income. Under section 512(a)(3)(B), exempt function income includes income that is set aside for exempt purposes, as described in Q&A-2 of this section, subject to certain limits, as described in Q&A-3 of this section.

(b) For purposes of this section, a "Covered Entity" means a VEBA or a SUB.

Q-2. What is exempt function income?

A-2. (a) Under section 512(a)(3)(B), the exempt function income of a Covered Entity for a taxable year means the sum of—

(1) amounts referred to in the first sentence of section 512(a)(3)(B) that are paid by members of the Covered Entity and employer contributions to the Covered Entity (collectively "member contributions"); and

(2) other income of the Covered Entity (including earnings on member contributions) that is set aside for—

(i) a purpose specified in section 170(c)(4) and reasonable costs of administration directly connected with such purpose, or

(ii) subject to the limitation of section 512(a)(3)(E) (as described in Q&A-3 of this section), the payment of life, sick, accident, or other benefits and

reasonable costs of administration directly connected with such purpose.

(b) The other income described in paragraph (a)(2) of this Q&A-2 does not include the gross income derived from any unrelated trade or business (as defined in section 513) regularly carried on by the Covered Entity, computed as if the organization were subject to section 512(a)(1).

Q-3. What are the limits on the amount that may be set aside?

A-3. (a) Pursuant to section 512(a)(3)(E)(i), and except as provided in paragraph (b) of this Q&A-3, the amount of investment income (as defined in paragraph (c)(1) of this Q&A-3) set aside by a Covered Entity as of the close of a taxable year of such Covered Entity to provide for the payment of life, sick, accident, or other benefits (and administrative costs associated with the provision of such benefits) is not taken into account for purposes of determining the amount of that income that constitutes "exempt function income" to the extent that the total amount of the assets of the Covered Entity at the end of the taxable year to provide for the payment of life, sick, accident, or other benefits (and related administrative costs) exceeds the applicable account limit for such taxable year of the Covered Entity (as described in paragraph (d) of this section). Accordingly, any investment income a Covered Entity earns during the taxable year is subject to unrelated business income tax to the extent the Covered Entity's year-end assets exceed the applicable account limit. This rule applies regardless of whether the Covered Entity spends or retains (or is deemed to spend or deemed to retain) that investment income during the course of the year. Thus, in addition to the unrelated business taxable income derived by a Covered Entity from any unrelated trade or business (as defined in section 513) regularly carried on by it, computed as if the organization were subject to section 512(a)(1), the unrelated business taxable income of a Covered Entity for a taxable year of such an organization includes the lesser of—

(1) the investment income of the Covered Entity for the taxable year, or
 (2) the excess of the total amount of the assets of the Covered Entity (excluding amounts set aside for a purpose described in section 170(c)(4)) as of the close of the taxable year over the applicable account limit for the taxable year.

(b) In accordance with section 512(a)(3)(E)(iii), a Covered Entity is not subject to the limits described in this Q&A-3 if substantially all of the contributions to the Covered Entity are

made by employers who were tax exempt throughout the five year taxable period ending with the taxable year in which the contributions are made.

(c) For purposes of this section, a Covered Entity's "investment income"—

(1) means all income except—

(i) member contributions described in paragraph (a)(1) of Q&A-2 of this section;

(ii) income set aside as described in paragraph (a)(2)(i) of Q&A-2 of this section; or

(iii) income from any unrelated trade or business described in paragraph (b) of Q&A-2 of this section; and

(2) includes gain realized by the Covered Entity on the sale or disposition of any asset during such year (other than gain on the sale or disposition of assets of an unrelated trade or business described in paragraph (b) of Q&A-2 of this section). The gain realized by a Covered Entity on the sale or disposition of an asset is equal to the amount realized by the organization over the basis of such asset in the hands of the organization reduced by any qualified direct costs attributable to such asset (under paragraphs (b), (c), and (d) of Q&A-6 of § 1.419A-1T).

(d) In calculating the total amount of the assets of a Covered Entity as of the close of the taxable year, certain assets with useful lives extending substantially beyond the end of the taxable year (for example, buildings, and licenses) are not to be taken into account to the extent they are used in the provision of life, sick, accident, or other benefits. By contrast, cash and securities (and other similar investments) held by a Covered Entity are taken into account in calculating the total amount of the assets of a Covered Entity as of the close of the taxable year because they are used to pay welfare benefits, rather than merely used in the provision of such benefits.

(e) The determination of the applicable account limit for purposes of this Q&A-3 is made under the rules of sections 419A(c) and 419A(f)(7), except that a reserve for post-retirement medical benefits under section 419A(c)(2)(A) is not to be taken into account. See § 1.419A-2T for special rules relating to collectively bargained welfare benefit funds.

(f) The limits of this Q&A-3 apply to a Covered Entity that is part of a 10 or more employer plan, as defined in section 419A(f)(6). For this purpose, the account limit is determined as if the plan is not subject to the exception under section 419A(f)(6).

(g) *Examples.* The following examples illustrate the calculation of a VEBA's UBTI:

Example 1 (a) Employer X establishes a VEBA as of January 1, 2013, through which it provides health benefits to active employees. The plan year is the calendar year. The VEBA has no employee contributions or member dues, receives no income from an unrelated trade or business regularly carried on by the VEBA, and has no income set aside for a purpose specified in section 170(c)(4). The VEBA's investment income in 2013 is \$1,000. As of December 31, 2013, the applicable account limit under section 512(a)(3)(E)(i) is \$5,000 and the total amount of assets is \$7,000.

(b) The UBTI for 2013 is \$1,000. This is because the UBTI is the lesser of (1) the investment income for the year (\$1,000) and (2) the excess of the VEBA assets over the account limit at the end of the year (\$7,000 over \$5,000, or \$2,000).

Example 2 (a) The facts are the same as in *Example 1*, except that the VEBA's applicable account limit under section 512(a)(3)(E)(i) as of December 31, 2013, is \$6,500.

(b) The UBTI for 2013 is \$500. This is because the UBTI for 2013 is the lesser of (1) the investment income for the year (\$1,000) and (2) the excess of the VEBA assets over the account limit at the end of the year (\$7,000 over \$6,500, or \$500).

Example 3 (a) Employer Y contributes to a VEBA through which Y provides health benefits to active and retired employees. The plan year is the calendar year. At the end of 2012, there was no carryover of excess contributions within the meaning of section 419(d), the balance in the VEBA was \$25,000, the Incurred but Unpaid (IBU) claims reserve was \$6,000, the reserve for post-retirement medical benefits (PRMB) (computed in accordance with section 419A(c)(2)) was \$19,000, and there were no existing reserves within the meaning of section 512(a)(3)(E)(ii). During 2013, the VEBA received \$70,000 in employer contributions and \$5,000 in investment income, paid \$72,000 in benefit payments and \$7,000 in administrative expenses, and received no income from an unrelated trade or business regularly carried on by the VEBA. All the 2013 benefit payments are with respect to active employees and the IBU claims reserve (that is, the account limit under section 419A(c)(1)) at the end of 2013 was \$7,200. The reserve for PRMB at the end of 2013 was \$20,000. All amounts designated as "administrative expenses" are expenses incurred in connection with the administration of the employee health benefits. "Investment income" is net of administrative costs incurred in the production of the investment income (for example, investment management and/or brokerage fees). Only employers contributed to the VEBA (that is, there were no employee contributions or member dues/fees). The VEBA did not set aside any income for a purpose specified in section 170(c)(4).

(b) The total amount of assets of the VEBA at the end of 2013 is \$21,000 (that is, \$25,000 beginning of year balance + \$70,000

contributions + \$5,000 investment income – (\$72,000 in benefit payments + \$7,000 in administrative expenses).

(c) The applicable account limit under section 512(a)(3)(E)(i) (that is, the account limit under section 419A(c), excluding the reserve for post retirement medical benefits) is the IBU claims reserve (\$7,200).

(d) The total amount of assets of the VEBA as of the close of the year (\$21,000) exceeds the applicable account limit (\$7,200) by \$13,800.

(e) The unrelated business taxable income is \$5,000 (that is, the lesser of investment income (\$5,000) and the excess of the amount of assets of the VEBA as of the close of the taxable year over the applicable account limit (\$13,800)).

Example 4 (a) The facts are the same as in *Example 3* except that the 2012 year-end balance was \$15,000.

(b) The total amount of assets in the VEBA at the end of 2013 is \$11,000 (that is, \$15,000 beginning of year balance + \$70,000 contributions + \$5,000 investment income – (\$72,000 in benefit payments + \$7,000 in administrative expenses)).

(c) The applicable account limit under section 512(a)(3)(E)(i) remains \$7,200.

(d) The total amount of assets of the VEBA as of the close of the year (\$11,000) exceeds the applicable account limit (\$7,200) by \$3,800.

(e) The unrelated business taxable income is \$3,800 (that is, the lesser of investment income (\$5,000) and the excess of the total amount of assets of the VEBA at the close of the taxable year over the applicable account limit (\$3,800)).

Q–4. What is the effective date of the amendments to section 512(a)(3) and what transition rules apply to “existing reserves for post-retirement medical or life insurance benefits”?

A–4. (a) The amendments to section 512(a)(3), made by the Tax Reform Act of 1984, apply to income earned by a Covered Entity after December 31, 1985, in the taxable years of such an organization ending after such date.

(b) Section 512(a)(3)(E)(ii)(I) provides that income that is attributable to “existing reserves for post-retirement medical or life insurance benefits” will not be treated as unrelated business taxable income. This includes income that is either directly or indirectly attributable to existing reserves. An “existing reserve for post-retirement medical or life insurance benefits” (as defined in section 512(a)(3)(E)(ii)(II)) is the total amount of assets actually set aside by a Covered Entity on July 18, 1984 (calculated in the manner set forth in Q&A–3 of this section, and adjusted under paragraph (c) of Q&A–11 of § 1.419–1T), reduced by employer contributions to the fund on or before such date to the extent such contributions are not deductible for the taxable year of the employer containing July 18, 1984, and for any prior taxable

year of the employer, for purposes of providing such post-retirement benefits. For purposes of the preceding sentence only, an amount that was not actually set aside on July 18, 1984, will be treated as having been actually set aside on such date if—

(1) such amount was incurred by the employer (without regard to section 461(h)) as of the close of the last taxable year of the Covered Entity ending before July 18, 1984, and

(2) such amount was actually contributed to the Covered Entity within 8½ months following the close of such taxable year.

(c) In addition, section 512(a)(3)(E)(ii)(I) applies to existing reserves for such post-retirement benefits only to the extent that such “existing reserves” do not exceed the amount that could be accumulated under the principles set forth in Revenue Rulings 69–382, 1969–2 CB 28; 69–478, 1969–2 CB 29; and 73–599, 1973–2 CB 40. Thus, amounts attributable to any such excess “existing reserves” are not within this transition rule even though they were actually set aside on July 18, 1984. See § 601.601(d)(2)(ii)(b).

(d) All post-retirement medical or life insurance benefits (or other benefits to the extent paid with amounts set aside to provide post-retirement medical or life insurance benefits) provided after July 18, 1984 (whether or not the employer has maintained a reserve or fund for such benefits) are to be charged, first, against the “existing reserves” within this transition rule (including amounts attributable to “existing reserves” within this transition rule) for post-retirement medical benefits or for post-retirement life insurance benefits (as the case may be) and, second, against all other amounts. For this purpose, the qualified direct cost of an asset with a useful life extending substantially beyond the end of the taxable year (as determined under Q&A–6 of § 1.419–1T) will be treated as a benefit provided and thus charged against the “existing reserve” based on the extent to which such asset is used in the provision of post-retirement medical benefits or post-retirement life insurance benefits (as the case may be). All plans of an employer providing post-retirement medical benefits are to be treated as one plan for purposes of section 512(a)(3)(E)(ii)(III), and all plans of an employer providing post-retirement life insurance benefits are to be treated as one plan for purposes of section 512(a)(3)(E)(ii)(III).

(e) In calculating the unrelated business taxable income of a Covered Entity for a taxable year of such

organization, the total income of the Covered Entity for the taxable year is reduced by the income attributable to “existing reserves” within the transition rule before such income is compared to the excess of the total amount of the assets of the Covered Entity as of the close of the taxable year over the applicable account limit for the taxable year.

(f) The following example illustrates the calculation of a VEBA’s UBTI:

Example. Assume that the total income of a VEBA for a taxable year is \$1,000, and that the excess of the total amount of the assets of the VEBA as of the close of the taxable year over the applicable account limit is \$600. Assume also that of the \$1,000 of total income, \$540 is attributable to “existing reserves” within the transition rule of section 512(a)(3)(E)(ii)(I). The unrelated business taxable income of this VEBA for the taxable year is equal to the lesser of the following two amounts: (1) The total income of the VEBA for the taxable year, reduced by the extent to which such income is attributable to “existing reserves” within the meaning of the transition rule (\$1,000 – \$540 = \$460); or (2) the excess of the total amount of the assets of the VEBA as of the close of the taxable year over the applicable account limit (\$600). Thus, the unrelated business income of this VEBA for the taxable year is \$460.

Q–5. What is the effective/ applicability date of this section?

A–5. Except as otherwise provided in this paragraph, this section is applicable to taxable years ending on or after the date of publication of the final regulation. For rules that apply to earlier periods, see 26 CFR 1.512(a)–5T (revised as of April 1, 2013).

John M. Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2014–01625 Filed 2–5–14; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 317

[DOD–2008–OS–0068]

RIN 0790–AI31

Defense Contract Audit Agency (DCAA) Privacy Act Program

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: The Department of Defense (DoD) is proposing to amend the Defense Contract Audit Agency (DCAA) Privacy Act Program Regulation. Specifically, an exemption section is being added to include an exemption for

RDCAA 900.1, DCAA Internal Review Case Files. This rulemaking provides policies and procedures for the DCAA's implementation of the Privacy Act of 1974, as amended.

DATES: Comments must be received by April 7, 2014.

ADDRESSES: You may submit comments, identified by docket number and/or RIN 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, Suite 02G09, Alexandria, VA 22350-3100.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Keith Mastromichalis, FOIA/PA Management Analyst, DCAA HQ, 703-767-1022.

SUPPLEMENTARY INFORMATION:

The revisions to this rule are part of DoD's retrospective plan under EO 13563 completed in August 2011. DoD's full plan can be accessed at http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Defense%20Final%20Plan.pdf.

Executive Summary

I. Purpose of This Regulatory Action

a. This rule provides policies and procedures for DCAA's implementation of the Privacy Act of 1974, as amended.

b. **Authority:** Privacy Act of 1974, Public Law 93-579, Stat. 1896 (5 U.S.C. 552a).

II. Summary of the Major Provisions of This Regulatory Action

DCAA is adding an exemption section to include an exemption for RDCAA 900.1, DCAA Internal Review Case Files.

III. Costs and Benefits of This Regulatory Action

This regulatory action imposes no monetary costs to the Agency or public. The benefit to the public is the accurate reflection of the Agency's Privacy

Program to ensure that policies and procedures are known to the public.

Regulatory Procedures

Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. This rule does not (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)

It has been determined that this Privacy Act rule for the Department of Defense does not have significant economic impact on a substantial number of small entities because it is concerned only with the administration of Privacy Act within the Department of Defense.

Public Law 95-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been determined that this Privacy Act rule for the Department of Defense imposes no information collection requirements on the public under the Paperwork Reduction Act of 1995.

Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been determined that this Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, "Federalism"

It has been determined that the Privacy Act rule for the Department of Defense does not have federalism implications. The 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.

List of Subjects in 32 CFR Part 317

Privacy.

Accordingly the Department proposes to revise 32 CFR Part 317 to read as follows:

PART 317—DCAA PRIVACY ACT PROGRAM

Sec.

317.1 Purpose

317.2 Applicability and scope.

317.3 Policy.

317.4 Responsibilities.

317.5 Procedures.

317.6 Procedures for exemptions

Authority: Pub. L. 93-579, 88 Stat. 1896 (5 U.S.C. 552a).

§ 317.1 Purpose.

This part provides policies and procedures for the Defense Contract Audit Agency's (DCAA) implementation of the Privacy Act of 1974 (5 U.S.C. 552a) and 32 CFR part 310, and is intended to promote uniformity within DCAA.

§ 317.2 Applicability and scope.

(a) This part applies to all DCAA organizational elements and takes precedence over all regional regulatory issuances that supplement the DCAA Privacy Program.

(b) This part shall be made applicable by contract or other legally binding action to contractors whenever a DCAA contract provides for the operation of a system of records or portion of a system of records to accomplish an Agency function.

§ 317.3 Policy.

(a) It is DCAA policy that personnel will comply with the DCAA Privacy Program; the Privacy Act of 1974; and the DoD Privacy Program (32 CFR part 310). Strict adherence is necessary to ensure uniformity in the implementation of the DCAA Privacy Program and create conditions that will foster public trust. It is also Agency policy to safeguard personal information contained in any system of records maintained by DCAA organizational elements and to make that information available to the individual to whom it pertains to the maximum extent practicable.

(b) DCAA policy specifically requires that DCAA organizational elements:

(1) Collect, maintain, use, and disseminate personal information only when it is relevant and necessary to

achieve a purpose required by statute or Executive Order.

(2) Collect personal information directly from the individuals to whom it pertains to the greatest extent practical.

(3) Inform individuals who are asked to supply personal information for inclusion in any system of records:

(i) The authority for the solicitation.
 (ii) Whether furnishing the information is mandatory or voluntary.
 (iii) The intended uses of the information.

(iv) The routine disclosures of the information that may be made outside of DoD.

(v) The effect on the individual of not providing all or any part of the requested information.

(4) Ensure that records used in making determinations about individuals and those containing personal information are accurate, relevant, timely, and complete for the purposes for which they are being maintained before making them available to any recipients outside of DoD, other than a Federal agency, unless the disclosure is made under DCAA Regulation 5410.8, DCAA Freedom of Information Act Program.

(5) Keep no record that describes how individuals exercise their rights guaranteed by the First Amendment to the U.S. Constitution, unless expressly authorized by statute or by the individual to whom the records pertain or is pertinent to and within the scope of an authorized law enforcement activity.

(6) Notify individuals whenever records pertaining to them are made available under compulsory legal processes, if such process is a matter of public record.

(7) Establish safeguards to ensure the security of personal information and to protect this information from threats or hazards that might result in substantial harm, embarrassment, inconvenience, or unfairness to the individual.

(8) Establish rules of conduct for DCAA personnel involved in the design, development, operation, or maintenance of any system of records and train them in these rules of conduct.

(9) Assist individuals in determining what records pertaining to them are being collected, maintained, used, or disseminated.

(10) Permit individual access to the information pertaining to them maintained in any system of records, and to correct or amend that information, unless an exemption for the system has been properly established for an important public purpose.

(11) Provide, on request, an accounting of all disclosures of the information pertaining to them except when disclosures are made:

(i) To DoD personnel in the course of their official duties.

(ii) Under DCAA Regulation 5410.8, DCAA Freedom of Information Act Program.

(iii) To another agency or to an instrumentality of any governmental jurisdiction within or under control of the United States conducting law enforcement activities authorized by law.

(12) Advise individuals on their rights to appeal any refusal to grant access to or amend any record pertaining to them, and file a statement of disagreement with the record in the event amendment is refused.

§ 317.4 Responsibilities.

(a) The Assistant Director, Resources has overall responsibility for the DCAA Privacy Act Program and will serve as the sole appellate authority for appeals to decisions of respective initial denial authorities.

(b) The Chief, Administrative Management Division under the direction of the Assistant Director, Resources, shall:

(1) Establish, issue, and update policies for the DCAA Privacy Act Program; monitor compliance with this part; and provide policy guidance for the DCAA Privacy Act Program.

(2) Resolve conflicts that may arise regarding implementation of DCAA Privacy Act policy.

(3) Designate an Agency Privacy Act Advisor, as a single point of contact, to coordinate on matters concerning Privacy Act policy.

(4) Make the initial determination to deny an individual's written Privacy Act request for access to or amendment of documents filed in Privacy Act systems of records. This authority cannot be delegated.

(c) The DCAA Privacy Act Advisor under the supervision of the Chief, Administrative Management Division shall:

(1) Manage the DCAA Privacy Act Program in accordance with this part and applicable DCAA policies, as well as DoD and Federal regulations.

(2) Provide guidelines for managing, administering, and implementing the DCAA Privacy Act Program.

(3) Implement and administer the Privacy Act program at the Headquarters.

(4) Ensure that the collection, maintenance, use, or dissemination of records of identifiable personal information is in a manner that assures

that such action is for a necessary and lawful purpose; that the information is timely and accurate for its intended use; and that adequate safeguards are provided to prevent misuse of such information.

(5) Prepare promptly any required new, amended, or altered system notices for systems of records subject to the Privacy Act and submit them to the Defense Privacy Office for subsequent publication in the **Federal Register**.

(6) Conduct training on the Privacy Act program for Agency personnel.

(d) Heads of Principal Staff Elements are responsible for:

(1) Reviewing all regulations or other policy and guidance issuances for which they are the proponent to ensure consistency with the provisions of this part.

(2) Ensuring that the provisions of this part are followed in processing requests for records.

(3) Forwarding to the DCAA Privacy Act Advisor, any Privacy Act requests received directly from a member of the public, so that the request may be administratively controlled and processed.

(4) Ensuring the prompt review of all Privacy Act requests, and when required, coordinating those requests with other organizational elements.

(5) Providing recommendations to the DCAA Privacy Act Advisor regarding the releasability of DCAA records to members of the public, along with the responsive documents.

(6) Providing the appropriate justification for any denial, in whole or in part, of a request for records to the DCAA Privacy Act Advisor. Those portions to be excised should be bracketed in red pencil, and the specific exemption or exemptions cited which provide the basis for denying the requested records.

(e) The General Counsel is responsible for:

(1) Ensuring uniformity is maintained in the legal position, and the interpretation of the Privacy Act; 32 CFR part 310; and this part.

(2) Consulting with DoD General Counsel on final denials that are inconsistent with decisions of other DoD components, involve issues not previously resolved, or raise new or significant legal issues of potential significance to other Government agencies.

(3) Providing advice and assistance to the Assistant Director, Resources; Regional Directors; and the Regional Privacy Act Officer, through the DCAA Privacy Act Advisor, as required, in the discharge of their responsibilities.

(4) Coordinating Privacy Act litigation with the Department of Justice.

(5) Coordinating on Headquarters denials of initial requests.

(f) Each Regional Director is responsible for the overall management of the Privacy Act program within their respective regions. Under his/her direction, the Regional Resources Manager is responsible for the management and staff supervision of the program and for designating a Regional Privacy Act Officer. Regional Directors will, as designee of the Director, make the initial determination to deny an individual's written Privacy Act request for access to or amendment of documents filed in Privacy Act systems of records. This authority cannot be delegated.

(g) Regional Privacy Act Officers will:

(1) Implement and administer the Privacy Act program throughout the region.

(2) Ensure that the collection, maintenance, use, or dissemination of records of identifiable personal information is in compliance with this part to assure that such action is for a necessary and lawful purpose; that the information is timely and accurate for its intended use; and that adequate safeguards are provided to prevent misuse of such information.

(3) Prepare input for the annual Privacy Act Report when requested by the DCAA Information and Privacy Advisor.

(4) Conduct training on the Privacy Act program for regional and FAO personnel.

(5) Provide recommendations to the Regional Director through the Regional Resources Manager regarding the releasability of DCAA records to members of the public.

(h) Managers, Field Audit Offices (FAOs) will:

(1) Ensure that the provisions of this part are followed in processing requests for records.

(2) Forward to the Regional Privacy Act Officer, any Privacy Act requests received directly from a member of the public, so that the request may be administratively controlled and processed.

(3) Ensure the prompt review of all Privacy Act requests, and when required, coordinating those requests with other organizational elements.

(4) Provide recommendation to the Regional Privacy Act Officer regarding the releasability of DCAA records to members of the public, along with the responsive documents.

(5) Provide the appropriate documents, along with a written justification for any denial, in whole or

in part, of a request for records to the Regional Privacy Act Officer. Those portions to be excised should be bracketed in red pencil, and the specific exemption or exemptions cited which provide the basis for denying the requested records.

(i) DCAA Employees will:

(1) Not disclose any personal information contained in any system of records, except as authorized by this part.

(2) Not maintain any official files which are retrieved by name or other personal identifier without first ensuring that a notice for the system has been published in the **Federal Register**.

(3) Report any disclosures of personal information from a system of records or the maintenance of any system of records that are not authorized by this part to the appropriate Privacy Act officials for their action.

§ 317.5 Procedures.

Procedures for processing material in accordance with the Privacy Act of 1974 are outlined in DoD 5400.11-R, DoD Privacy Program (32 CFR part 310).

§ 317.6 Procedures for exemptions.

(a) *General information.* There are two types of exemptions, general and specific. The general exemption authorizes the exemption of a system of records from all but a few requirements of the Privacy Act. The specific exemption authorizes exemption of a system of records or portion thereof, from only a few specific requirements. If a new system of records originates for which an exemption is proposed, or an additional or new exemption for an existing system of records is proposed, the exemption shall be submitted with the system of records notice. No exemption of a system of records shall be considered automatic for all records in the system. The systems manager shall review each requested record and apply the exemptions only when this will serve significant and legitimate Government purposes.

(b) *Specific Exemptions.* (1) System identifier and name: RDCAA 900.1, DCAA Internal Review Case Files

(i) *Exemption:* Any portions of this system of records which fall under the provisions of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (H), and (f).

(ii) *Authority:* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reason:* (A) From subsection (c)(3) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly

enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents.

(B) From subsection (d) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents. Disclosures could also subject sources and witnesses to harassment or intimidation which jeopardize the safety and well-being of themselves and their families.

(C) From subsection (e)(1) because the nature of the investigation functions creates unique problems in prescribing specific parameters in a particular case as to what information is relevant or necessary. Due to close liaison and working relationships with other Federal, state, local, foreign country law enforcement agencies, and other governmental agencies, information may be received which may relate to a case under the investigative jurisdiction of another government agency. It is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(4)(G) through (H) because this system of records is exempt from the access provisions of subsection (d).

(E) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

Dated: January 21, 2014.

Patricia L. Toppings,

*OSD Federal Register Liaison Officer,
Department of Defense.*

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BILLING CODE 5001-06-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2013-0762; FRL-9906-04-Region 9]

Approval and Promulgation of Implementation Plans—Maricopa County PM-10 Nonattainment Area; Five Percent Plan for Attainment of the 24-Hour PM-10 Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submitted by the State of Arizona to meet Clean Air Act (CAA) requirements applicable to the Maricopa County (Phoenix) PM-10 Nonattainment Area. The Maricopa County PM-10 Nonattainment Area is located in the eastern portion of Maricopa County and encompasses the cities of Phoenix, Mesa, Scottsdale, Tempe, Chandler, Glendale, several other smaller jurisdictions, unincorporated County lands, as well as the town of Apache Junction in Pinal County. The Maricopa County PM-10 Nonattainment Area is designated as a serious nonattainment area for the national ambient air quality standards (NAAQS) for particulate matter of ten microns or less (PM-10). The submitted SIP revision is the *Maricopa Association of Governments Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area* (2012 Five Percent Plan). Arizona's obligation to submit the 2012 Five Percent Plan was triggered by EPA's June 6, 2007 finding that the Maricopa PM-10 Nonattainment Area had failed to meet its December 31, 2006 deadline to attain the PM-10 NAAQS. The CAA requires a serious PM-10 nonattainment area that fails to meet its attainment deadline to submit a plan providing for attainment of the PM-10.

NAAQS and for an annual emission reduction in PM-10 or PM-10 precursors of not less than five percent until attainment. EPA is proposing to approve the 2012 Five Percent Plan as meeting all relevant statutory and regulatory requirements.

DATES: Any comments must arrive by March 10, 2014.

ADDRESSES: Submit comments, identified by docket number EPA-R09-OAR-2013-0762, by one of the following methods:

1. *Federal eRulemaking Portal:* www.regulations.gov. Follow the on-line instructions.

2. *Email:* nudd.gregory@epa.gov.

3. *Mail or Deliver:* Gregory Nudd (Air-2), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Instructions: All comments will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through www.regulations.gov or email. www.regulations.gov is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Gregory Nudd, U.S. EPA Region 9, 415-947-4107, nudd.gregory@epa.gov or www.epa.gov/region09/air/actions.

SUPPLEMENTARY INFORMATION:

Throughout this document, the terms "we," "us," and "our" mean U.S. EPA.

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- II. Overview of Applicable CAA Requirements
- III. Evaluation of the 2012 Five Percent Plan's Compliance with CAA Requirements
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- V. Statutory and Executive Order Reviews

I. PM-10 Air Quality Planning in the Maricopa PM-10 Non-Attainment Area

The NAAQS are standards for certain ambient air pollutants set by EPA to protect public health and welfare. PM-10 is among the ambient air

pollutants for which EPA has established health-based standards. PM-10 causes adverse health effects by penetrating deep in the lungs, aggravating the cardiopulmonary system. Children, the elderly, and people with asthma and heart conditions are the most vulnerable.

On July 1, 1987 EPA revised the health-based national ambient air quality standards, replacing the standards for total suspended particulates with new standards applying only to particulate matter up to ten microns in diameter (PM-10). 52 FR 24672. At that time, EPA established two PM-10 standards, annual and 24-hour. Effective December 18, 2006, EPA revoked the annual PM-10 standard but retained the 24-hour PM-10 standard. 71 FR 61144 (October 17, 2006). The 24-hour PM-10 standard of 150 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) is attained when the expected number of days with a 24-hour average concentration above 150 $\mu\text{g}/\text{m}^3$ per calendar year averaged over a three year period, as determined in accordance with appendix K to 40 CFR part 50, is equal to or less than one. 40 CFR 50.6 and 40 CFR part 50, appendix K.

On the date of enactment of the 1990 Clean Air Act Amendments (CAA or the Act), many areas, including the Maricopa PM-10 Nonattainment Area, meeting the qualifications of section 107(d)(4)(B) of the amended Act were designated nonattainment by operation of law. 56 FR 11101 (March 15, 1991). The Maricopa PM-10 Nonattainment Area is located in the eastern portion of Maricopa County and encompasses the cities of Phoenix, Mesa, Scottsdale, Tempe, Chandler, Glendale, as well as 15 other jurisdictions, four tribes and unincorporated County lands. The nonattainment area also includes the town of Apache Junction in Pinal County. EPA codified the boundaries of the Maricopa PM-10 Nonattainment Area at 40 CFR 81.303.

Once an area is designated nonattainment for PM-10, section 188 of the CAA outlines the process for classifying the area as moderate or serious and establishes the area's attainment deadline. In accordance with section 188(a), at the time of designation, all PM-10 nonattainment areas, including the Maricopa PM-10 Nonattainment Area, were initially classified as moderate.

A moderate PM-10 nonattainment area must be reclassified to serious PM-10 nonattainment by operation of law if EPA determines after the applicable attainment date that, based on air quality, the area failed to attain by that date. CAA sections 179(c) and

188(b)(2). On May 10, 1996, EPA reclassified the Maricopa PM-10 Nonattainment Area as a serious PM-10 nonattainment area. 61 FR 21372.

As a serious PM-10 nonattainment area, the area acquired a new attainment deadline of no later than December 31, 2001. CAA section 188(c)(2). However, CAA section 188(e) authorizes EPA to grant up to a 5-year extension of that attainment deadline if certain conditions are met by the state. In order to obtain the extension, the state must make a SIP submission showing that: (1) Attainment by the applicable attainment date would be impracticable; (2) the state complied with all requirements and commitments pertaining to the area in the implementation plan for the area; and (3) the plan for the area includes the most stringent measures (MSM) that are included in the implementation plan of any state or are achieved in practice in any state, and can feasibly be implemented in the specific area. Arizona requested an attainment date extension under CAA section 188(e) for the Maricopa PM-10 Nonattainment Area from December 31, 2001 to December 31, 2006.

On July 25, 2002, EPA approved the serious area PM-10 plan for the Maricopa PM-10 Nonattainment Area as meeting the requirements for such areas in CAA sections 189(b) and (c), including the requirements for implementation of best available control measures (BACM) in section 189(b)(1)(B) and MSM in section 188(e). In the same action, EPA approved the submission with respect to the requirements of section 188(e) and granted Arizona's request to extend the attainment date for the area to December 31, 2006. 67 FR 48718. This final action, as well as the two proposals preceding it, provide a more detailed discussion of the history of PM-10 planning in the Maricopa PM-10 Nonattainment Area. See 67 FR 48718 (July 25, 2002); 65 FR 19964 (April 13, 2000); and 66 FR 50252 (October 2, 2001).

On June 6, 2007, EPA found that the Maricopa PM-10 Nonattainment Area failed to attain the 24-hour PM-10 NAAQS by the applicable attainment date of December 31, 2006 (72 FR 31183). Accordingly, the state was required to submit a new plan meeting the requirements of section 189(d) by December 31, 2007.

On December 19, 2007, the Maricopa Association of Governments (MAG) adopted the "MAG 2007 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area" (2007 Five

Percent Plan).¹ On December 21, 2007 the Arizona Department of Environmental Quality (ADEQ) submitted the 2007 Five Percent Plan and two Pinal County resolutions. EPA proposed to partially disapprove this plan on September 9, 2010. 75 FR 54806. On January 25, 2011, prior to EPA's final action on the 2007 Five Percent Plan, Arizona withdrew the plan from the Agency's consideration. As a result of the withdrawal of the 2007 Five Percent Plan, on February 14, 2011, EPA made a finding of failure to make a required SIP submittal. 76 FR 8300. This finding of failure to submit obligated EPA to promulgate a federal implementation plan (FIP) within two years after that date, unless the state submits and EPA approves a SIP submission meeting the requirements of section 189(d) by such date. CAA section 110(c). Because EPA's evaluation of the 2012 Five Percent Plan indicates that it meets the requirements of section 189(d), EPA is proposing to approve the submission in today's action.

The 2012 Five Percent Plan was adopted by MAG on May 23, 2012 and submitted to EPA by ADEQ on May 25, 2012.² MAG adopted and ADEQ submitted the 2012 Five Percent Plan specifically to address the CAA requirements in section 189(d) for the Maricopa PM-10 Nonattainment Area. EPA reviewed the submission and found it to be complete on July 20, 2012.³ EPA is proposing approval of the submission as meeting the requirements of section 189(d) in today's action.

II. Overview of Applicable CAA Requirements

As a serious PM-10 nonattainment area that failed to meet its applicable attainment date, December 31, 2006, the

¹ MAG has responsibility for air quality and transportation planning in the metropolitan Phoenix region. MAG develops air quality plans in coordination with ADEQ, the Arizona Department of Transportation, and the Maricopa County Air Quality Department. See 2012 Five Percent Plan at ES-1; Appendix E., Exh. 2 (Resolution to Adopt the MAG 2012 Five Percent Plan for PM-10 for the Maricopa County Nonattainment Area).

² Also on May 25, 2012, Arizona submitted several Arizona statutes, Maricopa County rules, a Maricopa County ordinance, and related appendices for approval into the Arizona SIP. By letter dated May 21, 2013, Arizona submitted redacted materials to clarify its May 25, 2012 submittal. By letter dated September 26, 2013, Arizona withdrew its May 21, 2013 submittal and submitted a table and redacted materials as a supplement to the May 25, 2012 submittal to clarify the materials it is requesting EPA to approve into the Arizona SIP.

³ Letter from Deborah Jordan, Director, Air Division, USEPA Region 9 to Henry Darwin, Director, Arizona Department of Environmental Quality dated July 20, 2012.

Maricopa PM-10 Nonattainment Area is subject to CAA section 189(d). Section 189(d) provides that the state shall "submit within 12 months after the applicable attainment date, plan revisions which provide for attainment of the PM-10 air quality standard and, from the date of such submission until attainment, for an annual reduction of PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent inventory prepared for the area."

The general planning and control requirements for all nonattainment plans are found in CAA sections 110 and 172. More specific planning and control requirements relevant to the PM-10 NAAQS are found in Part D, Subpart 4, in CAA sections 188 and 189. EPA has issued a General Preamble⁴ and Addendum to the General Preamble⁵ to provide guidance to states for meeting the CAA's requirements for the PM-10 NAAQS. The General Preamble mainly addresses the requirements for moderate nonattainment areas and the Addendum addresses the requirements for serious nonattainment areas. EPA has also issued other guidance documents related to PM-10 plans which are discussed and cited below. The specific PM-10 plan requirements addressed by this proposed action are summarized below.

A. Emissions Inventories

CAA section 172(c)(3) requires that an attainment plan include a comprehensive, accurate, and current inventory of actual emissions from all sources of the relevant pollutants.

B. Section 189(d) Attainment Demonstration and Five Percent Requirement

For serious PM-10 nonattainment areas that do not attain the PM-10 NAAQS by the applicable attainment date, CAA section 189(d) requires the state to submit plan revisions that provide for attainment of the NAAQS (i.e., an attainment demonstration) and provide for an annual five percent reduction in PM-10 or PM-10 precursor emissions for each year from the date of

⁴ "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498 (April 16, 1992) (General Preamble) and 57 FR 18070 (April 28, 1992).

⁵ "State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 59 FR 41998 (August 16, 1994) (Addendum).

submission until attainment.⁶ Section 189(d) specifies that the state must submit these plan revisions within 12 months of the applicable attainment date that the area failed to meet.

C. Reasonable Further Progress and Quantitative Milestones

CAA section 172(c)(2) requires that implementation plans demonstrate reasonable further progress (RFP) as defined in section 171(1). Section 171(1) defines RFP as “such annual incremental reductions in emissions of the relevant air pollutant as are required by this part [part D of title I] or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.” The general RFP requirement of section 172(c)(2) applies to SIP submissions necessary to meet CAA section 189(d) for the PM-10 NAAQS.

In addition, CAA section 189(c)(1) specifically applicable to the PM-10 NAAQS requires that an implementation plan contain quantitative milestones which will be achieved every 3 years and which will demonstrate that RFP is being met.

D. Contingency Measures

CAA section 172(c)(9) requires that implementation plans provide for “the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the NAAQS by the attainment date applicable under this part [part D of title I]. Such measures are to take effect in any such case without further action by the State or the Administrator.” The contingency measure requirement of CAA section 179(c)(9) applies to the SIP submissions necessary to meet CAA section 189(d) for the PM-10 NAAQS.

⁶ EPA has previously determined that PM-10 precursors are not significant contributors to PM-10 levels in the Maricopa County PM-10 Nonattainment Area. See 65 FR 19971 (April 13, 2000); 67 FR 48718 (July 25, 2002). In those rulemaking notices, EPA specifically determined that the contribution from major stationary sources of PM-10 precursors was less than 0.5 percent of the annual PM-10 NAAQS. See *e.g.*, 65 FR 19971. Subsequent technical studies confirm that ambient PM-10 levels in the nonattainment area are primarily from crustal material and are not derived from organic compounds, nitrates or sulfates. See *e.g.*, “PM-10 Source Attribution and Deposition Study,” prepared by Sierra Research, Inc. for Maricopa Association of Governments (March 2008) at pg. 2 (“Local monitoring by co-located PM-10 and PM-2.5 monitors confirms that PM-2.5 on high PM-10 days is a small fraction of the PM-10 concentrations. Therefore, the PM-10 problem in the Maricopa County nonattainment area is largely attributable to coarse particles, comprised primarily of geologic material.”); see also, *id.* at Chapter 3.

E. Transportation Conformity and Motor Vehicle Emissions Budgets

Transportation conformity is required by CAA section 176(c). Our conformity rule (40 CFR part 93, subpart A) requires that transportation plans, programs, and projects conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do so. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS or any interim milestone. Once a SIP that contains motor vehicle emissions budgets (MVEBs) has been submitted to EPA, and EPA has found them adequate, these budgets are used for determining conformity: Emissions from planned transportation activities must be less than or equal to the budgets.

F. Adequate Authority

CAA section 110(a)(2)(E)(i) requires that implementation plans provide necessary assurances that the state (or the general purpose local government or regional agency designated by the state for this purpose) will have adequate personnel, funding and authority under state law to carry out the requirements of such plan. Requirements for legal authority are further defined in 40 CFR part 51, subpart L (51.230–51.232) and for resources in 40 CFR 51.280. States and responsible local agencies must also demonstrate that they have the legal authority to adopt and enforce provisions of the SIP and to obtain information necessary to determine compliance.

III. Evaluation of the 2012 Five Percent Plan’s Compliance With CAA Requirements

A. Emissions Inventories

CAA section 172(c)(3) requires all nonattainment area plans to include a comprehensive, accurate, and current inventory of actual emissions from all sources of the relevant pollutant or pollutants in the area at issue. Our policies require that the inventory be fully documented. The 2012 Five Percent Plan uses the comprehensive “2008 PM-10 Periodic Emissions Inventory for Maricopa County, Revised 2011” (2008 PM-10 Inventory) as a starting point in the analysis.⁷ The 2008

⁷ The 2008 PM-10 Inventory is included as Appendix A, Exhibit 1 to the 2012 Five Percent Plan. The 2008 PM-10 Inventory includes revisions made by MAG in 2011 to incorporate more recent vehicle registration data, and updated models and planning assumptions. See 2012 Five Percent Plan, Appendix B, Exh. 1, at II–10 to II–17.

PM-10 Inventory was developed by the Maricopa County Air Quality Department (MCAQD) and the Maricopa Association of Governments (MAG)—MCAQD prepared emission estimates for point sources and most area and nonroad mobile sources, and MAG prepared emission estimates for onroad mobile, biogenic and certain area and nonroad mobile sources. 2012 Five Percent Plan, Appendix A, Exhibit 1. The 2008 PM-10 Inventory was adjusted by MAG for economic and population changes to provide projected emissions inventories for 2007 through 2012. 2012 Five Percent Plan at p. 3–2; Appendix B, Exh. 1, Section II.

The 2008 PM-10 Inventory describes annual emissions from point, area, nonroad, on-road, and nonanthropogenic sources in the Maricopa County and the Pinal County portion of the nonattainment area.⁸ The 2008 PM-10 Inventory shows that the most significant sources of emissions in the Maricopa County Nonattainment Area are unpaved roads and alleys (21 percent), construction-related fugitive dust (17 percent), paved road dust (17 percent) and windblown dust (9 percent). 2012 Five Percent Plan, Table 5–3. The 2008 PM-10 Inventory and related inventories for 2007 through 2012 are well documented by documentation meeting our guidance criteria. See “Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations”, EPA, August 2005 (2005 EI Guidance).

The base year, 2008, is a reasonably current year, considering the length of time needed to develop an inventory, perform the modeling, develop and adopt control measures, and hold public hearings on such a large and technically-complex plan.

The MAG plan inventories are sufficiently comprehensive, covering all sources of PM-10 that have been found to be important sources of relevant emissions in this and other PM-10 nonattainment areas. The 2008 PM-10 Inventory includes emissions for certain PM-10 precursors (nitrogen oxides, sulfur dioxide, and ammonia). The

⁸ The 2008 PM-10 Inventory notes that Maricopa County is approximately 9,223 square miles, whereas the Maricopa County PM-10 Nonattainment Area is approximately 2,888 square miles. See 2012 Five Percent Plan at p. 3–2.

⁹ The 2008 PM-10 Inventory also references “typical daily emissions.” The 2012 Five Percent Plan does not rely on “typical daily emissions” for the attainment demonstration or the five percent reduction in annual emissions; therefore, we did not comprehensively analyze these values in connection with today’s proposed action.

2007–2012 projected inventories based on the 2008 PM-10 Inventory do not include emissions of PM-10 precursors; however, EPA has previously determined that these precursors do not play a significant part in the PM-10 problems in the Maricopa County PM-10 Nonattainment Area. *See* 65 FR 19971 (April 13, 2000); *see also*, note 6. EPA proposes to find again that precursors still do not play a significant part in PM-10 problems in the Maricopa County PM-10 Nonattainment Area.

In developing the inventory, MAG and MCAQD followed EPA's 2005 guidance and recommendations regarding the use of emission factors, activity estimates, and control factors, and the other source specific emission estimation methodologies. The relative accuracy of each estimate underwent the prescribed quality assurance procedures, documented in the 2008 PM-10 Inventory, Sections 2.7, 3.7, 4.14 and 5.5, to minimize possible errors. MCAQD used reasonable and accurate methods to calculate rule effectiveness.

Rule effectiveness is the estimate of the extent to which a state rule in the SIP is achieving the intended reductions. A rule is 100 percent effective only if every impacted source is in compliance at all times. Often, rules are not 100 percent effective, and this aspect must be considered when calculating the emissions reductions from the rule. The 2008 PM-10 Inventory generally complies with EPA's guidance on calculating rule effectiveness found in Appendix B of EPA's 2005 EI Guidance.

EPA's analysis indicates the inventory is sufficiently accurate for the purposes of the 2012 Five Percent Plan. Because we find that the inventory is current, comprehensive, and accurate, we propose to approve the 2008 PM-10 Inventory and the adjusted inventories for 2007, 2009, 2010, 2011 and 2012 under CAA section 172(c)(3).

B. Attainment Demonstration

EPA determines whether an area's air quality is meeting the PM-10 NAAQS based on complete, quality assured, and certified data collected at state and local air monitoring stations (SLAMS) in the nonattainment area. Attainment of the 24-hour PM-10 standard is determined by calculating the average number of expected exceedances of the standard over a three-year period. Specifically, the 24-hour PM-10 standard is attained when the expected number of exceedances averaged over a three-year period is less than or equal to one at each monitoring site within the

nonattainment area.¹⁰ In the case of a monitor that collects daily data, and has a full three years worth of adequate data, that monitor should show no more than one exceedance of the standard in a three year period. If all of the monitors in the nonattainment area meet the standard for the requisite period reflecting the form of the 24 hour PM-10 NAAQS, then the area has attained the standard. This point is discussed in more detail in our technical support document (TSD).¹¹

1. Attainment Deadline

The 2012 Five Percent Plan predicts attainment of the PM-10 NAAQS by December 31, 2012. For an area determined by EPA to have failed to attain by the applicable attainment date for a serious PM-10 nonattainment area, CAA sections 172(a)(2) and 179(d)(3) specify that the new attainment date is as soon as practicable, but no later than 5 years from the date of publication of the nonattainment finding in the **Federal Register**. Pursuant to these provisions, the attainment date for the Maricopa PM-10 Nonattainment Area would be as expeditiously as practicable, but not later than June 6, 2012.¹² CAA section 172(a)(2), however, authorizes EPA to extend the attainment deadline to the extent it deems appropriate for a period no greater than 10 years from the publication of the nonattainment finding, "considering the severity of nonattainment and the availability and feasibility of pollution control measures." EPA believes such an extension to December 31, 2012, is warranted, based on various factors, including the following.

First, EPA notes that the PM-10 NAAQS is an calendar-based standard, which makes setting a mid-year attainment deadline (such as June 6) less appropriate than setting an end of calendar year date that would include the entire year of monitored data for comparison against the NAAQS. In addition, the 2012 Five Percent Plan explains that an extension is reasonable because modeled attainment of the PM-10 NAAQS requires implementation of a new measure, the Dust Action General Permit. *See* 2012 Five Percent Plan at p. 6–45 through 6–47. The Dust Action General Permit is a new measure developed by ADEQ and MAG following EPA's identification of approvability issues in the 2007 Five Percent Plan, including flaws in the

emissions inventory. These flaws required Arizona and MAG to develop a new emissions inventory and new attainment demonstration and to convene technical and stakeholder groups for appropriate input. One result of these processes was the Dust Action General Permit, which identifies a series of Best Management Practices (BMPs) for specific dust generating operations. When ADEQ's Maricopa County Dust Control Forecast predicts that a day is at high risk for dust generation, those dust generating operations that are not already required to control dust through a permit issued by the Arizona Department of Environmental Quality (ADEQ) or the Maricopa County Air Quality Department (MCAQD) are expected to choose and implement at least one BMP to reduce or prevent PM-10 emissions. The Dust Action General Permit required action by the Arizona Legislature and was not finalized until December 30, 2011.¹³ ADEQ and MAG estimate that the Dust Action General Permit will increase the rule effectiveness of Rule 310.01 by one percent on high wind days, or 190 tons on an annual basis. 2012 Five Percent Plan at p. 5–4 and p. 6–45. ADEQ and MAG also state that modeled attainment cannot be shown without the reductions attributable to the Dust Action General Permit. It was necessary to extend the attainment date until December 2012 in order for the Dust Action General Permit to be adopted and implemented.

For these reasons, EPA concurs that an extension of the attainment deadline to December 31, 2012 is warranted.

2. Modeled Attainment Demonstration

The 2012 Five Percent Plan shows attainment of the PM-10 NAAQS through modeled attainment demonstrations for the area near the Salt River in central Phoenix, (including the West 43rd Avenue monitor which recorded the most PM-10 exceedances during high wind conditions for the period 2005–2010) and for the entire Maricopa County PM-10 Nonattainment Area. *See generally*, 2012 Five Percent Plan, Chapter 6. MAG conducted modeling for two design days: May 4, 2007 (based on data from the West 43rd Avenue monitor), and June 6, 2007 (based on data from the Higley and West 43rd Avenue monitors). In consultation with ADEQ and EPA, MAG selected the design days and locations based on the fact that, for the past few years, measured exceedances of the PM-10 NAAQS have been associated with

¹⁰ 40 CFR 50.6(a); 40 CFR part 50, Appendix K.

¹¹ Technical Support Document for EPA's Action on the 2012 Five Percent Plan, U.S. EPA Region 9, January 14, 2014, Section III.

¹² *See* 72 FR 31183 (June 6, 2007).

¹³ Arizona House Bill 2208, which added ARS 49–457.05 and authorized creation of the Dust Action General Permit, was enacted in April 2011.

elevated winds. MAG's selected design days were not days that would be likely to be considered a high wind exceptional event (i.e., the geographic extent of the exceedances did not suggest the occurrence of an area-wide storm event). EPA's detailed analysis of the modeling can be found in Section IV of the TSD for this action. The modeling was conducted in a way that was consistent with EPA guidance and the input of EPA technical experts. The modeling indicates that the emission reductions in the plan should result in PM-10 levels that are consistent with the NAAQS by December 31, 2012. This attainment modeling was confirmed by the monitoring data as described in the next section of this proposal. Therefore, EPA proposes to find that the 2012 Five Percent Plan's attainment demonstration provides sufficient assurance that the control measures implemented in the nonattainment area will be sufficient to ensure ongoing compliance with the PM-10 standard in the Maricopa County PM-10 Nonattainment Area.

3. Monitoring Data Showing Attainment

EPA is also taking into account the fact that monitoring data recorded at air quality monitors throughout the Maricopa County PM-10 Nonattainment Area show that the area in fact reached attainment of the PM-10 NAAQS by December 31, 2012. Attainment of the 24-hour PM-10 standard is determined by calculating the average number of expected exceedances of the standard over a three-year period. Specifically, the 24-hour PM-10 standard is attained when the expected number of exceedances averaged over a three-year period is less than or equal to one at each monitoring site within the nonattainment area. During the 2010–2012 time period, MCAQD operated fifteen PM-10 monitors, while ADEQ and the Pinal County Air Quality Control District (PCAQCD) operated an additional three PM-10 monitoring stations in the area. EPA's analysis indicates that all of these monitors have an expected exceedance of less than one for the years 2010–2012.

EPA's review of monitoring data for the 24-hour PM-10 NAAQS for the Maricopa County PM-10 Nonattainment Area includes exceedances of the standard recorded during the 2010–2012 time period. However, EPA does not consider these exceedances of the NAAQS to be violations because they were the result of exceptional events. ADEQ submitted three packages containing demonstrations for high wind PM-10 exceptional events covering a total of one hundred thirty-three measured exceedances occurring

over twenty-seven days in the years 2011 and 2012 at monitors within the Maricopa County PM-10 Nonattainment Area. EPA reviewed the documentation that ADEQ provided to demonstrate that the exceedances on these days meet the criteria for an exceptional event in EPA's Exceptional Events Rule (EER).¹⁴ EPA concurred with ADEQ's requests for exceptional event determinations, based on the weight of evidence, that one hundred thirty-one of the one hundred thirty-three exceedances were caused by high wind exceptional events.¹⁵ Accordingly EPA has determined that the monitored exceedances associated with these exceptional events should not be used for regulatory purposes, including for evaluation of the CAA section 189(d) plan submission. Excluding these exceedances caused predominantly by uncontrollable emissions, EPA proposes to determine that the Maricopa County PM-10 Nonattainment Area has attained the 24-hour PM-10 NAAQS based on the monitors operated by ADEQ, MCAQD and PCAQD. This is consistent with attainment of the standard projected by the state in the 2012 Five Percent Plan.

Monitors operated by tribal governments in the nonattainment area also provide data that can be considered to evaluate attainment. The Salt River Pima-Maricopa Indian Community operates three PM-10 monitoring stations on tribal land within the Maricopa County PM-10 Nonattainment Area that meet the requirements of 40 CFR part 58 and are therefore appropriate to consider when determining if the area has attained the standard. As our analysis in Section III of the TSD indicates, these monitors show exceedances of the standard on three days during the 2010–2012 time period. Two of those exceedances (both on July 8, 2011) were during area-wide storms that resulted in exceedances at the non-tribal monitors that EPA has already determined were caused by exceptional events. EPA TSD Section III. The third exceedance (on July 2, 2011) appears to be related to local sources rather than an exceptional event. Pursuant to 40 CFR 49.10, however, EPA cannot disapprove a state SIP submittal because of the "failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian tribe." Therefore, we did not further consider these exceedances as

¹⁴ 40 CFR 50.1(j), (k), (l); 50.14; 51.930.

¹⁵ See Letters from Jared Blumenfeld, Regional Administrator, EPA Region 9, to Eric Massey, Director, Air Division, ADEQ, dated September 6, 2012, May 6, 2013, and July 1, 2013.

part of this proposed action to approve the 2012 Five Percent Plan.

The plan submitted by the state projected that the Maricopa County PM-10 Nonattainment Area would attain by December 31, 2012, because that was the most expeditious attainment date practicable considering the severity of nonattainment and the availability of controls in the area. Monitoring data for the years 2010–2012, taking into account EPA's determinations with respect to exceptional events during that period, indicate that the area attained the standard as of December 31, 2012.¹⁶

EPA proposes to find that the 2012 Five Percent Plan meets the requirement to demonstrate attainment by the appropriate attainment date. This proposed finding is based on our analysis of the modeling described in the plan and analysis of the monitoring data for the years 2010–2012.

C. Five Percent Requirement

CAA section 189(d) requires a state with a serious PM-10 nonattainment area that fails to attain the PM-10 NAAQS by the applicable attainment deadlines to submit within 12 months after the applicable attainment date plan revisions which provide an annual five percent reduction in emissions of PM-10 or PM-10 precursors in the area from the date of the submission until attainment, based on the most recent inventory.

The 2012 Five Percent Plan's demonstration of annual five percent reductions is found in Chapter 5. Arizona and MAG used the 2008 PM-10 Inventory as the "most recent inventory" and derived emissions levels for years 2007–2012 based upon the 2008 PM-10 Inventory. See Five Percent Plan at p. 5–4. The demonstration of annual five percent reductions uses 2007 as the baseline from which the five percent reductions are calculated and as point at which the reductions should start.¹⁷ The 2012 Five Percent Plan's

¹⁶ Additional exceedances of the PM-10 NAAQS occurred on six days between April and October 2013. Arizona has indicated its intent to submit documentation regarding these exceedances to EPA and to request that EPA concur with the state's determination that they qualify as exceptional events. EPA will evaluate the state's submissions and requests consistent with the EER and relevant guidance.

¹⁷ EPA believes Arizona's use of 2007 as the baseline for five percent reductions is reasonable and consistent with Congress' intent. Section 189(d) states that plans are due *within 12 months of the missed attainment deadline* and that the plans should provide for annual five percent reductions *from the date of the submission until attainment*. Arizona's attainment deadline was December 31, 2006. 67 FR 48718 (July 25, 2002). Accordingly, a submittal to fulfill section 189(d) was due by December 31, 2007, and reductions should have begun to occur as of that date. See 72 FR 31183 (June 6, 2007). The decline in emissions from 2007

demonstration is summarized in Table 1,^{18 19} below.

TABLE 1—2012 FIVE PERCENT PLAN EMISSIONS BY YEAR

Year	2007	2008	2009	2010	2011	2012
Baseline Inventory ¹⁸	59,218	56,681	52,123	50,497	49,743	49,673
Controlled Inventory ¹⁹	59,218	49,231	45,600	44,062	43,438	43,130
Annual Reduction		9,987	3,631	1,538	624	308
Cumulative Reduction		9,987	13,618	15,156	15,780	16,088
Target Reduction		2,961	5,922	8,883	11,844	14,805

The “baseline inventory” values are derived from the 2008 PM-10 Inventory as adjusted by population and economic growth factors from the University of Arizona. *See* 2012 Five Percent Plan, at p. 5–4 and p. 5–5, Table 5–2. The “controlled inventory” values show emission levels after taking into account reductions attributable to adopted control measures, specifically, Rules 310, 310.01 and 316, and the Dust Action General Permit. *See* 2012 Five Percent Plan at p. 5–1 through 5–6; *see also*, p. 5–7, Table 5–3. “Annual reduction” is the mathematical difference between the prior year controlled inventory and the current year controlled inventory. “Cumulative reduction” is the running total of actual reductions starting with 2007 and continuing to the attainment year of 2012. The target required reduction is five percent of the base year (2007) inventory (2,961 tons per year) for the first year (2008), and additional reductions of five percent per year, until the attainment year of 2012.

The “controlled inventory” values reflect emission reductions due to improved compliance with Maricopa County Rules 310 (Fugitive Dust from Dust-Generating Operations), 310.01 (Fugitive Dust from Non-Traditional Sources of Fugitive Dust) and 316 (Nonmetallic Mineral Processing) as well as the benefits of the Dust Action General Permit in 2012.²⁰ Maricopa County has been inspecting sources subject to these rules and tracking the extent to which the sources are complying with the regulations. Based on these data, MCAQD calculated rule effectiveness values for each rule. *See* 2012 Five Percent Plan, Appendix B, Chapter 3.

to 2008 shows that reductions did, in fact, begin to occur within that time frame. *See* Table 1. Arguably, these reductions occurred outside the literal time frame specified by Congress (i.e., “the date of the submission” of the plan) because the 2012 Five Percent Plan was not submitted until May 26, 2012. We note that Arizona had submitted the 2007 Five Percent Plan on December 21, 2007 (although it withdrew the plan on January 25,

The 2012 Five Percent Plan demonstrates compliance with the five percent reduction requirement by comparing the cumulative reductions from the Dust Action General Permit and increased effectiveness of the Maricopa County rules against the total five percent reductions each year. Most of the required reductions were achieved in the early years of the plan. EPA encourages this approach as it accelerates the environmental benefits of the reductions.²¹

D. Reasonable Further Progress and Quantitative Milestones

Pursuant to sections 172(c)(3) and 189(c)(1), the state must demonstrate RFP in the 2012 Five Percent Plan. We have explained in guidance that for areas such as the Maricopa County PM-10 Nonattainment Area where “the nonattainment problem is attributed to area type sources (e.g., fugitive dust, residential wood combustion, etc.), RFP should be met by showing annual incremental emission reductions sufficient generally to maintain linear progress towards attainment. Total PM-10 emissions should not remain constant or increase from 1 year to the next in such an area.” Addendum at 42015. Further, we have stated that, “in reviewing the SIP, EPA will determine whether the annual incremental emission reductions to be achieved are reasonable in light of the statutory objective to ensure timely attainment of the PM-10 NAAQS.” *Id.* at 42016.

CAA section 189(c) further requires PM-10 attainment plans to contain quantitative milestones that are to be achieved every three years and that are consistent with RFP for the area. These quantitative milestones should consist of elements that allow RFP to be

2011). EPA believes that it is appropriate and consistent with Congress’s intent for expeditious attainment of the NAAQS that we consider reductions that occurred prior to the submittal of the 2012 Five Percent Plan.

¹⁸ Table 5–2

¹⁹ Table 5–3

²⁰ EPA has approved Rules 310, 310.01 and 316 into the Arizona SIP. 75 FR 78167 (Dec. 15, 2010);

quantified or measured objectively. Specifically, states should identify and submit quantitative milestones that allow for evaluation of whether the plan is obtaining emission reductions adequate to achieve the NAAQS by the applicable attainment date. *Id.* at 42016.

The 2012 Five Percent Plan provides a reasonable further progress (RFP) demonstration in Chapter 6. *See* 2012 Five Percent Plan at 6–34 through 6–36. This analysis uses the controlled inventory totals by year as shown in Table 1 of this proposal. Specifically, the 2012 Five Percent Plan shows the following levels of PM-10, which decline between 2007 and 2012:

2007—59,218 tons
2008—49,231 tons
2009—45,600 tons
2010—44,062 tons
2011—43,438 tons
2012—43,130 tons

The analysis required for the five percent demonstration provides annual emission targets between the base year of 2007 and the attainment year of 2012. These annual totals show a steady downward trend in emissions that fulfills the milestone requirement of every three years. *See* 2012 Five Percent Plan at 6–36, Fig. 6–6. The trend is more sharply downward in the initial years because most of the improvements in rule effectiveness occurred in 2008. *Id.* at 35–36. EPA proposes to find that the 2012 Five Percent Plan has demonstrated reasonable further progress and that by setting annual target emission levels, the plan has exceeded the requirement to provide for milestones every three years.

E. Contingency Measures

CAA section 172(c)(9) requires that attainment plans provide for the

74 FR 58554 (Nov. 13, 2009). EPA has also approved Arizona statutory provisions related to the Dust Action General Permit. 78 FR 72579 (Dec. 3, 2013). EPA intends to propose action on the Dust Action General Permit in the near future.

²¹ This approach is consistent with the approach taken in a previous section 189(d) plan for the San Joaquin Valley. *See* 69 FR 5411 (Feb. 4, 2004) and 69 FR 30006 (May 25, 2004).

implementation of specific measures to be undertaken if the area fails to meet RFP requirements or fails to attain the PM-10 standard as projected in the plan. That section further requires that such measures are to take effect in any such case without further action by the state or EPA. The CAA does not specify how many contingency measures are necessary nor does it specify the level of emission reductions they must produce.

In guidance we have explained that the purpose of contingency measures is to ensure that additional emission reductions beyond those relied on in the attainment and RFP demonstrations are available immediately if there is a failure to meet RFP requirements or a failure to attain by the applicable statutory date. Addendum at 42014–42015. Contingency measures must consist of measures that the state is not otherwise relying on to meet other attainment plan requirements in the area. Thus, these additional emission reductions that will be achieved by the contingency measures ensure continued progress towards attainment while the state is revising the SIP to correct the failure to meet RFP or to attain. To that end, we recommend that contingency measures for PM-10 nonattainment areas provide emission reductions equivalent to one year's average increment of RFP. *Id.*

In interpreting the requirement that the contingency measures must “take effect without further action by the State or the Administrator,” the General Preamble provides the following general guidance: “[s]tates must show that their contingency measures can be implemented with minimal further action on their part and with no additional rulemaking actions such as public hearings or legislative review.” General Preamble at 13512.²² Further, “[i]n general, EPA will expect all actions needed to affect full implementation of the measures to occur within 60 days after EPA notifies the State of its failure.” *Id.* The Addendum at 42015 reiterates this interpretation.

We have also interpreted section 172(c)(9) to allow states to implement contingency measures before they are triggered by a failure of RFP or attainment as long as those measures are intended to achieve emission reductions

over and beyond those relied on in the attainment and RFP demonstrations. *Id.*; see also, *LEAN v. EPA*, 382 F.3d 575 (5th Cir. 2004). The 2012 Five Percent Plan calculated the target for contingency measure reductions by subtracting the attainment year 2012 emissions (43,130 tons) from the 2007 baseline emissions (59,218 tons) and dividing by five years, yielding a target of 3,218 tons per year. 2012 Five Percent Plan at 6–37. EPA proposes to find that this method of calculating the target for contingency measure reductions is consistent with CAA requirements and EPA guidance and we propose to approve this target value for contingency measures.

The contingency measures are shown in Table 6–22 of the 2012 Five Percent Plan and are composed of various methods to reduce fugitive dust emissions from roads. The most significant reductions are from paving dirt roads and alleys; other reductions result from street sweeping of freeways, ramps and frontage roads, lower speed limits on dirt roads and alleys, and paving and stabilizing of unpaved shoulders. The measures were implemented in the years 2008 through 2012. These contingency measures are surplus to the measures used to demonstrate five percent reductions, RFP, and attainment. The method used to estimate emissions reductions from these contingency measures are consistent with EPA recommended calculation methods for such measures and the total reductions exceed the target of one year of RFP. EPA proposes to approve the contingency measures described in the 2012 Five Percent Plan.

F. Transportation Conformity and Motor Vehicle Emissions Budgets

Transportation conformity is required by CAA section 176(c). Our conformity rule (40 CFR part 93, subpart A) requires that transportation plans, programs, and projects conform to state air quality implementation plans and establishes the criteria and procedures for determining whether or not they do so. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS or the timely achievement of interim milestones.

The 2012 Five Percent Plan specifies the maximum transportation-related PM-10 emissions allowed in the proposed attainment year, 2012, i.e., the MVEB of 54.9 metric tons per day (mtpd). 2012 Five Percent Plan at p. 6–43. This budget includes emissions from road construction, vehicle exhaust, tire

and brake wear, dust generated from unpaved roads and re-entrained dust from vehicles traveling on paved roads. This budget is based on the 2012 emissions inventory that was projected from the 2008 PM-10 Inventory and reflects emission reductions that the plan expects will result from the control measures. The budget is consistent with the attainment, five percent and RFP demonstrations in the Plan.

On September 12, 2013, we announced receipt of the 2012 Five Percent Plan on the Internet and requested public comment on the adequacy of the MVEB by October 15, 2013. We did not receive any comments during the comment period. During that time we reviewed the MVEB and preliminarily determined that it met the adequacy criteria in 40 CFR 93.118(e)(4) and (5). We sent a letter to ADEQ and MAG dated November 22, 2013 stating that the 2012 motor vehicle PM-10 emissions budget for the Maricopa area in the submitted plan was adequate. Our finding was published in the **Federal Register** on December 5, 2013, effective December 20, 2013. 78 FR 73188.

Now that EPA has thoroughly reviewed the submitted SIP, we are proposing to approve the MVEB for 2012 as part of our approval of the 2012 Five Percent Plan. EPA has determined that the MVEB emission target is consistent with emission control measures in the SIP and the attainment demonstration, five percent demonstration and RFP demonstration. The details of EPA's evaluation of the MVEB for compliance with the budget adequacy criteria of 40 CFR 93.118(e) is provided in a separate document included in the docket of this rulemaking.²³

G. Adequate Legal Authority

Section 110(a)(2)(E)(i) of the Clean Air Act requires that implementation plans provide necessary assurances that the state (or the general purpose local government) will have adequate personnel, funding and authority under state law. Requirements for legal authority are further defined in 40 CFR part 51, subpart L (section 51.230–232) and for resources in 40 CFR 51.280.

States and responsible local agencies must demonstrate that they have the legal authority to adopt and enforce provisions of the SIP and to obtain information necessary to determine compliance. These requirements are addressed in cover letters and submittal

²² EPA elaborated on its interpretation of this language in section 172(c)(9) in the General Preamble in the context of the ozone standard: “The EPA recognizes that certain actions, such as notification of sources, modification of permits, etc., would probably be needed before a measure could be implemented effectively.” General Preamble at 13512.

²³ See “Transportation Conformity Adequacy Review” by Greg Nudd, EPA Region 9, November 11, 2013.

package for the 2012 Five Percent Plan.²⁴

MAG derives its authority to develop and adopt air quality plans, including the 2012 Five Percent Plan, from ARS 49–406 and from a February 7, 1978 letter from the Governor of Arizona designating MAG as responsible for those tasks.²⁵ ADEQ is authorized to adopt and submit the 2012 Five Percent Plan by ARS 49–404 and ARS 49–406. MCAQD implements air quality programs within Maricopa County. Pinal County Air Quality Control District implements air quality programs within Pinal County.

For the reasons discussed above, we propose to find that the requirements of section 110(a)(2)(E) and related regulations have been met with respect to legal authority.

IV. Summary of Proposed Actions

EPA is proposing to approve the 189(d) plan for the Maricopa County (Phoenix) PM-10 nonattainment area. Specifically, we propose to approve the following:

(A) The 2008 baseline emissions inventory and the 2007, 2009, 2010, 2011 and 2012 projected emission inventories as meeting the requirements of CAA sections 172(c)(3);

(B) the attainment demonstration as meeting the requirements of CAA sections 189(d) and 179(d)(3);

(C) the 5% demonstration as meeting the requirements of CAA section 189(d);

(D) the reasonable further progress and quantitative milestone demonstrations as meeting the requirements of CAA section 172(c)(2) and 189(c);

(E) the contingency measures as meeting the requirements of CAA sections 172(c)(9); and

(F) the Motor Vehicle Emissions Budget as compliant with the budget adequacy requirements of 40 CFR 93.118(e).

V. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled “Regulatory Planning and Review.”

²⁴ See Completeness Determination Checklist (EPA, July 2, 2012) for details on the location of the documentation of authority.

²⁵ Letter from Wesley Bolin, Governor of Arizona, to Douglas M. Costle, Administrator of EPA, February 7, 1978. 2012 Five Percent Plan, Appendix E, Exh. 2.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals or disapprovals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the State is already imposing. Therefore, because the proposed Federal approval of the SIP does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the proposed approval action does not

include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to approve pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that 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.” Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely proposes to approve a State rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, 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. Thus, Executive Order 13175 does not apply to this rule. However, even though EPA is acting on a State plan, and that plan does not apply in Indian Country, there are four tribes located within the PM-10 nonattainment area, several of which have imposed particulate control measures of their own in order to reduce PM-10 concentrations. EPA informed tribal environmental staff regarding the proposed approval so that the tribes could inform their leadership and participate in the public comment process if desired.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it approves a state rule implementing a Federal standard.

H. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing,

as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States. The Executive Order has informed the development and implementation of EPA’s environmental justice program and policies. Consistent with the Executive Order and the associated Presidential Memorandum, the Agency’s environmental justice policies promote environmental protection by focusing attention and Agency efforts on addressing the types of environmental harms and risks that are prevalent among minority, low-income and Tribal populations.

This action will not have disproportionately high and adverse human health or environmental effects on minority, low-income or Tribal populations because the action proposed increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

I. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use “voluntary consensus standards” (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to this action. Today’s action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: January 14, 2014.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2014–02574 Filed 2–5–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2013–0713, FRL–9906–33–Region–10]

Approval and Promulgation of Implementation Plans; Washington: Kent, Seattle, and Tacoma Second 10-Year PM₁₀ Limited Maintenance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: The EPA is reopening the public comment period on the notice of proposed rulemaking “Approval and Promulgation of Implementation Plans; Washington: Kent, Seattle, and Tacoma Second 10-Year PM₁₀ Limited Maintenance Plan” published on December 26, 2013. A commenter requested additional time to review the proposal and prepare comments. In response to this request, the EPA is reopening the comment period.

DATES: For the proposed rule published December 26, 2013 (78 FR 78311), comments must be received in writing by March 10, 2014.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2013–0713, by any of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.

- *Email:* R10-

- *Public Comments@epa.gov.*

- *Mail:* Jeff Hunt, EPA Region 10, Office of Air, Waste and Toxics (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle, WA 98101.

- *Hand Delivery/Courier:* EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Jeff Hunt, Office of Air, Waste and Toxics, AWT–107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2013–0713. The EPA’s policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless

the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or email. The www.regulations.gov Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through www.regulations.gov your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Jeff Hunt at telephone number: (206) 553-0256, email address: hunt.jeff@epa.gov, or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: On December 26, 2013, the EPA published a proposed rulemaking to approve a limited maintenance plan addressing coarse particulate matter (PM₁₀) for the Kent, Seattle, and Tacoma maintenance areas (78 FR 78311). The EPA received a request that the public comment period be reopened to allow more time to review the proposal and prepare comments. In response to this request, the EPA is reopening the public comment period.

Dated: January 24, 2014.

Dennis J. McLerran,

Regional Administrator, Region 10.

[FR Doc. 2014-02609 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 262 and 264

RIN 0970-AC56

Temporary Assistance for Needy Families (TANF) Program, State Reporting On Policies and Practices to Prevent Use of TANF Funds in Electronic Benefit Transfer Transactions in Specified Locations

AGENCY: Office of Family Assistance (OFA), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Administration for Children and Families (ACF) proposes to amend the Temporary Assistance for Needy Families (TANF) regulations to require states, subject to penalty, to maintain policies and practices that prevent TANF funded assistance from being used in any electronic benefit transfer transaction in specified locations. This responds to provisions in the Middle Class Tax Relief and Job Creation Act of 2012 requiring states receiving TANF grants to maintain policies and practices as necessary to prevent assistance provided under the program from being used in any electronic benefit transfer transaction in any liquor store; any casino, gambling casino, or gaming establishment; or any retail establishment that provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment.

DATES: In order to be considered, comments on this proposed rule must be received on or before May 7, 2014.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. (We strongly recommend this method of submitting comments). Follow the instructions for submitting comments.

- *Mail:* Office of Family Assistance, Administration for Children and Families, 5th Floor East, 370 L'Enfant Promenade SW., Washington, DC 20024, Attention: Robert Shelbourne.

- *Hand Delivery/Courier:* OFA/ACF, 5th Floor East, 901 D Street SW., Washington, DC 20251.

FOR FURTHER INFORMATION CONTACT: Robert Shelbourne, Office of Family Assistance, 202-401-5150 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

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- I. Public Inspection of Comments
- II. Statutory Authority
- III. Background
- IV. Discussion of Regulatory Provisions Part 262—Accountability Provisions—General
- Part 264—Other Accountability Provisions
- V. Paperwork Reduction Act
- VI. Regulatory Flexibility Analysis
- VII. Regulatory Impact Analysis
- VIII. Unfunded Mandates Reform Act of 1995
- IX. Congressional Review
- X. Assessment of Federal Regulation and Policies on Families
- XI. Executive Order 13132

I. Public Inspection of Comments

All comments received, including any personal information provided, will be made available for public inspection Monday through Friday 8:30 a.m. to 5 p.m. at 370 L'Enfant Promenade SW., Washington, DC.

II. Statutory Authority

This proposed regulation is being issued under the authority granted to the Secretary of Health and Human Services (HHS) by the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112-96), Section 408 of the Social Security Act (42 U.S.C. 608), Section 409 of the Social Security Act (42 U.S.C. 609), and Section 1102 of the Social Security Act (42 U.S.C. 1302), which authorizes the Secretary to make and publish such rules and regulations, not inconsistent with the Act, as may be necessary to the efficient administration of functions under the Act.

The statute at 42 U.S.C. 617 limits the authority of the Federal government to regulate state conduct or enforce the TANF provisions of the Social Security Act, except as expressly provided. We have interpreted this provision to allow us to regulate where Congress has charged HHS with enforcing certain TANF provisions by assessing penalties. Because the legislation includes a TANF penalty, HHS has the authority to regulate in this instance.

III. Background

Authorized by title IV-A of the Social Security Act, TANF is a block grant that provides states, territories and tribes

federal funds to design and operate a program to accomplish the purposes of TANF. The purposes are: (1) Assisting needy families so that children can be cared for in their own homes or homes of relatives; (2) reducing the dependency of needy parents by promoting job preparation, work and marriage; (3) preventing out-of-wedlock pregnancies; and (4) encouraging the formation and maintenance of two-parent families.

In addition to federal TANF block grant funds, each state must spend a certain minimum amount of non-federal funds to help eligible families in ways that further a TANF purpose. This is referred to as maintenance-of-effort (MOE).

In general, federal TANF and state MOE funds may be expended on benefits and services targeted to needy families, and activities that aim to prevent and reduce out-of-wedlock pregnancies or encourage the formation and maintenance of two-parent families, as well as administrative expenses. Regulations under 45 CFR 260.31 define "assistance," and regulations under 45 CFR 263.2 specify what kind of state expenditures count toward meeting a state's MOE requirement. In particular, federal TANF and state MOE funds may be expended on "assistance," which includes cash payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses). Assistance also includes supportive services such as transportation and child care provided to families who are not employed (see 45 CFR 260.31(a)). TANF funds also can be used for a wide range of benefits and services that do not fall within the definition of assistance; such expenditures are considered "nonassistance."

Based on the most recent information provided to us by states, there are currently four means that states use to provide assistance payments to eligible low-income families with children: Paper checks, Electronic Funds Transfers (EFT), Electronic Benefit Transfer (EBT) cards, and Electronic Payment Cards (EPC). Most states have replaced paper checks with one or more of the other three delivery methods in order to provide benefits in a timelier manner, reduce theft and fraud, and eliminate the need to pay check-cashing fees. For example, states are automatically transferring assistance payments directly into a recipient's own private bank account through EFT; however, this option is not available if a recipient does not have access to or

qualify for a checking account. Most states load the amount of assistance on EBT cards or EPCs, both of which allow recipients to use a debit-like card to access their benefits through automated teller machines (ATMs) and point-of-sale (POS) devices. EPCs differ from government EBT cards in that they are network-branded (Visa or MasterCard) prepaid cards that recipients may use virtually anywhere the brand's logo is displayed. On the other hand, EBT cards may be used in fewer locations, as retailers and ATMs must be authorized to accept EBT cards.

On February 22, 2012, President Obama signed Public Law 112-96, which among its provisions, requires states to maintain policies and practices to prevent TANF funds from being used in any electronic benefit transfer transaction in any liquor store; any casino, gambling casino, or gambling establishment; or any retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment.

The legislation at Section 4004(b) also imposes a new reporting requirement as well as a new penalty. Each state is required to report to the Department of Health and Human Services (HHS) by February 22, 2014, its implementation of policies and practices related to restricting recipient from using their TANF assistance in EBT transactions at the locations specified in the previous paragraph. HHS will reduce a state's block grant if the state fails to comply with this reporting requirement or if, based on the information that the state reports, HHS finds that the state has not implemented and maintained the required policies and practices.

Finally, states are required to include in their state plans a statement outlining how they intend to implement policies and procedures to prevent access to assistance through electronic fund transactions at casinos, liquor stores, and establishments providing adult-oriented entertainment. The state plan also must include an explanation of how the state plans to ensure that (1) recipients of the assistance have adequate access to their cash assistance, and (2) recipients of assistance have access to using or withdrawing assistance with minimal fees or charges, including an opportunity to access assistance with no fee or charges, and are provided information on applicable fees and surcharges that apply to electronic fund transactions involving the assistance, and that such information is made publicly available.

Before enactment of Public Law 112-96, there were no federal requirements

to restrict a recipient's use of TANF assistance provided on electronic benefit cards, nor were there any provisions in the TANF statute or regulations precluding a state from implementing policies that prevent a recipient from using his or her benefit card at particular locations. Indeed, various states have taken measures to restrict access to EBT benefits at ATMs located in different types of establishments, such as casinos, adult entertainment establishments, liquor stores, bail bonds businesses, bingo halls, cruise ships, gun/ammunition stores, psychic readers, massage parlors, and tattoo and piercing shops. These actions have been required through state executive orders, state legislation, and state agency policy directives.

On April 25, 2012, HHS published in the **Federal Register** a Request for Public Comment (RFPC), which invited states and other interested persons to provide information that could help to inform the rulemaking process. State TANF agencies, others involved in implementation, and any stakeholders were invited to comment on: Current methods of assistance delivery and ability to identify transaction locations; mechanisms to ensure that recipients have adequate access to their cash assistance, including withdrawals with minimal fees and opportunities to access assistance with no fee; incidence of the use of TANF EBT transactions in restricted locations; issues and challenges states could face in implementing the requirements of Public Law 112-96—e.g., technical issues, costs, and access implications—and mechanisms for addressing problems identified; experience with implementing EBT transaction restrictions (if applicable), e.g., nature of restriction, specific method and procedures used, challenges to implementation and responses, costs, if and how approach is effective, and any concerns raised by businesses, electronic benefit vendors, and/or TANF recipients.

As stated in the RFPC, while we do not intend to provide responses to specific comments, in the next section we do indicate where comments informed the proposed rule. In general, we received input from 45 commenters. A majority were state or local TANF agencies, most with experience in implementing TANF EBT restrictions or in the process of considering approaches to doing so. Other commenters included welfare advocacy/research organizations, electronic benefit industry organizations/companies, and one member of the general public.

Responses to the RFPC provided information on matters such as the processes involved with tracking EBT transactions, the information available in transaction records, the challenges associated with identifying types of locations where transactions have occurred, and potential options for preventing TANF EBT transactions at specified locations. Some states that have already implemented EBT prohibitions described their experiences, provided examples of definitions of the types of businesses subject to restrictions, identified challenges and costs associated with implementation, and described concerns of businesses, vendors, and recipients. This information helped us assess the feasibility and effectiveness of various approaches to identifying locations subject to restrictions, preventing the use of TANF assistance via EBT transactions at those locations, and monitoring and enforcing compliance. For example, options for preventing the use of TANF via EBT transactions in the specified locations included centralized electronic blocking by a state or its EBT vendor, placing the responsibility on business owners to block access at their establishments, and relying on TANF recipients to monitor their EBT use and imposing penalties on those who do not comply with restrictions. We provide further detail on the options identified in the comments later in this preamble in discussing potential approaches that HHS would accept as complying with the new statutory requirements.

Additionally, commenters raised other concerns that they encouraged HHS to consider when drafting regulations. For example, commenters frequently highlighted that prohibiting EBT access at all of the locations cited in the statute would have a detrimental effect on TANF recipients access to cash assistance, particularly in rural areas, inner city neighborhoods, and Indian reservations. Commenters expressed that many clients do not have access to transportation, or the funds for transportation if ATMs in their neighborhoods are restricted and they are forced to travel further to obtain benefits. Another concern expressed in a number of comments related to the inability of states or their contractors/vendors to prevent TANF assistance that has been deposited directly in a recipient's personal banking account from being used or accessed in the locations identified in the legislation.

Several states provided comments that included data about the incidence of the use of TANF EBT transactions in liquor stores, gaming establishments,

and adult entertainment venues (and any other types of establishments on which the state chooses to place restrictions). States that have conducted such an analysis consistently informed us that they found the numbers engaged in possible misuse are very low. While we understand that the extent of misuse of benefits may be low, any inappropriate expenditure of public funds raises concerns.

Eight states reported that they had measured the extent that TANF benefits were used in prohibited locations. While findings varied slightly among states based on which locations are included in the assessment, it was always less than one percent:

- California, which prohibits TANF EBT access at the greatest number of location types (12), found that less than one half of one percent of the total number of cash transactions were performed at these locations prior to implementing its prohibition.

- Florida's last analysis in 2010 indicated less than .01% of state cash benefits were being accessed at liquor stores and casinos.

- Indiana provided information on liquor store ATM transactions in its comments, stating that from October through December 2011 it found that fewer than 30 of the 28,000 transactions per month took place in restricted establishments with the letters "LIQ" in the name.

- New Hampshire reviewed a six-month period of EBT card transactions. During this period, there were no transactions that could be identified as happening at a New Hampshire liquor store, a casino or other type of gambling establishment, or adult-oriented entertainment business.

- New Jersey reviewed transactions occurring at casinos from April-October 2011, the total number of which represented less than 1% of the total number Family First transactions for this period. The state notes that these transactions may or may not have occurred on the gaming floor, as any transaction on casino property was included in the count.

Finally, commenters presented recommendations for HHS to consider as we draft proposed regulations. There was a general consensus that HHS should draft regulations in a manner that provides states flexibility when implementing these new requirements. Commenters generally urged that states be allowed to implement approaches that are cost effective and fit within the existing structure of state operations, yet at the same time meet the intent and requirements of the law. Some commenters also cautioned that the

regulations should seek to protect recipients who inadvertently use an EBT card at prohibited locations, and ensure that states' policies are implemented in a non-discriminatory manner.

IV. Discussion of Regulatory Provisions

Part 262—Accountability Provisions—General

The proposed rule in part 262 adds new penalties for failure to report or adequately implement the new requirements outlined in Public Law 112–96, defines terms relevant to the new requirements, specifies when the penalty takes effect, and identifies the reporting form that ACF will use to determine whether a state warrants a penalty.

Section 262.1 What penalties apply to states?

Section 4004(b) of Public Law 112–96 at Section 409(a)(16) of the Social Security Act (the Act) creates a new penalty. As provided in the statute, the penalty will be imposed if, by February 22, 2014, a state fails to report to HHS its implementation of the policies and practices to prevent assistance provided under the state program funded under this part from being used in any electronic benefit transfer transaction in: (i) Any liquor store; (ii) any casino, gambling casino, or gaming establishment; or (iii) any retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment. Furthermore, HHS may impose a penalty if it determines, based on the information provided in a state report, that the state has not implemented and maintained such policies and practices. If HHS determines that the state should be subject to a penalty, it will reduce the state family assistance grant by five percent or a lesser amount based on the degree of noncompliance. States should note that the regulations at 45 CFR 262.4 through 262.7, concerning the processes for appealing a penalty, presenting a reasonable cause justification, and submitting a corrective compliance plan, apply to the new penalty added to 45 CFR 262.1.

Accordingly, we propose to add paragraph (16)(i) to § 262.1(a) to provide that a penalty of not more than five percent of the adjusted SFAG will be applied for failure to report by February 22, 2014, the state's implementation of policies and practices related to these prohibited EBT transactions and to add paragraph (16)(ii) to provide that a penalty likewise will be applied for FY

2014 and each succeeding fiscal year if the state does not demonstrate that it has implemented and maintained such policies and practices. Note that if a state submits the initial report after February 22, 2014 (or a subsequently due report after February 22 of a subsequent year), and also fails to demonstrate its implementation of policies and practices, the combined penalty will not exceed five percent of its adjusted SFAG. Conforming changes also are proposed in paragraph (c)(2) to add reference to the penalties proposed in paragraphs (a)(16)(i) and (ii).

Section 262.2 When do the TANF penalty provisions apply?

We propose to amend § 262.2 to add new paragraph (e) indicating that the penalty for failure to report on how the state is implementing and maintaining policies and practices to prevent assistance from being used in electronic benefit transfer transactions in specified locations will be imposed for FY 2014 and each succeeding fiscal year. Compliance requires the submission of an initial report by February 22, 2014, and annually by February 22 of each subsequent year.

Section 262.3 How will we determine if a state is subject to a penalty?

We propose to amend § 262.3 by adding a new paragraph (g) to specify we will use the information provided in an annual state report due by February 22, 2014, and annually thereafter, to determine whether to impose a penalty authorized by section 409(a)(16) of the Social Security Act. Note that this reporting requirement is distinct from the provisions of Public Law 112–96 related to additional state plan requirements (see Sec. 4004(c)).

Part 264—Other Accountability Provisions

Subpart A—What specific rules apply for other program penalties?

The proposed rule in part 264 explains in further detail what HHS expects of states when implementing the new requirements of Public Law 112–96 by specifying the policies and procedures required, providing relevant definitions and addressing consequences if a state fails to meet the requirement.

Section 264.0 What definitions apply to this part?

In order to clarify the types of locations where states are required to block the use of TANF assistance via electronic benefit transfer transactions and to ensure that the policies and practices are applied consistently

between states, we propose to amend section 264.0(b).

We will incorporate the statutory definition of “electronic benefit transfer transaction,” which is “the use of a credit or debit card service at an automated teller machine, point-of-sales terminal, or access to an online system for the withdrawal of funds or the processing of a payment for merchandise or service.” The statutory language is broad and questions have been raised as to whether the definition includes TANF funds directly deposited into a recipient’s private bank account, and whether it is feasible for states and banks to implement such a requirement, particularly if the recipient also maintains non-TANF funds in the same account. Accordingly, we encourage commenters to address the question of whether states and banks have, or reasonably could have, the capacity to apply the EBT transaction restrictions to assistance funds deposited in private bank accounts and to monitor whether recipients use such funds in a prohibited manner.

As provided in the statute, in proposed paragraph (b), the term “liquor store” refers to any retail establishment which sells exclusively or primarily intoxicating liquor, and does not include a grocery store which sells both intoxicating liquor and groceries including staple foods.

The statute provides exclusions to the phrase “casino, gambling casino, or gaming establishment,” but does not provide a further definition. We propose to interpret the statutory reference to “casino, gambling casino, or gaming establishment” to mean an establishment with a primary purpose of accommodating the wagering of money. Under the statutory definition provided in proposed paragraph (b), this would not include a grocery store which also offers, or is located within the same building or complex as casino, gambling or gaming activities or other establishments where such activities are incidental to the principal purpose of the business.

The statute is silent of the definition of “retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclad state to entertainment.” To clarify the intended locations to which restrictions apply, we add to proposed paragraph (b) that this term means “such an establishment that prohibits the entrance of minors under the age specified by state law.” Therefore, a theater or cinema whose primary purpose is not to provide adult-oriented entertainment, but may, for instance, occasionally feature an unrated or X-

rated movie, would be excluded from this definition because minors are generally allowed to enter such an establishment (though not permitted to attend the unrated or X-rated film).

Section 264.60 What policies and procedures must a state implement to prevent assistance use in electronic benefit transfer transaction in locations prohibited by the Social Security Act?

We propose to add a new section 264.60 under subpart A. Under the proposed paragraph, states are required to implement policies and procedures to prevent assistance (defined at § 260.31(a)) provided with federal TANF or state TANF MOE funds from being used in any electronic benefit transfer transaction in any: (a) Liquor store, (b) casino, gambling casino or gaming establishment, (c) retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclad state for entertainment. As states consider the appropriate policies and practices that they will implement to comply with the new requirements of Public Law 112–96, we advise them to be mindful of the goals of the legislation. The new requirements not only aim to ensure that cash assistance is used in a manner consistent with the purposes of TANF, but also serve to promote the integrity of the program and the responsible stewardship of public funds. When HHS reviews state reports that outline their policies and procedures, we will accept any reasonable approaches that further these goals and comply with the statutory and regulatory requirements. We note that a state has flexibility in determining appropriate policies and practices to prevent the use of TANF assistance in electronic benefit transfer transactions at specified locations. At the same time, states’ policies and practices must prevent the use of TANF funds at the specified locations, while ensuring reasonable access to cash assistance, as directed by Congress. Below, we outline examples of approaches that HHS would accept as complying with statutory and regulatory requirements; at the same time, states have the option to elect other methods to achieve the goals of the legislation.

Identifying Locations: When reporting policies and practices to prevent the use of TANF assistance at any liquor store; casino, gambling casino or gaming establishment; and retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclad state for entertainment, states must describe an initial and on-going process for identifying the establishments in their

states that are subject to the requirements. Comments responding to the RFPC reflected a number of challenges associated with identifying the locations where access to TANF assistance via EBT transaction should be prevented; these predominately related to inaccurate or limited information in transaction data, e.g., wrong addresses, missing data elements. Comments explained that retailers do not always send accurate ATM location information to the third party processors and/or third party processors do not consistently populate ATM data fields accurately. Furthermore, commenters stated that ATM location information can change each time an ATM is moved or there is a change in ownership, which also makes it difficult to ensure that ATMs have the restrictions applied. The Government Accountability Office's recent report on TANF Electronic Benefit Cards (GAO-12-535, July, 2012) confirms this in describing California's experience identifying locations where EBT access would be blocked. State officials said that the EBT transaction data sometimes contain addresses that are misspelled or refer to the address of a retailer's corporate offices rather than the locations where the transactions actually took place. GAO also found that address information was complete for only 30 percent of transactions in Texas, but also estimate that about 70.4 percent of those addresses could be simply standardized. Furthermore, while ATM transactions contain merchant category codes (MCCs), this information has limitations because some ATMs have an MCC that identifies it as a financial institution rather than referring to the type of establishment where the ATM is located. GAO concludes that "preventing unauthorized transactions can be time-intensive and is impaired by flaws in available transaction data and other challenges. Addressing the limitations we found in the transaction data that impede the identification and monitoring of certain locations could require significant resources." HHS understands these challenges, and we encourage states to explore an array of approaches aimed at identifying locations subject to restrictions. We would anticipate that a state's methodology would involve multiple actions to identify the relevant establishments, such as reviewing transaction records, conducting Internet searches (e.g., searches of specific keywords associated with the types of establishments identified in the statute), and other forms of searches a state determines to be appropriate and feasible (e.g., visiting establishments).

When possible, we recommend that TANF agencies collaborate with state licensing agencies, such as a state's gaming commission, for whatever information licensing agencies can provide in efforts to develop a list of locations that are subject to these requirements. When seeking to identify liquor stores, a TANF agency may contact the state liquor authority to obtain a list of all establishments with a liquor license; the TANF agency can then notify all the merchants that they must follow procedures to prevent TANF assistance from being used or accessed at their place of business unless they notify the state agency that they do not fall within the definition of "liquor store." Finally, states will need to develop on-going procedures for identifying new establishments to which the state's requirements apply.

Commenters noted that while gaming authorities may have a list of all affected gaming establishments, and liquor authorities may have a listing that includes all liquor stores (though the list is likely to be broader than just liquor stores), there may be no entity in the state charged with regulating adult entertainment, and accordingly, there may be no readily available list of such establishments. If that is the case, then a state may choose to conduct internet searches using key words as the principal way of identifying such establishments, but if the state relies on such a methodology, it will be appropriate to provide notice to identified entities so that they can inform states of any misclassification.

We received a number of comments explaining that states do not have the authority to block transactions that occur on sovereign tribal lands in the state. While Congress did not apply the requirements in Public Law 112-96 to tribal TANF programs, we believe it is the responsibility of the state to develop appropriate policies for preventing access to TANF cash assistance provided by state programs at any "liquor store," "casino, gambling casino, or gaming establishment" or "retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment," including those that are located on sovereign tribal land. We encourage states to work with tribes to try to prevent state TANF assistance use at the prohibited locations located on sovereign tribal land.

We also face the question of how to address internet transactions. We note that the statutory definition of "electronic benefit transfer transaction" refers to "access to an online system for

the withdrawal of funds or the processing of a payment for merchandise or a service" in the establishments identified in the statute. It has been suggested that the statute is only intended to apply to transactions occurring in the specified establishments and not to internet transactions. While we are mindful of the overall goals of the legislative provision, we recognize that there may be significant practical issues that states would face in any efforts to enforce restrictions on internet transactions. Accordingly, we invite comments in response to this Notice of Proposed Rulemaking on the issue of whether the restrictions should extend to internet transactions, and if so, what mechanisms might be available to states to enforce such restrictions.

Furthermore, many commenters recommended that regulations allow states the flexibility to avoid imposing a restriction at an ATM or POS terminal if such a restriction would limit the ability of recipients in a geographic area to access their cash assistance. While one of the new state plan requirements at Section 4004(c) of Public Law 112-96 conveys a clear emphasis that states ensure adequate access to cash assistance for recipients, we do not interpret this language as providing states the option to avoid imposing a restriction at an ATM or POS terminal located in any of the three types of specified locations. Rather, it conveys a responsibility for states to take corrective actions to increase locations where TANF recipients may access their cash assistance if they find that there is an insufficient number of access points in a geographic area. Commenters provided the following examples of factors to take into consideration when aiming to ensure reasonable access by applying exceptions to restrictions: The number of recipients who would be affected if a location to access assistance is blocked and the number of ATMs available in a community (e.g., if a community within a defined geographic area or zip code has fewer than three locations to access cash assistance, none of those locations would be subject to any restrictions). One state TANF agency that has implemented blocking measures commented that it "maintains cash access plans for each county in the state to ensure that recipients have reasonable access to benefits. These plans are reviewed on an annual or as-needed basis. The plans were reviewed prior to and after the deactivation of certain ATMs and it has been determined that sufficient cash access continues to be maintained."

Finally, we remind states of the other state plan requirement at Section 4004(c) of Public Law 112–96, stating that a plan must also include an explanation of how the state plans to ensure that recipients of assistance “have access to using or withdrawing assistance with minimal fees or charges, including an opportunity to access assistance with no fee or charges, and are provided information on applicable fees and surcharges that apply to electronic fund transactions involving the assistance, and that such information is made publicly available.” Therefore, as they develop plans to ensure adequate access to cash assistance, states must be sure to consider whether there is an adequate number of locations where recipients may obtain cash assistance at a minimal cost *and* at no cost. Comments conveyed that a reasonable cash access fee is between \$0.25 and \$1.00. Furthermore, most states offer a number of free ATM withdrawals per month, which would be stipulated in a state’s contract with its EBT vendor. The Electronic Funds Transfer Association (EFTA) commented that a survey of electronic payment program directors revealed that “about 93% of [23] responding states say that their TANF beneficiaries exhaust their monthly cash in no more than three transactions.” In July of 2011, the median of all states’ maximum monthly benefit levels for a single parent family of three was \$428, ranging from \$170 in Mississippi to \$923 in Alaska. With an amount that is “less than the estimated cost of a modest two-bedroom apartment (based on HUD Fair Market Rents or FMRs) in all states, and less than *half* of the FMR in 26 states,” it is plausible that a recipient would withdraw all of his or her monthly benefits in few transactions (I. Finch & L. Schott, “TANF Benefits Fell Further in 2011 and Are Worth Much Less Than in 1996 in Most States,” Center on Budget and Policy Priorities, November 21, 2011). If a state TANF agency has data that indicate that a majority of its TANF beneficiaries withdraw all of their cash in fewer than three transactions, it may consider providing three free transactions so that most TANF beneficiaries would incur little or no cost.

Preventing Use of TANF Assistance via EBT transactions: Once a state or local TANF agency has identified the businesses that are subject to restrictions, the agency may implement one or a combination of approaches that aim to prevent a recipient from accessing or using his or her TANF assistance in EBT transactions at those

locations. For example, a TANF agency may choose to implement electronic or automated prevention measures; this may involve the reprogramming of ATMs and POS terminals so that they deny TANF EBT or EPC transactions in specified locations. A TANF agency would need to notify relevant merchants that they must communicate to third-party processors or ATM owners to block bank identification numbers (BINs) associated with TANF benefit cards. Alternately, if feasible, a TANF agency or its EBT vendor may choose to contact the third-party processors who provide the network services to those devices directly and request that they block the EBT BIN at locations subject to restrictions. Regarding EPC, one commenter explained that “transaction servicers could block transactions by matching the terminal ID of the incoming transaction against a list of prohibited terminal IDs/locations provided by the State.”

Another option that does not require electronic blocking of ATMs or POS terminals is to communicate to recipients and/or establishments that recipients are not permitted to access their TANF benefits via EBT transactions at the specified locations and enforce compliance with appropriate penalties for violations. This may involve requiring merchants to post signs next to terminals to inform TANF recipients of the restrictions, or providing a list of restricted establishments to recipients, which should be updated on a regular basis. However, if a state’s policies and practices do not electronically prevent access to cash assistance at restricted locations, the state should consider the need for procedures for monitoring compliance and taking action (e.g., warnings, penalties) when violations are identified. States are encouraged to periodically evaluate the effectiveness of these policies to prevent the use of TANF assistance via electronic benefit transfer transactions at specified locations, and adjust policies as necessary. We note that if a state chooses to implement policies and practices that do not involve steps to electronically block or prevent access of TANF assistance via EBT transfer, we encourage them to ensure that recipients are informed and reminded of the restrictions on a regular basis.

Monitoring: State reports of policies and practices should include a description of implementation activities. For example, a state agency may have in place procedures for auditing a certain percentage of recipients’ transaction records to determine compliance by individuals

and businesses; TANF agency staff or EBT/EPC vendors may review monthly ATM activity reports, matching them against a list of terminal IDs or addresses of restricted locations, to determine whether the owners and processors complied with the request to reprogram ATMs. A state agency may also conduct random site visits to establishments that are subject to the requirements.

Enforcement of Compliance: In order to fulfill the goals of the legislation, a state should have mechanisms in place to maintain a state’s policies to prevent TANF assistance from being used or accessed in restricted locations. For example, a state may choose to impose penalties on the parties responsible for ensuring that ATMs and POS terminals are reprogrammed (e.g., merchants, ATM owners or third-party processors) if they do not block transactions with state EBT or EPC cards from being processed at relevant ATMs and POS terminals. Or if a state chooses to implement measures that do not involve steps to electronically block EBT access, then the state may choose to impose penalties on merchants who do not post signs informing TANF recipients that they cannot use their EBT cards or EPC to purchase goods at that establishment or access funds at an ATM located on the premises. If authorized by state law, the state could impose financial penalties in relation to entities that are subject to state licensing requirements. If a TANF agency develops policies under which it imposes a sanction or penalty on a recipient who is found to have used his or her EBT or EPC card at a prohibited location, such action would be subject to applicable appeals procedures needed to meet due process requirements.

Once a state has implemented policies and practices to comply with these new requirements, in addition to the four areas described above (i.e., identifying locations; methods to prevent use of TANF assistance via EBT transactions in restricted locations; monitoring; and enforcement of compliance), we encourage states to share any information they develop concerning the effectiveness of policies and enforcement practices (e.g., data related to the incidence of the use of TANF assistance via EBT transactions in restricted locations), whether the state was able to achieve desired outcomes, and any potential plans to modify policies in order to address challenges or improve effectiveness. This information may be useful to other states as they consider adjustments to their procedures over time.

Section 264.61 What happens if a state fails to report or implement and maintain policies and practices required in Section 264.60 of this Subpart?

We propose to add a new section 264.61 to address the penalty associated with the new requirements. Under paragraph (a), HHS will impose a penalty of not more than five percent of a state's adjusted SFAG for failure to submit by February 22, 2014 a report demonstrating the state's implementation of policies and practices to prevent EBT use in the locations specified in Public Law 112-96. Under paragraph (b), HHS will impose a penalty of not more than five percent of a state's adjusted SFAG each fiscal year succeeding FY 2014 in which the state does not demonstrate it has implemented and maintained the required policies and practices. In order to meet this requirement, states' reports must fully explain the policies and

practices that are being implemented and maintained; reports should address each of the following four areas: Identifying locations; methods to prevent use of TANF assistance via EBT transactions in restricted locations; monitoring; and enforcement of compliance. Note that if a state submits a report after February 22 and also fails to demonstrate its implementation of policies and practices, the combined penalty will not exceed five percent of its adjusted SFAG.

All penalties will be imposed in accordance with 45 CFR Part 262, which provides states with procedures for appealing a penalty, and submitting a reasonable cause justification or corrective compliance. Furthermore, Section 409(a)(16)(C) of the Act, as amended by Section 4004(b) of Public Law 112-96 provides HHS the discretion to reduce the penalty amount based on the degree of noncompliance of the state.

Section 409(a)(16)(C) of the Act, as amended by Section 4004(b) of Public Law 112-96, also specifies that "Fraudulent activity by any individual in an attempt to circumvent the policies and practices required by Section 408(a)(12) shall not trigger a state penalty under subparagraph (A);" as such, HHS will not base any penalty on such information.

V. Paperwork Reduction Act

This proposed rule establishes new information collection requirements in § 262.3(g). As required by the Paperwork Reduction Act of 1995, codified at 44 U.S.C. 3507, the Administration for Children and Families will submit a copy of these sections to the Office of Management and Budget (OMB) for review and they will not be effective until they have been approved and assigned a clearance number.

Requirement	Number of respondents	Yearly submittals	Average burden per respondent (hours)	Total burden hours
Annual reporting on policies and practices to prevent TANF assistance from being used in electronic benefit transfer transactions in liquor stores; casinos, gambling casinos, or gaming establishments; or any retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment	54	1	40	2,160

We estimate the costs of implementing these proposed requirements would be approximately \$108,000 annually. We calculated this estimate by multiplying 2,160 hours by \$50 (average cost per hour).

With respect to these provisions, the Administration for Children and Families will consider comment by the public on this collection of information in the following areas:

- Evaluating whether the proposed collection is necessary for the proper performance of the functions of ACF, including whether the information will have practical utility;
- Evaluating the accuracy of ACF's estimate of the proposed collection of information, including the validity of the methodology and the assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in this proposed regulation 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. This does not affect the deadline for the public to comment to the Department on the regulations. Written comments to OMB for the proposed collection of information should be sent directly to the following: Office of Management and Budget, either by fax to 202-395-6974 or by email to OIRA at *submission@omb.eop.gov*. Please mark faxes and emails to the attention of the desk officer for ACF.

VI. Regulatory Flexibility Analysis

The Secretary certifies under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this proposed regulation will not result in a significant impact on a substantial number of small entities. We note that any impact on businesses emanates from statutory mandate and the policies that states adopt in implementing the statutory requirement. HHS sought

information related to concerns of businesses resulting from restrictions on TANF EBT access when we released a Request for Public Comment on April 25, 2012. A limited number of commenters addressed this issue, and most conveyed that they are not aware of any concerns at this time. In fact, the Western Center on Law and Poverty stated that in California, which prohibits TANF EBT access to 12 location types, many banned businesses expressed support for the policy. One commenter, the Electronic Funds Transfer Association (EFTA), did however summarize concerns of EBT vendors, such as Xerox and J.P. Morgan. EFTA stated that EBT vendors have expressed concerns over the expense of implementing the new requirements and notes that any system modifications that may be required would be extra-contractual for the processors and their states; despite the financial opportunity this presents, EBT vendors say that such modifications are not cost beneficial for either them or the states.

In order to address these concerns, HHS has drafted the proposed regulations in a manner that minimizes the impact on businesses, including

small businesses, by providing states flexibility when implementing policies and practices that comply with the new requirements. In particular, states have the flexibility to implement approaches that do not place significant burden or impose large costs on its EBT vendor, small businesses, or any one particular party. Therefore any costs resulting from policies under which states require action by small entities, including small businesses, are the result of choices states make when implementing the statutory requirements.

The primary impact of this proposed regulation is on state governments. State governments are not considered small entities under the Act.

VII. Regulatory Impact Analysis

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 the 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. These proposed rules meet the criteria for a significant regulatory action under E.O. 12866. Therefore, the Office of Management and Budget has reviewed this rule.

Need for the Regulation

These regulations incorporate statutory changes to the TANF program enacted in the Middle Class Tax Relief and Job Creation Act of 2012. These proposed regulations are limited to the penalty provisions of Section 4004 of Public Law 112–96. Because states have a range of systems for disbursement of assistance, and a number of questions have arisen regarding the applicability and requirements of the statutory language, the proposed regulations are being released in order to clarify for states the information they should submit in order to avoid a penalty.

ACF does not believe there would be a significant economic impact from this proposed regulatory action. The regulatory requirement is to implement, maintain, and report on policies and practices that prevent the use or withdrawal of TANF assistance in any electronic benefit transfer transactions in the three specified locations. The costs associated with implementation, and the parties that bear these costs, largely depend on the policies and practices a state chooses to in order to

comply with the statutory requirements. For example, if a state chooses to take on a centralized oversight role, it will face additional resources at the agency-level; at the same time, if it chooses to place the responsibility to prevent assistance from being used in restricted locations via EBT transactions on its EBT service provider, additional contract costs will need to be negotiated. Or if a state chooses to direct ATM and business owners to take the necessary steps to reprogram ATM and POS terminals within the restricted establishments, then costs are passed on to these parties.

At the same time, states have flexibility in policies and practices they choose to implement in order to comply with the statutory requirements that prevent assistance (defined at § 260.31(a)) provided with federal TANF or state TANF MOE funds from being used in any electronic benefit transfer transaction in any liquor store; casino, gambling casino or gaming establishment; and retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment. States may develop approaches that are cost effective and fit within the existing structure of state operations, yet at the same time meet the requirements of the law.

Nevertheless, regardless of the approach a state may take when implementing policies in order to comply with the statute and regulations, there will be, at a minimum, administrative costs for the state agency responsible for administering the TANF benefits. We believe that states will spend funds on the following types of costs to implement the changes in order to complete the annual progress report to ACF:

- Costs for identifying the prohibited locations;
- Costs to modify existing tracking of recipient use of electronic benefits and/or electronic banking;
- Costs to monitor recipient use of electronic benefit transfers;
- Costs to investigate and follow up on violations of electronic benefit transfers;
- Cost of processing and responding to appeals.

With regards to the reporting requirement, based on our estimate described under the Paperwork Reduction Act section of this preamble, the total costs for all states to comply with this requirement would fall well below the \$100 million threshold.

The statutory requirements and proposed regulations also provide potential benefits that coincide with

goal of financial responsibility. For example, the policies and practices that state implement may result in reductions in inappropriate expenditures of government funds, and provide opportunities to educate recipients on budgeting (emphasizing to recipients that they should ensure assistance is spent only on basic needs) and ways to minimize access fees.

VIII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any federal mandate that may result in the expenditure by state, tribal and local governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. ACF has determined that this proposed rule would not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year.

IX. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. Chapter 8.

X. Assessment of Federal Regulation and Policies on Families

Section 654 of The Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires federal agencies to determine whether a proposed policy or regulation may negatively affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law.

This regulation will not have an impact on family well-being as defined in the legislation.

XI. Executive Order 13132

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has Federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. We do not believe the regulation has Federalism implications as defined in the Executive Order. However, consistent with Executive Order 13132, the Department specifically solicits and welcomes comments from state and local government officials on this proposed rule.

List of Subjects in 45 CFR Parts 262 and 264

Administrative practice and procedures, Day care, Employment, Grant programs-social programs, Loan programs-social programs, Manpower training programs, Penalties, Public assistance programs, Reporting and recordkeeping requirements, Vocational education.

(Catalog of Federal Domestic Assistance Program Number 93.558 Temporary Assistance for Needy Families)

Dated: January 13, 2014.

Mark Greenberg,

Acting Assistant Secretary for Children and Families.

Approved: January 15, 2014.

Kathleen Sebelius,

Secretary.

For the reasons set forth in the preamble, we propose to amend Parts 262 and 264 of 45 CFR as follows:

PART 262—ACCOUNTABILITY PROVISIONS-GENERAL

■ 1. The authority citation for 45 CFR part 262 is revised to read as follows:

Authority: 31 U.S.C. 7501 *et seq.*; 42 U.S.C. 606, 609 and 610; Pub. L. 109–171; Pub. L. 112–96.

■ 2. Amend § 262.1 by adding paragraph (a)(16) and revising paragraph (c)(2) to read as follows:

§ 262.1 What penalties apply to states?

(a) * * *

(16)(i) A penalty of not more than five percent of the adjusted SFAG (in accordance with § 264.61(a)), for failure to report by February 22, 2014 on the state's implementation and maintenance of policies and practices required in § 264.60 of this chapter.

(ii) A penalty of not more than five percent of the adjusted SFAG (in accordance with § 264.61(b)), for FY 2014 and each succeeding fiscal year in which the state does not demonstrate that it has implemented and maintained policies and practices required in § 264.60 of this chapter.

(c) * * *

■ (2) We will take the penalties specified in paragraphs (a)(3), (a)(4), (a)(5), (a)(6), (a)(8), (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), and (a)(16) of this section by reducing the SFAG payable for the fiscal year that immediately follows our final decision.

* * *

■ 3. Amend § 262.2 by adding paragraph (e) to read as follows:

§ 262.2 When do the TANF penalty provisions apply?

* * * *

■ (e) In accordance with § 264.61(a) and (b), the penalty specified in § 262.1(a)(16) will be imposed for FY 2014 and each succeeding fiscal year.

■ 4. Amend § 262.3 by adding paragraph (g) as follows:

§ 262.3 How will we determine if a State is subject to a penalty?

* * * *

(g) To determine if a State is subject to a penalty under § 262.1(a)(16), we will use the information provided in annual state reports due by February 22, 2014, and annually thereafter in accordance with section 409(a)(16) of the Social Security Act. State reports must address the policies and practices that are being implemented and maintained with respect to each of the following: Identifying locations; methods to prevent use of TANF assistance via EBT transactions in restricted locations; monitoring; and enforcement of compliance.

PART 264—OTHER ACCOUNTABILITY PROVISIONS

■ 5. The authority citation for 45 CFR part 264 is revised to read as follows:

Authority: 31 U.S.C. 7501 *et seq.*; 42 U.S.C. 608, 609, 654, 1302, 1308, and 1337.

■ 6. Amend § 264.0(b) to add definitions of *Casino, gambling casino, or gaming establishment; Electronic benefit transfer transaction; Liquor Store; and Retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment* in alphabetical order to read as follows:

§ 264.0 What definitions apply to this part?

* * * *

(b) * * * *Casino, gambling casino, or gaming establishment* means an establishment with a primary purpose of accommodating the wagering of money. It does not include:

(i) A grocery store which sells groceries including staple foods and which also offers, or is located within the same building or complex as, casino, gambling, or gaming activities; or

(ii) Any other establishment that offers casino, gambling, or gaming activities incidental to the principal purpose of the business.

* * * *

Electronic benefit transfer transaction means the use of a credit or debit card service, automated teller machine, point-of-sales terminal, or access to an online system for the withdrawal of

funds or the processing of a payment for merchandise or a service.

* * * *

Liquor Store means any retail establishment which sells exclusively or primarily intoxicating liquor. Such term does not include a grocery store which sells both intoxicating liquor and groceries including staple foods (within the meaning of section 3(r) of the Food and Nutrition Act of 2008 (7 U.S.C. 2012(r))).

Retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment means such an establishment that prohibits the entrance of minors under the age specified by state law.

* * * *

■ 7. Add § 264.60 and § 264.61 to subpart A to read as follows:

§ 264.60 What policies and practices must a state implement to prevent assistance use in electronic benefit transfer transactions in locations prohibited by the Social Security Act?

Pursuant to section 408(a)(12) of the Act, states are required to implement policies and procedures to prevent assistance (defined at § 260.31(a)) provided with federal TANF or state TANF MOE funds from being used in any electronic benefit transfer transaction in any:

- (a) Liquor store
- (b) Casino, gambling casino or gaming establishment
- (c) Retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment.

§ 264.61 What happens if a state fails to report or implement and maintain policies and practices required in § 264.60 of this subpart?

(a) Pursuant to section 409(a)(16) of the Act and in accordance with 45 CFR part 262, a penalty of not more than five percent of the adjusted SFAG will be imposed for failure to report by February 22, 2014 and each succeeding fiscal year on the state's implementation of policies and practices required in § 264.60. The penalty will be imposed in the succeeding fiscal year subject to § 262.4(g) of this chapter.

(b) Pursuant to section 409(a)(16) of the Act and in accordance with 45 CFR part 262, a penalty of not more than five percent of the adjusted SFAG will be imposed for FY 2014 and each succeeding fiscal year in which the state fails to demonstrate the state's implementation of policies and practices required in § 264.60. The penalty will be imposed in the

succeeding fiscal year subject to § 262.4(g) of this chapter.

[FR Doc. 2014-02488 Filed 2-4-14; 11:15 am]

BILLING CODE 4184-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MB Docket No. 11-154; DA 14-72]

Deadline Extended for Comment on Media Bureau Public Notice on Application of the IP Closed Captioning Rules to Video Clips

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment and reply comment period.

SUMMARY: The Media Bureau extends the deadline for filing comments and reply comments on application of the Internet protocol (“IP”) closed captioning rules to video clips, which was published in the **Federal Register** on December 26, 2013. The extension will facilitate the development of a full record.

DATES: The comment and reply comment period for the proposed rule published December 26, 2013 (78 FR 78319) is extended. Submit comments on or before February 3, 2014. Submit reply comments on or before March 5, 2014.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Notice.

FOR FURTHER INFORMATION CONTACT:

Diana Sokolow, Policy Division, Media Bureau, at (202) 418-2120, or email at Diana.Sokolow@fcc.gov. Press contact: Janice Wise, (202) 418-8165.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Public Notice in MB Docket No. 11-154, DA 14-72, released on January 22, 2014, which extends the comment and reply comment filing deadline established in DA No. 13-2392, published at 78 FR 78319, December 26, 2013.

1. The Media Bureau extends the deadlines for filing comments and reply comments in the above-captioned proceeding. On December 13, 2013, the Media Bureau sought updated information on the closed captioning of video clips delivered by Internet protocol (“IP”), including the extent to which industry has voluntarily

captioned IP-delivered video clips.¹ The Video Clips PN established a comment deadline of January 27, 2014 and a reply comment deadline of February 26, 2014. On January 17, 2014, the National Association of Broadcasters (“NAB”) requested a one week extension of the comment deadline.² NAB explained that it is “currently working diligently on a sister docket” regarding the closely related subject matter of closed captioning quality, and that a one week extension of the video clips comment deadline would enable NAB and others “to continue their collaborative work” in that other docket and to more fully address the issues in the Video Clips PN. We grant NAB’s request.

2. As set forth in Section 1.46(a) of the Commission’s Rules,³ the Commission’s policy is that extensions of time shall not be routinely granted. Given the closely related subject matter of the two pending proceedings, however, we believe that granting NAB’s request is necessary to facilitate the development of a full record. Accordingly, we extend the comment deadline by one week, until February 3, 2014. To ensure that interested parties have sufficient time to respond fully to the comments, on our own motion we also extend the reply comment deadline by one week, until March 5, 2014.

Federal Communications Commission.

William T. Lake,
Chief, Media Bureau.

[FR Doc. 2014-02444 Filed 2-5-14; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R1-ES-2014-0002; FXES11130900000C6-145-FF09E42000]

RIN 1018-BA28

Endangered and Threatened Wildlife and Plants; Removing the Oregon Chub From the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of draft post-delisting monitoring plan.

¹ Media Bureau Seeks Comment on Application of the IP Closed Captioning Rules to Video Clips, Public Notice, MB Docket No. 11-154, DA 13-2392 (Dec. 13, 2013) (“Video Clips PN”).

² Motion for Extension of Time of the National Association of Broadcasters, MB Docket No. 11-154 (filed January 17, 2014).

³ 47 CFR § 1.46.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to remove (delist) the Oregon chub (*Oregonichthys crameri*) from the Federal List of Endangered and Threatened Wildlife. This proposed action is based on a thorough review of the best available scientific and commercial information, which indicates that the Oregon chub has recovered and no longer meets the definition of an endangered species or a threatened species under the Endangered Species Act of 1973, as amended (Act). Our review of the status of this species shows that the threats to this species have been eliminated or reduced and populations are stable so that the species is not currently, and is not likely to again become, a threatened species within the foreseeable future in all or a significant portion of its range. This proposed rule, if made final, would remove the currently designated critical habitat for the Oregon chub throughout its range. We also announce the availability of a draft post-delisting monitoring plan for the Oregon chub. We seek information, data, and comments from the public regarding this proposal to delist the Oregon chub and on the draft post-delisting monitoring plan.

DATES: We will accept comments received or postmarked on or before April 7, 2014. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES**), the deadline for submitting an electronic comment is Eastern Standard Time on this date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by March 24, 2014.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R1-ES-2014-0002, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R1-ES-2014-0002; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally

means that we will post any personal information you provide us (see the Public Comments section below for more information).

Document availability: The proposed rule and draft post-delisting monitoring plan are available on <http://www.regulations.gov>. In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Portland, Oregon, 97266, telephone 503-231-6179. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800-877-8339.

FOR FURTHER INFORMATION CONTACT: Paul Henson, State Supervisor, telephone: 503-231-6179. Direct all questions or requests for additional information to: Oregon Chub Information Request, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Portland, Oregon, 97266. Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at 1-800-877-8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Information Requested

We intend that any final action resulting from this proposal will be based on the best available scientific and commercial data and will be as accurate and as effective as possible. Therefore, we invite Tribal and governmental agencies, the scientific community, industry, and other interested parties to submit comments or recommendations concerning any aspect of this proposed rule and the draft post-delisting monitoring plan. Comments should be as specific as possible.

We are specifically requesting comments on:

(1) Biological information concerning the Oregon chub, including competition and predation from nonnative species and the loss or alteration of habitat through natural or anthropogenic processes;

(2) Relevant data concerning any current or likely future biological or environmental threats which may lead to a decline in the Oregon chub, such that it meets the definition of a threatened or endangered species;

(3) Whether we could improve or modify our post-delisting monitoring (PDM) plan methods to provide information critical to the long-term persistence of the Oregon chub;

(4) Whether the triggers and responses described under the PDM plan provide

adequate protection for the species during the 9-year duration of the plan;

(5) Additional information regarding management plans or other mechanisms that provide protections to the Oregon chub or their habitats; and

(6) Relevant data on climate change (including any modeling data and projections for the Willamette River basin) and potential impacts to the Oregon chub due to changes in precipitation levels, seasonal stream flows, and water temperatures.

To issue a final rule to implement this proposed action, we will take into consideration all comments and any additional information we receive. Such communications may lead to a final rule that differs from this proposal. All comments, including commenters' names and addresses, if provided to us, will become part of the supporting record.

You may submit your comments and materials concerning the proposed rule by one of the methods listed in the **ADDRESSES** section. Comments must be submitted to <http://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in the **DATES** section. We will consider any and all comments received, or mailed comments that are postmarked, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposal, if requested. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section within 45 days after the date of this **Federal Register** publication (see **DATES**). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the

Federal Register at least 15 days before the first hearing.

Peer Review

In accordance with our policy, "Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities," which was published on July 1, 1994 (59 FR 34270), we will seek the expert opinion of at least three appropriate independent specialists regarding scientific data and interpretations contained in this proposed rule as well as the draft PDM plan. We will send copies of the proposed rule and PDM plan to the peer reviewers immediately following publication in the **Federal Register**. This assessment will be completed during the public comment period. The purpose of such review is to ensure that our decisions are based on scientifically sound data, assumptions, and analyses. Accordingly, the final decision may differ from this proposal.

Previous Federal Actions

In our December 30, 1982, Review of Vertebrate Wildlife for Listing as Endangered or Threatened Species Under the Act, we listed the Oregon chub as a Category 2 candidate species (47 FR 58454). Category 2 candidates, a designation no longer used, were species for which information contained in Service files indicated that proposing to list was appropriate but additional information was needed to support a listing proposal. The Oregon chub maintained its Category 2 status in both the September 18, 1985 (50 FR 37958), and January 6, 1989 (54 FR 554), Notices of Review.

On April 10, 1990, we received a petition to list the Oregon chub as an endangered species and to designate critical habitat. On November 1, 1990, we published a 90-day finding indicating that the petitioners had presented substantial information indicating that the requested action may be warranted and initiated a status review (55 FR 46080). On November 19, 1991, we published a 12-month finding on the petition concurrent with a proposal to list the species as endangered (56 FR 58348). A final rule listing the Oregon chub as endangered was published in the **Federal Register** on October 18, 1993 (58 FR 53800).

On March 9, 2007, the Institute for Wildlife Protection filed suit in Federal district court, alleging that the Service and the Secretary of the Interior violated their statutory duties as mandated by the Act when they failed to designate critical habitat for the Oregon chub and failed to perform a 5-year status review

(*Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*). On March 8, 2007, we issued a notice in the **Federal Register** that we would commence a status review of the Oregon chub (72 FR 10547). In a settlement agreement with the Plaintiff, we agreed to submit a proposed critical habitat rule for the Oregon chub to the **Federal Register** by March 1, 2009, and to submit a final critical habitat determination to the **Federal Register** by March 1, 2010.

A 5-year review of the Oregon chub status was completed in February 2008 (Service 2008a); this review concluded that the Oregon chub's status had substantially improved since the time of listing and that the Oregon chub no longer met the definition of endangered but met the definition of a threatened species under the Act. The review recommended that the Oregon chub should be reclassified from endangered to threatened.

On March 10, 2009, we published a proposed rule (74 FR 10412) to designate critical habitat for the Oregon chub. The public comment period was open for 60 days, from March 10, 2009, to May 11, 2009. We subsequently reopened the public comment period on September 22, 2009, for an additional 30 days ending October 22, 2009 (74 FR 48211). During the reopened public comment period, we held a public hearing in Corvallis, Oregon. We published a final rule designating critical habitat on March 10, 2010 (75 FR 11010), and a technical correction to the final critical habitat rule on April 9, 2010 (75 FR 18107).

On May 15, 2009, we published a proposed rule to reclassify the Oregon chub from endangered to threatened (74 FR 22870). The public comment period on the proposal was open for 60 days from May 15, 2009, to July 14, 2009. On April 23, 2010, we published a final rule reclassifying the federally endangered Oregon chub to threatened under the authority of the Act (75 FR 21179). The decision was based on a thorough review of the best available scientific and commercial data, which indicated that the species' status had improved to the point that the Oregon chub was not in danger of extinction throughout all or a significant portion of its range.

On May 19, 2009, we published a notice in the **Federal Register** announcing the Oregon Department of Fish and Wildlife (ODFW) application for an enhancement of survival permit under section 10(a)(1)(A) of the Act (74 FR 23431). The permit application included a proposed Programmatic Safe Harbor Agreement between ODFW and the Service (Service 2009, pp. 1–30). We issued the permit on August 31, 2009.

The term of the permit and agreement is 30 years. The permit authorizes ODFW to extend incidental take coverage with assurances to eligible landowners who are willing to carry out habitat management measures that would benefit the Oregon chub by enrolling them under the agreement as Cooperators through issuance of Certificates of Inclusion. The geographic scope of the agreement includes all non-Federal properties throughout the estimated historical distribution of the species in the Willamette Valley.

On February 5, 2013, we published a notice in the **Federal Register** announcing the initiation of 5-year status reviews and requesting information for 44 species, including the Oregon chub (78 FR 8185). No information was received from this request. This proposed rule, which considers the same information as required in a status review, will also serve as our 5-year status review for the Oregon chub.

Background

Species Information

Species Description and Life History—The Oregon chub is a small minnow in the Cyprinid family. Young of the year range in length from 7 to 32 millimeters (mm) (0.3 to 1.3 inches), and adults can be up to 90 mm (3.5 inches) in length (Pearsons 1989, p. 17). The Oregon chub reaches maturity at about 2 years of age (Scheerer and McDonald 2003, p. 78) and in wild populations can live up to 9 years. Oregon chub spawn from May through August and are not known to spawn more than once a year.

The Oregon chub is found in slack water off-channel habitats such as beaver (*Castor canadensis*) ponds, oxbows, side channels, backwater sloughs, low-gradient tributaries, and flooded marshes. These habitats usually have little or no water flow, are dominated by silty and organic substrate, and contain considerable aquatic vegetation providing cover for hiding and spawning (Pearsons 1989, p. 27; Markle *et al.* 1991, p. 289; Scheerer and McDonald 2000, p. 1). The average depth of habitat utilized by the Oregon chub is less than 1.8 meters (m) (6 feet), and summer water temperatures typically exceed 16° Celsius (61°F). Adult Oregon chub seek dense vegetation for cover and frequently travel in the mid-water column in beaver channels or along the margins of aquatic plant beds. Larval Oregon chub congregate in shallow near-shore areas in the upper layers of the water column, whereas juveniles venture farther from

shore into deeper areas of the water column (Pearsons 1989, p. 16). In the winter months, the Oregon chub can be found buried in the detritus or concealed in aquatic vegetation (Pearsons 1989, p. 16). Fish of similar size school and feed together. In the early spring, Oregon chub are most active in the warmer, shallow areas of aquatic habitats.

The Oregon chub is an obligatory sight feeder (Davis and Miller 1967, p. 32). They feed throughout the day and stop feeding after dusk (Pearsons 1989, p. 23). The Oregon chub feeds mostly on water column fauna. The diet of Oregon chub adults collected in a May sample consisted primarily of minute crustaceans including copepods, cladocerans, and chironomid larvae (Markle *et al.* 1991, p. 288). The diet of juvenile Oregon chub also consists of minute organisms such as rotifers and cladocerans (Pearsons 1989, p. 2).

Range—The Oregon chub is endemic to the Willamette River drainage of western Oregon. Historical records show the Oregon chub was found as far downstream as Oregon City and as far upstream as the town of Oakridge. At the time of listing in 1993, there were only nine known populations of Oregon chub, and only a few estimates existed of the number of individuals within each population. These locations represented a small fraction (estimated as 2 percent based on stream miles) of the species' formerly extensive distribution within the Willamette River drainage.

Abundance and Distribution—Since we listed the Oregon chub as endangered in 1993, the status of the species has improved dramatically due to the discovery of many new populations and successful reintroductions within the species' historical range (Scheerer 2007, p. 97). Recently, since we reclassified the Oregon chub to threatened status in 2010, a substantial number of new Oregon chub populations have been discovered (28 populations) and established through introductions (8 populations). In 2012, the ODFW confirmed the existence of the Oregon chub at 79 locations in the Luckiamute River, North and South Santiam River, McKenzie River, Middle Fork and Coast Fork Willamette Rivers, and several tributaries to the mainstem Willamette River downstream of the Coast Fork and Middle Fork Willamette River confluence (Bangs *et al.* 2012, pp. 7–9). These include 59 naturally occurring and 20 introduced populations. Currently, 36 Oregon chub populations have an estimated abundance of more than 500 fish each; and 20 of these

populations have also exhibited a stable or increasing trend over the last 7 years (Bangs *et al.* 2012, p. 1). The current status of Oregon chub populations meets the goals of the recovery plan for delisting. The distribution of these sites is shown in Table 1.

TABLE 1—DISTRIBUTION OF OREGON CHUB POPULATIONS MEETING RECOVERY CRITERIA FOR DELISTING [Bangs *et al.* 2012, pp. 7–9].

Recovery subbasin	Number of populations	Number of large populations (≥500 adult fish)	Number of large populations with stable/increasing abundance trend	Total estimated abundance in subbasin
Santiam	17	11	5	29,070
Mainstem Willamette ¹	25	9	6	146,509
Middle Fork Willamette	33	15	9	44,999
Coast Fork Willamette ²	4	1	0	962
Total	79	36	20	221,540

¹ Includes McKenzie River subbasin.

² The Coast Fork Willamette was identified as a subbasin containing the Oregon chub in the Recovery Plan, but was not identified as a Recovery Area.

Although certain populations of the Oregon chub have remained relatively stable from year to year, substantial fluctuations in population abundance have been observed. For instance, the largest known population at Ankeny National Wildlife Refuge had an estimated abundance of 21,790 Oregon chub in 2010 and increased to 96,810 Oregon chub in 2011. Cyclical fluctuations in Oregon chub population abundance are commonly observed. For instance, Dexter Reservoir Alcove

“PIT1” had an estimated population abundance of 140 in 1995. Although annual estimated abundance fluctuated, the population reached 1,440 estimated individuals in 2000. A decline in population abundance followed, and the 2004 population estimate was 70 Oregon chub. In 2005 the population again began to increase, and reached 1,370 estimated individuals in 2009 (Scheerer *et al.* 2005, p. 2).

A major component of recovery efforts for the Oregon chub has been

introducing Oregon chub into hydrologically isolated habitats that are free from nonnative fish species. Twenty new populations have been established since 1988 (Table 2). In 2012, there were 13 introduced populations with more than 500 Oregon chub each; 6 of these populations have exhibited a stable or increasing 7-year abundance trend (Bangs *et al.* 2012, p. 15).

TABLE 2—INTRODUCED OREGON CHUB POPULATIONS (BANGS ET AL. 2012, PP. 7–9, 16)

[MS—Mainstem Willamette River, S—Santiam River, CF—Coast Fork Willamette River, MF—Middle Fork Willamette River]

Site name	Subbasin	Year of first introduction	Number of fish introduced	Estimated abundance
Dunn Wetland	MS	1997	573	44,160
Finley Display Pond	MS	1998	500	220
Russell Pond	MS	2001	500	340
Finley Cheadle Pond	MS	2002	530	204
Ankeny Willow Marsh	MS	2004	500	82,800
St. Paul Ponds	MS	2008	195	510
Finley-Buford Pond	MS	2011	160	460
Murphy Pond	MS	2011	214	189
Ellison Pond	MS	2012	110	111
Foster Pullout Pond	S	1999	500	2,240
South Stayton Pond	S	2006	439	2,000
North Stayton Pond	S	2010	620	4,370
Budeau South Pond	S	2010	312	4,160
Budeau North Pond	S	2010	310	5,730
Herman Pond	CF	2002	400	190
Sprick Pond	CF	2008	65	700
Wicopee Pond	MF	1992	178	5,620
Fall Creek Spillway Ponds	MF	1996	500	6,750
Haws Enhancement Pond	MF	2009	133	900
Hills Creek Pond	MF	2010	1,127	13,460

Genetic Diversity—The Service’s Abernathy Fish Technology Center conducted a genetic analysis on the Oregon chub in 2010 (DeHaan *et al.* 2010). The analysis examined genetic diversity at 10 microsatellite loci within and among 20 natural and 4 introduced

populations. The findings suggest that four genetically distinct groups of the Oregon chub exist and these groups corresponded to the four subbasins of the Willamette River. Levels of genetic diversity were consistent across distribution and equal to, or greater

than, other species of minnows (i.e., cyprinids). Most populations were stable over time at sites where genetic diversity was evaluated at a 7- to 8-year interval (three to four Oregon chub generations). Data suggests that adequate levels of genetic diversity exist

in most populations. Two sites were shown to have reduced genetic diversity: a recent bottleneck was observed in the Shetzline population, and the Geren Island population showed evidence of decreasing diversity, possibly due to significant reductions in the population size. Currently, both of these sites support abundant populations of the Oregon chub, which have exhibited an increasing trend in population growth over the last 7 years (Bangs *et al.* 2012, pp. 7–8).

The report resulting from the genetic assessment (DeHaan *et al.* 2010, p. 18) shows that the current Oregon chub translocation guidelines (ODFW 2006) are effective in establishing genetically viable populations (donor population from within same subbasin, and a minimum of 500 Oregon chub introduced). Levels of genetic diversity were similar to natural populations in three out of four of the introduced sites studied. Introduced populations from multiple sources had increased diversity and showed evidence of interbreeding. The Dunn wetland population, which had three donor populations, had the highest genetic diversity of all sites (natural and introduced). The Wicopee Pond population had relatively low levels of genetic diversity, which was likely due to this population being founded with only 50 Oregon chub originating from 1 source population. These data support introducing greater numbers of individuals and using multiple sources from within a subbasin.

Recovery and Recovery Plan Implementation

Background—4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii), recovery plans must, to the maximum extent practicable, include: “Objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of [section 4 of the Act], that the species be removed from the list.” Recovery plans may be revised to address continuing or new threats to the species, as new, substantive information becomes available. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that set a trigger for review of the species’ status, and methods for monitoring recovery progress.

Recovery plans are nonregulatory documents that are intended to establish goals for long-term conservation of listed species, define criteria that are designed to indicate when the threats facing a species have been removed or reduced to such an extent that the species may no longer need the protections of the Act, and provide guidance to our Federal, State, other governmental and nongovernmental partners on methods to minimize threats to listed species. Thus, while recovery plans provide important guidance on methods of minimizing threats to listed species and measurable objectives against which to measure progress towards recovery, they are not regulatory documents and cannot substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the Federal List of Endangered and Threatened Plants (50 CFR 17.11) (adding, removing, or reclassifying a species) must reflect determinations made in accordance with sections 4(a)(1) and 4(b) of the Act. Section 4(a)(1) requires that the Secretary determine whether a species is endangered or threatened (or not) because of one or more of five threat 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 human-made factors affecting its continued existence. Section 4(b) of the Act requires that the determination be made “solely on the basis of the best scientific and commercial data available.” Therefore, recovery criteria should indicate when a species is no longer an endangered species or threatened species under the five statutory factors.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and the species is robust enough to delist. In other cases, recovery opportunities may be discovered that were not known when the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan. Likewise, information on the species may be discovered that was not known at the time the recovery plan was

finalized. The new information may change the extent to which criteria need to be met for recognizing recovery of the species. Recovery of a species is a dynamic process requiring adaptive management that may, or may not, fully follow the guidance provided in a recovery plan.

Recovery Planning—The Oregon Chub Working Group, which was formed prior to listing the species, has been a proactive force in improving the conservation status of the Oregon chub. This group of Federal and State agency biologists, academicians, land managers, and others has met each year since 1991 to share information on the status of the Oregon chub, results of new research, and ongoing threats to the species. Additionally, an interagency conservation agreement was established for the Oregon chub in 1992 (ODFW *et al.* 1992). The objectives of the agreement were to: (1) Establish a task force drawn from participating agencies to oversee and coordinate Oregon chub conservation and management actions; (2) protect existing populations; (3) establish new populations; and (4) foster greater public understanding of the species, its status, and the factors that influence it (ODFW *et al.* 1992, pp. 3–5). These objectives are similar to that of the subsequently developed recovery plan.

The Recovery Plan for the Oregon Chub was approved by the Service on September 3, 1998 (Service 1998). The recovery plan outlines recovery criteria to assist in determining when the Oregon chub has recovered to the point that the protections afforded by the Act are no longer needed. These delisting criteria are: (1) 20 populations of at least 500 individuals each are established and maintained; (2) all of these populations must exhibit a stable or increasing trend for 7 years; (3) at least 4 populations (meeting criteria 1 and 2) must be located in each of the 3 subbasins (Mainstem Willamette, Middle Fork Willamette, and Santiam Rivers); and (4) management of these 20 populations must be guaranteed in perpetuity (Service 1998, pp. 27–28).

Recovery Plan Implementation—The status of the Oregon chub has improved dramatically since it was listed as endangered. The improvement is due largely to the implementation of actions identified in the interagency conservation agreement and the Oregon chub recovery plan. This includes the establishment of additional populations via successful introductions within the species’ historical range and the discovery of many new populations as a result of ODFW’s surveys of the basin (Scheerer 2007, p. 97). Twenty years

have passed since the species was listed, and it is now abundant and well-distributed throughout much of its presumed historical range. Currently, there are 79 Oregon chub populations, of which 36 have more than 500 adults (Bangs *et al.* 2012, pp. 6–12). The risk of extinction has been substantially reduced as threats have been managed and as new populations have been discovered or established. The Oregon chub has exceeded or met the following criteria for delisting described in the recovery plan:

Delisting Criterion 1: 20 populations of at least 500 individuals are established and maintained. This criterion has been exceeded; in 2012, we identified 36 populations with more than 500 adult Oregon chub (Table 1).

Delisting Criterion 2: All of these populations (20) must exhibit a stable or increasing trend for 7 years. This criterion has been met. Currently, 20 populations of at least 500 individuals have exhibited a stable or increasing trend for 7 years (Table 1).

Delisting Criterion 3: At least four populations (meeting criteria 1 and 2) must be located in each of the three subbasins (Mainstem Willamette, Middle Fork, and Santiam Rivers). This criterion has been exceeded in all three subbasins. Six populations in the Mainstem Willamette River subbasin, nine populations in the Middle Fork Willamette River subbasin, and five populations in the Santiam River subbasin meet the first three delisting criteria (Table 1).

Delisting Criterion 4: Management of these 20 populations must be guaranteed in perpetuity. The level of management protection recommended in the Oregon chub recovery plan (i.e., management guaranteed into perpetuity) exceeds the requirements of the Act in evaluating whether a species meets the statutory definition of threatened or endangered, as adequate protection for the species in the long term may be provided otherwise. Although we do not have guarantees that all of the populations will be managed into perpetuity, we have a high level of confidence that management of the Oregon chub sites will continue to provide adequate protection for the species in the long term, as further discussed below. However, of the 36 sites with populations of more than 500 Oregon chub, 25 of the sites are in public or Tribal ownership, with either active conservation management programs, or where land managers consider the needs of the Oregon chub when implementing site management activities. Additionally, seven of the sites with abundant populations of the

Oregon chub are on land which is privately owned where landowners have signed conservation agreements or are enrolled in our Safe Harbor Program. These seven sites include land that is in a permanent easement or ownership by the McKenzie River Trust, a land trust which is dedicated to conservation of wetland and riparian habitat. Our analysis of whether the species has achieved recovery is based on the five factors identified in section 4 of the Act, which are discussed next.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. “Species” is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We must consider these same five factors in delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened (as is the case with the Oregon chub); and/or (3) the original scientific data used at the time the species was classified were in error.

A recovered species is one that no longer meets the Act’s definition of threatened or endangered. Determining whether a species is recovered requires consideration of the same five categories of threats specified in section 4(a)(1) of the Act. For species that are already listed as threatened or endangered, this analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal or reduction of the Act’s protections.

A species is “endangered” for purposes of the Act if it is in danger of extinction throughout all or a “significant portion of its range” and is “threatened” if it is likely to become endangered within the foreseeable future throughout all or a “significant portion of its range.” The word “range” in the significant portion of its range phrase refers to the range in which the species currently exists. For the purposes of this analysis, we will evaluate whether the currently listed species, the Oregon chub, should be considered threatened or endangered throughout all its range. Then we will consider whether there are any significant portions of the Oregon chub’s range where the species is in danger of extinction or likely to become so within the foreseeable future.

The Act does not define the term “foreseeable future.” For the purpose of this proposed rule, we defined the “foreseeable future” to be the extent to which, given the amount and substance of available data, we can anticipate events or effects, or reliably extrapolate threat trends, such that we reasonably believe that reliable predictions can be made concerning the future as it relates to the status of the Oregon chub. In considering the foreseeable future as it relates to the status of the Oregon chub, we considered the factors affecting the Oregon chub, historical abundance trends, and ongoing conservation efforts.

The following analysis examines all five factors currently affecting, or that are likely to affect, the Oregon chub within the foreseeable future.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

When the Oregon chub was listed as endangered in 1993, the species was known to exist at nine locations, representing only 2 percent of the species’ historical range (Markle 1991, pp. 288–289; Scheerer *et al.* 2007, p. 2, Service 1993, p. 1). The decline in Oregon chub abundance and distribution was attributed to the extensive channelization, dam construction, and chemical contamination that occurred in the Willamette River basin, particularly from the 1940s through the late 20th century (Pearsons 1989, pp. 29–30).

Since listing, concerted efforts by Federal, State, and local governments and private landowners have greatly reduced the threats to the Oregon chub. For example, the introduction of the Oregon chub into secure habitats has created refugial populations in habitats that are isolated from the threats of

habitat loss and invasion by nonnative fishes. Additionally, as explained below, research has expanded our understanding of suitable habitat for the Oregon chub, and increased survey efforts have led to the discovery of many natural populations. And, since 2002, the U.S. Army Corps of Engineers (USACE) has implemented minimum dam outflow targets that sustain downstream floodplain habitat, which has reduced the threat of habitat loss for the Oregon chub. These minimum flow targets will continue to be required into the future under existing biological opinions from the Service and National Marine Fisheries Service (NMFS) on the USACE's Willamette River Basin Project (see description below). The USACE also has a memorandum of understanding with The Nature Conservancy's Sustainable Rivers Project, an ongoing collaboration to promote ecologically sustainable flows below USACE dams in the Willamette River basin. For these reasons we anticipate that the USACE would continue to meet these minimum flow targets after delisting of the Oregon chub. Also, the acquisition of floodplain habitat for long-term conservation and restoration, including off-channel locations preferred by the Oregon chub, has gained momentum in the Willamette River basin by a variety of Federal, State, Tribal, local governmental and nongovernmental agencies, which provides assurances that Oregon chub habitat will continue to be managed for the species. As a result, the Oregon chub is now abundant and well distributed in several Willamette River basin tributaries at 79 locations.

Since 1992, the Oregon chub has been introduced and established in 20 secure, isolated habitats (Bangs *et al.* 2012, p. 16). These populations contribute to recovery by providing redundancy to the naturally occurring populations, increasing the abundance of the Oregon chub in each recovery area, and providing refugial habitat that is more resistant to the threats of habitat loss and invasion by nonnative fishes. The majority of Oregon chub individuals occur in populations at these introduction sites. In 2012, we estimated 174,730 Oregon chub in the 20 introduced populations. By contrast, we estimated 46,810 Oregon chub in the 59 naturally occurring populations. Ten of the introduction sites are in public ownership by Federal and State agencies that manage these sites for conservation of the Oregon chub.

The remaining 10 introduction sites are privately owned. Many of these introduction sites were created or

restored under the Service's Partners for Fish and Wildlife program managed by the staff of the Willamette Valley National Wildlife Refuge Complex. Most of these landowners have either signed conservation agreements or are participating in our Safe Harbor Program. In the interest of conserving the Oregon chub, our Safe Harbor Program participants volunteered to allow the introduction of the Oregon chub into ponds on their land and signed management plans, called cooperative agreements, which are designed to protect the species and its habitat. In exchange, they were given an incidental take permit that extended an exemption from take prohibitions under section 9 of the Act. If the Oregon chub is delisted, the species will no longer be protected under these take prohibitions and the incidental take permit associated with the safe harbor agreements will no longer be in effect. This means that landowners will no longer be legally bound to protect the species on their property. However, we anticipate, based on their past interest and cooperation in protecting the species, that these landowners will continue to manage their land for conservation of the Oregon chub into the future as described in their cooperative agreements. We will also seek to extend these agreements beyond their initial 10-year time period and, in the event the property is later sold or transferred, we will work with the future landowners to enroll them in a cooperative agreement. Our conclusion that the species has recovered does not, however, rely on an assumption that these landowners will continue managing for conservation.

In the 2008 5-year review of the status of the Oregon chub (Service 2008a, p. 26), we identified concerns about the ability to achieve recovery due to the focus on managing primarily isolated populations with limited genetic exchange. To reduce threats associated with habitat isolation, we suggested that future recovery efforts should integrate habitat that is connected to the floodplain. Successful efforts to integrate floodplain habitat into Oregon chub recovery were facilitated in part through consultation with several Federal agencies under section 7 of the Act. Specifically, in 2008, the Service and NMFS completed consultation with the USACE, Bonneville Power Administration, and the Bureau of Reclamation under section 7 of the Act on the continued operation and maintenance of 13 large flood-control dams in the Willamette River basin, collectively known as the Willamette

River Basin Project (Willamette Project). The Service's biological opinion considered the project's effects to the Oregon chub, the bull trout, and bull trout critical habitat (Service 2008b), while the NMFS' biological opinion considered effects to threatened salmon and steelhead (salmonids) and associated critical habitat. The terms and conditions of the Service's biological opinion required the USACE to fund a floodplain study that would increase our understanding of the effects that dam flow management was having on connected downstream Oregon chub habitat. The ODFW subsequently pursued opportunities to study these effects and to integrate floodplain habitat in recovery efforts, in part, through funding provided by the USACE under the terms and conditions of the biological opinion.

The floodplain study required by the Willamette Project biological opinion began in 2009 (Bangs *et al.* 2010a, p. 1). Under this study, ODFW began sampling fish assemblages and monitoring habitat conditions (i.e., bathymetry, pond volume, percent vegetation, water temperature) in several off-channel habitats in the Middle Fork Willamette River downstream of Dexter dam in Lowell, Oregon, to Jasper, Oregon (Bangs *et al.* 2010a, pp. 2–4). The ODFW chose the Dexter to Jasper reach of the Middle Fork Willamette River as a study area because several off-channel habitats in this reach were known to be occupied by the Oregon chub, and the majority of the adjacent land is in public ownership and accessible.

The ODFW sampled most of the hydrologically connected off-channel habitat in this reach and discovered that the Oregon chub also occupied sites previously thought to be unsuitable. These sites contain greater habitat complexity than sites where Oregon chub were previously known to occur. Although these habitats have features such as beaver dams and shallow inundated benches that were known to provide suitable habitat for the Oregon chub, the recently discovered sites also include channels that have frequent connectivity to the adjacent river channel (Bangs 2013, pers. comm.). Frequently connected sites, such as these, were thought to be unsuitable because these sites could be accessed by nonnative fishes that prey upon or compete with the Oregon chub for resources. The discovery of the Oregon chub in these connected sites facilitated a better understanding of the diversity of habitats occupied by the Oregon chub, and prompted ODFW to shift their basin-wide sampling efforts from

primarily focusing on isolated habitats or habitats with infrequent river connection to sampling frequently connected off-channel habitats. They sampled similar habitat in other recovery subbasins and found that the Oregon chub also occupied many of these frequently connected habitats. Between 2009 and 2012, ODFW discovered 28 additional Oregon chub populations throughout the 3 recovery subbasins (Bangs *et al.* 2012, pp. 7–9).

Several anthropogenic and natural environmental factors, discussed below, may continue to have effects on the Oregon chub and its habitat in the foreseeable future. Many of these factors are included in this discussion because they were previously identified as threats to the continued existence of the species in the listing and downlisting rules. Additionally, new factors affecting the species are discussed.

Activities Related to the Willamette Project

The Oregon chub occupies 38 connected habitats that are downstream of Willamette Project dams or adjacent to reservoirs, and are thus influenced by Willamette Project operations. The Willamette Project biological opinions were signed in 2008 and continue until 2023 (NMFS 2008, Service 2008b). In addition to normal operations of the Willamette Project, several actions required under the terms and conditions of the biological opinions may affect Oregon chub populations and habitat in the future.

Temperature and flow augmentation—The USACE is implementing a number of structural and operational changes to alter flows and water temperatures downstream of Willamette Project dams to increase survival of federally listed salmon and steelhead (salmonids). These operational and structural changes have resulted in downstream water temperatures closer to natural conditions that existed prior to the construction of the dams (e.g., river temperatures downstream of the reservoirs are now warmer in early summer, and cooler in the late summer and early fall). The USACE is also operating to meet mainstem and tributary flow objectives identified in the Willamette Project biological opinion to benefit listed salmonids; these flows also benefit the Oregon chub by sustaining floodplain habitat downstream. In addition, the USACE is working with partners in the Willamette River basin as part of The Nature Conservancy's Sustainable Rivers Project to implement a set of environmental flow objectives designed

to improve channel morphology in a manner that would create and sustain new, and improve existing, fish habitat (Gregory *et al.* 2007, p. 11). The effects of water flow augmentation and temperature normalization on fish communities in off-channel habitat are largely unknown. ODFW has a monitoring program in place (Bangs *et al.* 2011) to detect any negative effects on the Oregon chub and its habitat. If the species is delisted as proposed in this rule, this monitoring program, which is detailed in our draft PDM plan, will continue for several years post-delisting (Service and ODFW 2013). The draft PDM plan identifies thresholds and responses for detecting and reacting to significant changes in Oregon chub protected habitat, distribution, and persistence. If declines are detected that exceed the thresholds, the Service, in combination with other PDM participants, will investigate causes of these declines and determine if the Oregon chub warrants expanded monitoring, additional research, additional habitat protection, or relisting as an endangered or threatened species under the Act.

Reservoir drawdowns—As required in the NMFS biological opinion for the Willamette Project, the USACE is implementing an annual complete reservoir drawdown of Fall Creek Reservoir on the Middle Fork Willamette River. The biological objectives of the reservoir drawdown are to improve fish passage efficiency and survival of juvenile Chinook salmon migrating out of Fall Creek Reservoir and to reduce nonnative fish populations inhabiting the Fall Creek Reservoir. This is expected to result in reduced nonnative predation and competition with juvenile Chinook salmon rearing in the reservoir. While reservoir drawdown benefits Chinook salmon, there are potential negative effects to the Oregon chub from sedimentation of Oregon chub habitats.

Willamette River basin flood control dams inhibit the transport of sediment downstream, causing sedimentation to occur in the reservoirs. During a complete reservoir drawdown, released reservoir water scours the reservoir bed and transports sediment downstream. During the Fall Creek drawdowns, a massive volume of silt, sand, and debris was flushed, causing sediment deposition to occur in off-channel habitats downstream of the dam. Sampling for Oregon chub populations in the Fall Creek drainage occurred after the first drawdown. Three previously undocumented Oregon chub populations were affected by sedimentation resulting from the

drawdown. The extent to which these populations were affected is unknown because Oregon chub were discovered at these sites after the sedimentation occurred and we cannot determine the area of habitat or number of Oregon chub that existed prior to the sedimentation. Fewer than five Oregon chub were found in each of these three sites after the sedimentation occurred. These sites experienced the accumulation of fine sediments, perhaps beyond typical historical levels, which reduced the amount of habitat available to Oregon chub (Bangs 2013, pers. comm.). However, little sedimentation was observed in the few Oregon chub habitats that occur further downstream of the confluence of Fall Creek and the Middle Fork Willamette River. Most of the abundant populations of Oregon chub in off-channel habitats of the Middle Fork Willamette River were not affected because they occur upstream of this confluence.

Although partial drawdowns of Willamette Project reservoirs are likely to occur in the near future, they are unlikely to result in large volumes of sediment moving downstream because the water level will remain above the sediment bed and little sediment will be moved. Complete reservoir drawdowns to the extent seen at Fall Creek are not currently planned at other reservoirs. The effects of a complete reservoir drawdown would vary by location; it is difficult to predict what habitat changes may occur downstream. However, any future proposal to implement this scale of drawdown will include extensive coordination and planning between the Service, ODFW, the USACE, and other land managers. Additionally, in cooperation with the USACE, we have developed monitoring guidance and recommended responses in the event a drawdown is planned (Service and ODFW 2013, pp. 18–19).

Another concern related to drawdowns is that nonnative predatory fishes are common in reservoir habitats. During a drawdown, these fish are likely transported downstream, where they may invade off-channel habitats. The risks to the Oregon chub associated with nonnative fishes are discussed under Factors C and E, below.

Reservoir water level fluctuations—Fluctuating water levels in Lookout Point Reservoir on the Middle Fork Willamette River may limit the breeding success of the Oregon chub population in Hospital Pond, which provides habitat for the species in a pool connected to the reservoir by a culvert (Service 2008b, p. 160). Between 2001 and 2003, the USACE, which manages Lookout Point Reservoir as part of the

Willamette Project, implemented a series of actions to protect the population of Oregon chub in Hospital Pond. The goal was to allow the USACE to manage the water level in Lookout Point Reservoir independently of the water elevation in Hospital Pond. In order to achieve this, they installed a gate on Hospital Pond's outlet culvert and lined the porous berm between the pond and reservoir (Service 2002, pp. 1–11). They also excavated additional areas to create more suitable spawning habitat in the pond (Service 2003, pp. 1–3). Despite these actions, water elevation in Hospital Pond continues to be influenced by reservoir water levels. Hospital Pond currently supports a large, stable population of the Oregon chub; however, future Willamette Project operations may result in reservoir elevations that are below the levels necessary to inundate the spawning habitat in Hospital Pond (Service 2008b, p. 160). This reduction in spawning habitat may result in limited breeding success for the Oregon chub in Hospital Pond into the foreseeable future. However, the Hospital Pond population is not considered as vital as we once thought because additional surveys in the Middle Fork Willamette River subbasin have found that the subbasin has the highest number of Oregon chub populations (33 populations) across the range of the species. Currently, 15 of the Oregon chub sites in this subbasin have abundant (greater than 500 individuals) populations of the Oregon chub. This redundancy of large populations provides additional security to the species in the event that single populations decline.

Inability to meet minimum flow targets—During low water or drought years, the USACE may not be able to meet the seasonal minimum water flow targets established in the Willamette Project biological opinions. This may have negative effects on Oregon chub habitat downstream through a temporary reduction in pond volume and increased water temperatures. Under the floodplain study, the ODFW has mapped the bathymetry and installed equipment to measure pond elevation, area, volume, and temperature in Oregon chub sites that are influenced by Willamette Project flows. This information has been used to determine the effect that low flows may have on the extent of habitat area available to the Oregon chub. The USACE has considered these data in managing flows and has a notification process in place to coordinate with the Service and ODFW during low water

periods before flows are reduced to levels below the minimum flow targets. To date, except for during malfunctions and emergency operations explained below, flows below minimum targets have been of short duration and have not resulted in observable adverse effects to Oregon chub populations (Bangs 2013, pers. comm.).

The minimum flow targets protect not only the Oregon chub, but many other native aquatic species, including listed salmonids. If the Oregon chub is delisted, these minimum flow targets will continue to be required under existing biological opinions from the Service and NMFS on the Willamette Project for listed bull trout, Chinook salmon, and steelhead. Moreover, the USACE was proactive in implementing recommended flows before the Willamette Project biological opinions were completed (USACE 2007, pp. 3–19). Therefore, we anticipate that the USACE will continue to meet these minimum flow targets after delisting of the Oregon chub, except under infrequent, extreme conditions such as drought.

Willamette Project malfunctions and emergency operations resulting in the USACE not meeting minimum flow targets or necessitating restrictions on reservoir pool elevations have affected Oregon chub habitats. These incidents have been infrequent, but resulted in short-term negative effects on a few Oregon chub populations. For instance, in 2009, two of the three spillway gates at the USACE Big Cliff dam on the North Santiam River failed (Bangs *et al.* 2010b, p. 16). While repairing the gates, the outflow from Big Cliff Dam was reduced to below the minimum summer flow target. Record high air temperatures coincided with the low flow levels. Monitoring during this event detected that three Oregon chub sites downstream were nearly desiccated and fish mortalities were observed. Screened pumps were used to increase the volume of water in the ponds and to reduce water temperatures. The effects of this incident on Oregon chub populations were short term, and the numbers of the Oregon chub in these three populations have either increased or are exhibiting a stable trend (Bangs *et al.* 2012, pp. 7–9).

Additionally, in 2010, the USACE determined that the condition and reliability of the spillway gates at Willamette Project dams represented an unacceptable risk to public safety (USACE 2011, p. 1). To mitigate this risk, they proposed to implement pool elevation restrictions at Willamette Project reservoirs to lower than normal

levels to support maintenance and repair of the spillway gates. The imposed restrictions at Dexter Reservoir were likely to reduce the pond level at the adjacent Oregon chub site, PIT1 alcove, below levels critical for Oregon chub survival. The PIT1 alcove had filled in with sediment over the years and in consultation with the USACE it was determined that removing some of this sediment was the best measure to prevent desiccation of the pond. Prior to removing sediment, the ODFW captured and relocated a total of 1,127 Oregon chub to Hills Creek Pond, a site with perennial flow located on USACE property at Hills Creek Dam. This site is within the historical range of the Oregon chub, but at the time was not occupied by the species. The pond site is adjacent to the Middle Fork Willamette River and has historically been managed by USACE staff for wildlife habitat enhancement. The spillway gate repairs were completed, the pool elevation restriction for Dexter Reservoir was lifted in 2011, and the reservoir has returned to normal operations. The Oregon chub population abundance in PIT1 alcove is currently stable and has met the recovery criteria for delisting (Bangs *et al.* 2012, p. 9). The translocation of the Oregon chub into Hills Creek Pond has provided a large, secure habitat for the species and the population is now the largest Oregon chub population within the Middle Fork Willamette River subbasin with an estimated abundance of 13,460 Oregon chub (Bangs *et al.* 2012, p. 9).

Siltation Resulting From Timber Harvest

Excessive siltation from ground-disturbing activities in the watershed, such as timber harvest upstream of Oregon chub habitat, can degrade or destroy Oregon chub habitat. Minimum riparian management areas, required by the Oregon Forest Practices Act, may be protective of aquatic habitat depending on the harvest methods used (e.g., clearcut versus thinning) and the topography of the land where timber is being harvested, although monitoring water bodies for siltation is not required after harvest.

In the 1990s, timber harvest occurred on lands upstream of East Fork Minnow Creek. Flood events in the watershed in 1996, 1997, and 1998 caused accelerated siltation into East Fork Minnow Creek Pond, a downstream pond that is occupied by Oregon chub, and over half of the habitat was lost (Scheerer 2009, pers. comm.). The Oregon chub population in East Fork Minnow Creek Pond declined dramatically following these events (Scheerer 2009, pers. comm.). In 2010, the Oregon

Department of Transportation excavated accumulated sediment in the pond and created a pool that will provide a buffer from the effects of future siltation. This Oregon chub population has increased in abundance from 1,340 Oregon chub in 2009 to 3,330 Oregon chub in 2012. The population has also met the delisting criterion for a stable or increasing trend over 7 years.

In 2012, timber harvest occurred upstream of an Oregon chub site on William L. Finley National Wildlife Refuge (Finley NWR) known as Gray Creek Swamp. Prior to this timber harvest, we negotiated with the landowner who agreed to increase the width of the riparian area not subject to timber harvest in order to reduce the risk of siltation in Oregon chub habitat downstream. To date, siltation of this Oregon chub habitat has not been observed, but the site will continue to be monitored by ODFW during the proposed 9-year post-delisting monitoring period.

The potential for adverse effects to Oregon chub habitat from logging has also been identified at three other sites: Dexter Reservoir PIT1 alcove, Buckhead Creek, and Wicopee Pond (Scheerer 2008, pers. comm.). However, to date we have not observed levels of siltation at these sites that have resulted in habitat loss, and the Oregon chub populations within each of the five sites located downstream of timber activities all met the delisting criteria in 2012. Therefore, although siltation from timber harvest could have effects on the Oregon chub and its habitat, it has not been observed at levels that are causing declines in Oregon chub population abundance.

Floods and Seasonal High-Water Events

The Oregon chub is a low-elevation floodplain dependent species that evolved under dynamic environmental conditions created by seasonal flooding and droughts. As a result, the species' life history reflects these dynamic conditions. While floods and seasonal high-water events constitute a potential stressor to individuals or specific Oregon chub populations, these events create and maintain off-channel habitats necessary for the long-term persistence of the species, and they function to transport the Oregon chub to colonize these new sites.

For example, in 2007, a flood event in the Santiam River caused channel avulsion (a shift in the stream channel that results in the rapid abandonment of a river channel and formation of a new river channel) at an Oregon chub site, reducing the extent of habitat available at this location and likely negatively affecting this population. Yet in another

example, between 2000 and 2003, new off-channel habitat was formed in the McKenzie River due to flooding and, after aquatic vegetation became established, the site was subsequently colonized by the Oregon chub (Bangs 2013, pers. comm.). Although we are unable to predict the magnitude or the extent to which current Oregon chub habitats may be affected by flooding and seasonal high water events, the number and distribution of large populations, in combination with habitat heterogeneity, increases the species' resiliency in recovering from periodic disturbances, as the species would have historically.

Water Quality Issues

The analysis of threats in the final rule to list the Oregon chub as an endangered species and the recovery plan for the species discussed numerous potential threats to water quality in Oregon chub habitats. However, in the 20 years since the Oregon chub was listed, only a few of these concerns, discussed below, have materialized, and even then, these were localized and of short duration.

In the spring of 2011, ODFW noted the complete die-off of the introduced Oregon chub population in Cheadle Pond on the Finley NWR. They assessed the water quality (temperature, pH, and dissolved oxygen) and discovered that the pH level was abnormally high (mean pH: 9.6, range: 8.4–10.2). The pH level in Oregon chub habitats typically ranges between 7.42 and 8.66. The cause of the increased pH level was unknown and has not been observed previously at this site. We have not observed, and do not anticipate, similar incidents in other Oregon chub habitats. ODFW subsequently conducted an in-situ 7-day bioassay using 30 adult Oregon chub from the Gray Creek Swamp population. All of the Oregon chub survived the trial and were released into Cheadle Pond following the bioassay. In April 2012, ODFW confirmed the survival of the Oregon chub that were moved and found that the pH of the water in Cheadle Pond had decreased and was more typical of pH levels observed in other Oregon chub habitats (mean pH: 7.97, range: 7.42–8.66). An additional 184 Oregon chub were translocated from the Gray Creek Swamp population to Cheadle Pond to reestablish the population.

Nutrient enrichment may have caused the extirpation of the Oregon chub population at Oakridge Slough in the Middle Fork Willamette River subbasin. The slough is downstream from the Oakridge Sewage Treatment Plant, and increased nitrogen and phosphorus concentrations were detected in the

slough prior to a decline in the population. While the nutrient concentrations are not believed to be directly harmful to the species, the elevated nutrient levels may have contributed to habitat conditions that were unsuitable for Oregon chub (i.e., an increase in growth of algae, which then decomposed and led to low oxygen conditions below what the Oregon chub requires to survive) (Buck 2003, p. 12).

Several Oregon chub sites are located adjacent to agricultural land. Runoff from farm fields may contain pesticides or fertilizers that could adversely affect the water quality in Oregon chub habitats. However, many of these sites have protective vegetated buffers between crops and the aquatic habitat. To date, we have not observed declines in Oregon chub populations that can be attributed to agricultural practices, and several Oregon chub habitats located adjacent to farmland have supported abundant populations of Oregon chub for many years.

Several Oregon chub sites are located adjacent to private forestland (as previously discussed above under "*Sedimentation Resulting From Timber Harvest*"). Additionally, several Oregon chub sites are managed by the U.S. Forest Service (USFS) within the Willamette National Forest. Forests managed by the USFS operate under land and resource management plans that include management practices protective of fish (USFS 1990, pp. IV–61–64), and we anticipate these resource management plans will continue to guide forest management into the future. On private forestland, the use of chemicals is regulated by the Oregon Department of Forestry, and operators are required to comply with product labels and additional protective measures to protect waters of the State, including leaving untreated vegetated buffers and limiting aerial applications near areas of standing open water larger than one-quarter acre (ORS 527.765 and OAR 629–620–0000 through 629–620–0800). Although we have no information regarding landowners' compliance with these rules on forestland in the vicinity of Oregon chub habitats, we have not observed harmful effects to Oregon chub populations due to chemical exposure related to forestry operations.

Aggradation

Aggradation is an alluvial process where sediment deposition is more rapid than the capacity of a river to transport sediment downstream. We have observed aggradation at the Geren Island North Channel in the North Santiam River. Natural movement of the river channel changed sediment

deposition in the upstream end of this location, which had the potential to block water flow into the site. The City of Salem, which manages the site, excavated a portion of the channel to allow free-flowing water to enter the Oregon chub habitat. To date, we have not observed a decline in the Geren Island population; with the exceptions of this site and habitats in Fall Creek, which we discussed previously, no other Oregon chub habitats are currently being negatively impacted by aggradation.

Succession

Succession resulting from the manipulation of river flows was identified as a potential threat to Oregon chub habitat in the downlisting rule (75 FR 21179, April 23, 2010). Succession is a natural, long-term process that ponds go through as they mature. As vegetation dies back seasonally, it is deposited on the substrate of the pond, causing a reduction in water depth over time. Eventually, plant communities shift from aquatic to amphibious wetland plants, and the open water pond will be replaced by seasonal wetland and marsh habitat. Historically, seasonal high flows and alluvial floodplain processes created off-channel habitat, and rejuvenated existing habitats by flushing out sediment and diversifying the aquatic plant community. These processes no longer function as they did historically because flows are regulated under the USACE's Willamette Project. However, in the Willamette River basin, the USACE recently began implementing environmental flows recommended by The Nature Conservancy's Sustainable Rivers Project. These recommendations call for a more natural flow regime, which includes high-magnitude flows to create and rejuvenate off-channel habitats. Given the memorandum of understanding between the USACE and The Nature Conservancy regarding the Sustainable Rivers Project, and the minimum flows required under existing biological opinions from the Service and NMFS, we anticipate flow management trending towards natural flow regimes below Willamette Project dams will continue to create and rejuvenate off-channel habitats to the benefit of the Oregon chub into the future.

We are not aware of any particular sites that are vulnerable to succession in the near future; however, the sites that remain hydrologically isolated during high flows are cut off from these natural processes, and succession may continue resulting in a reduction of open water habitat. For instance, succession occurred at Herman Pond, an isolated

Oregon chub site in the Coast Fork Willamette basin, which led to a reduction in habitat area and a decline in population abundance. In 2005, the site was excavated to remove successional vegetation. This activity was successful in increasing open water habitat and led to an increase in Oregon chub abundance at this location. Given the wide distribution and number of Oregon chub habitats under different land ownership, we are uncertain whether manual modification of chub habitats to reverse the effects of succession will occur in the future following delisting. However, given that we are not aware of any particular sites vulnerable to succession in the foreseeable future, we consider the potential negative impact to the Oregon chub from succession to be very low.

Irrigation Withdrawals

A few Oregon chub sites may be influenced by irrigation water withdrawals. In recent years, at Elijah Bristow Berry Slough in the Middle Fork Willamette River subbasin, a drop in summer water level and a significant decline in Oregon chub abundance coincided with increased irrigation use by a farm located upstream. However, this was an isolated event that we have not observed at other sites. Many Oregon chub populations occur on publicly owned lands or on areas managed for conservation, where direct water withdrawals do not occur. In addition, water levels at habitats adjacent to mainstem river channels are highly dependent on river flow, and are less likely to be negatively impacted by irrigation withdrawals due to the amount of hyporheic (subsurface) flow into these habitats from the adjacent river.

Summary of Factor A

Many of the factors discussed above were previously identified as threats to the continued existence of the Oregon chub. These factors include activities associated with the operation of the Willamette Project dams, sedimentation from timber harvest, floods or high-water events, water quality issues, and succession. Modifications that resulted in the way the Willamette Project dams are currently operated have provided flows that create and sustain off-channel habitat used by the Oregon chub, and we anticipate these flow targets will continue into the future due to requirements under biological opinions from the Service and NMFS, and the Sustainable Rivers Project collaboration between USACE and The Nature Conservancy. Sedimentation from timber harvest is not currently indicated

in the decline of any Oregon chub populations, and riparian buffers protected from timber harvest under State and Federal regulations are expected to provide habitat protection in future timber harvest operations. Flooding and high-water events are largely unpredictable; however, the Oregon chub evolved within a dynamic environment and the current distribution of the Oregon chub in many abundant populations within subbasins and across multiple subbasins reduces the risk that these events will affect a large proportion of the Oregon chub and its habitat. Water quality issues have the potential to affect individual populations but few observations of negative effects due to water quality issues have materialized over the past 21 years that we have been monitoring Oregon chub populations. Succession has been documented at one Oregon chub site and may occur in the future, particularly at sites that are isolated from the floodplain. However, succession is a slow process that can be addressed through ongoing monitoring and habitat management, and is not currently a cause for concern at any of our known sites.

Other factors that may affect the Oregon chub and its habitat include actions required under the terms and conditions of the Willamette Project biological opinions, aggradation, and irrigation withdrawals. Actions required under the Willamette Project biological opinions began in 2008, but the effects to Oregon chub habitat from these actions are not well understood, as the focus of most of these actions is recovery of listed salmonids. Research into the effects of these actions on off-channel habitats started in 2009 and is continuing for the next few years. This research may lead to an improved understanding of the habitat characteristics that support abundant populations of the Oregon chub in connected habitats and flow management recommendations specific to maintaining Oregon chub habitat. Aggradation from natural causes has been identified at one Oregon chub site, and aggradation from a complete drawdown of Fall Creek Reservoir resulted in large deposits of sediment in three, previously unknown, Oregon chub habitats. Other than these events, aggradation has not been observed at Oregon chub sites. Irrigation withdrawal has been observed to negatively affect the volume of water available in one Oregon chub habitat in the Middle Fork River subbasin, but is not considered a widespread concern throughout the range of the Oregon chub.

In summary, the factors discussed under Factor A continue to occur across the subbasins occupied by the Oregon chub, but only a few populations have exhibited declines as a result of any of the factors or combination of factors. The threat of habitat loss has been reduced by changes in flow management and by introducing the species into secure, isolated habitats that are not influenced by floodplain processes. We also have a better understanding of the diversity of connected habitats used by the Oregon chub and have discovered many abundant populations in these habitats across multiple subbasins. Therefore, based on the best available information and because we expect that current management practices will continue into the future, we conclude that the present or threatened destruction, modification, or curtailment of its habitat or range does not constitute a substantial threat to the Oregon chub now and is not expected to in the future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization for commercial, recreational, scientific, or educational purposes was not a factor in listing, nor is it currently known to be a threat to the Oregon chub.

C. Disease or Predation

Predation by Nonnative Fishes and Amphibians

In the final rule to downlist the Oregon chub (75 FR 21179), we identified predation and competition with nonnative fishes as the primary threat to recovery of the Oregon chub (competition with nonnative fishes is addressed below under Factor E). The Willamette River basin contains 31 native fish species and 29 nonnative species (Hulse *et al.* 2002, p. 44). The large-scale alteration of the Willamette River basin's hydrologic system (i.e., construction of dams and the resultant changes in flood frequency and intensity) has created conditions that favor nonnative, predatory fishes, and reservoirs throughout the basin have become sources of continual nonnative fish invasions in the downstream reaches (Li *et al.* 1987, p. 198). Significant declines in Oregon chub abundance due to the presence of nonnative fishes have been documented. For instance, after floods in 1996, nonnative fish were first collected from several sites containing the Oregon chub in the Santiam River drainage; the two largest populations of Oregon chub (Geren Island North Pond

and Santiam Easement) subsequently declined sharply in abundance (Scheerer 2002, p. 1076).

Game fish, which prey upon the Oregon chub, have also been intentionally introduced into Oregon chub habitats. For example, illegal planting of largemouth bass at East Ferrin Pond in the Middle Fork Willamette River drainage coincided with the collapse of an Oregon chub population that had once totaled more than 7,000 fish. Regulatory mechanisms are in place to prevent the translocation of nonnative fish. Within the State of Oregon, with few exceptions, it is unlawful to transport, release or attempt to release any live fish into the waters of this State (Oregon Administrative Rules (OAR) 635-007-0600). Although similar illegal introductions may still occur in the future, they have historically been infrequent in habitats known to be occupied by the Oregon chub.

Predatory, nonnative centrarchids (bass and sunfish) and *Ameiurus* spp. (bullhead catfish) are common in the off-channel habitats preferred by the Oregon chub (Scheerer 2002, p. 1075), and the Oregon chub is most abundant at sites where nonnative fishes are absent (Scheerer 2007, p. 96). However, ODFW biologists have recently found many abundant Oregon chub populations that coexist with nonnative fish in hydrologically connected habitats (Bangs *et al.* 2011, pp. 21-24). One of the primary objectives of the floodplain study funded under the Willamette Project biological opinion (Service 2008b, see previous discussion under Factor A) is to examine the relationship between the environmental conditions at hydrologically connected sites and the fish community, with a focus on the Oregon chub and nonnative fish. Research conducted under the study will continue to improve our understanding of the effects that nonnative fishes have on the Oregon chub in these connected habitats and will continue to try to explain the habitat conditions that allow the species to coexist. It is apparent from the sampling results to date that the Oregon chub is coexisting with nonnatives more frequently than previously known. The results to date indicate that spatial and seasonal differences in temperature within these off-channel habitats may be providing areas that are suitable for Oregon chub but are not suitable for nonnatives. In other words, the species may be able to coexist because the habitat provides a diverse range of temperatures that appears to result in some habitat partitioning among the species (Bangs *et al.* 2011, pp. 9-10, 16-

17). Currently, 41 percent of all known Oregon chub habitats and 26 percent of the habitats supporting abundant populations (more than 500 Oregon chub) contain nonnative fishes.

In the recovery plan, we also identified predation by bullfrogs as a potential threat to the Oregon chub (Service 1998, p. 13), but we no longer consider this to be true. Bullfrogs are prevalent in most of the habitats occupied by the Oregon chub and their presence has not been correlated to a decline in the abundance of Oregon chub populations (Bangs 2013, pers. comm.). The Oregon chub is not known to be threatened by disease.

Summary of Factor C

Although the habitat conditions that allow the Oregon chub to coexist with nonnative fish are not yet well understood, we have documented several Oregon chub populations, in multiple subbasins, that are abundant despite the presence of nonnative, predatory fish. These Oregon chub populations exist in habitat that is connected to the active floodplain. Ongoing research conducted under the floodplain study funded by the USACE will continue to improve our understanding of the interactions between the Oregon chub and nonnative fishes.

While the presence of nonnative fishes in isolated sites may be associated with higher rates of predation on the Oregon chub, the species has been introduced into 20 isolated habitats that are generally protected from the risk of invasion by nonnative fishes due to the habitat distance from the floodplain or other fish barriers. During major flooding in the Willamette Basin in 1996, these sites remained isolated from neighboring water bodies. The Oregon chub in these secure, isolated sites currently account for more than 70 percent of all Oregon chub individuals. Therefore, based on the best available information, we conclude that disease and predation do not constitute substantial threats to the Oregon chub now or in the future.

D. The Inadequacy of Existing Regulatory Mechanisms

In evaluating the inadequacy of existing regulatory mechanisms, we first identify threats under one or more of the other four factors that are affecting the species to the extent it meets the definition of a threatened or endangered species under the Act. We then identify and evaluate the adequacy of existing regulatory mechanisms that are designed to prevent or reduce those threats. The Oregon chub, however, is

no longer facing threats to its long-term survival under the other four factors, thus the inadequacy of existing regulatory mechanisms is also no longer a threat to the species' continued existence. Therefore, our discussion herein focuses on regulatory mechanisms, not previously discussed, that may provide benefits to the Oregon chub.

The Oregon chub is designated as "Sensitive-Critical" by ODFW. Although this designation is a nonregulatory tool, it helps focus wildlife management and research activities, with the goal of preventing species from declining to the point of qualifying as "threatened" or "endangered" under the Oregon Endangered Species Act (Oregon Revised Statutes (ORS) 496.171, 496.172, 496.176, 496.182 and 496.192). Sensitive-Critical designation encourages, but does not require, the implementation of conservation actions for the species; however, other State agencies, such as the Oregon Department of State Lands (DSL) and the Water Resources Department, refer to the Sensitive Species List when making regulatory decisions.

Wetlands and waterways in Oregon are protected by both Federal and State laws. Under section 404 of the Clean Water Act (CWA), the USACE regulates the discharge of dredged or fill material into waters of the United States, including navigable waters and wetlands that may contain the Oregon chub. Oregon's Removal-Fill Law (ORS 196.795–990) requires people who plan to remove or fill material in waters of the State to obtain a permit from the DSL. Projects impacting waters often require both a State removal-fill permit, issued by the DSL, and a Federal permit issued by the USACE. A permit is required only if 50 cubic yards or more of fill or removal will occur. The removal-fill law does not regulate the draining of wetlands. Projects permitted under these programs must avoid and minimize impacts to wetlands or waterways, or propose mitigation to replace the functions and values lost as a result of the project (DSL 2013, p. 64). Some actions, however, such as irrigation diversion structure construction and maintenance and other activities associated with ongoing farming operations in existing cropped wetlands, are exempt from CWA requirements. Additionally, projects authorized under a nationwide USACE permit program receive minimal public and agency review unless the action may affect a listed species, in which case, a consultation under section 7 of the Act would be required. Individual

permits are subject to a more rigorous review, and may be required for nationwide permit activities with more than minimal impacts.

Under section 303(c) of the CWA, States are required to adopt water quality standards to restore and maintain the chemical, physical and biological integrity of the Nation's waters. Oregon adopted revised water quality standards for toxic pollutants in 2004. These standards are intended to protect native aquatic species, and are regulated by the Oregon Department of Environmental Quality. The State implements the standards through listing of waters that exceed criteria on the section 303(d) list of the CWA, calculating the Total Maximum Daily Loads (the maximum amount of pollutants that may enter a stream), and issuing or reissuing permits (i.e., National Pollutant Discharge Elimination System). In 2012, we completed consultation under section 7 of the Act on the Environmental Protection Agency's (EPA) proposed approval of the State of Oregon's water quality criteria for toxic pollutants (Service 2012). Although some Oregon chub sites may be affected by point-source discharges (i.e., wastewater treatment facilities and stormwater discharge from a manufacturing plant) and non-point-source discharges (i.e., runoff of agricultural and forestry pesticides and fertilizers) of toxic chemicals, in our consultation with the EPA, we determined that the Oregon chub's exposure to these chemicals at the criteria levels and the resulting effects would not jeopardize the species' continued existence, adversely modify or destroy Oregon chub critical habitat, nor reach levels preventing the Oregon chub from attaining the abundance and distribution criteria for delisting identified in the recovery plan (Service 2012, pp. 351–352).

Summary of Factor D

Although existing regulatory mechanisms offer limited protection to the Oregon chub, we have no indication that other factors, which these mechanisms are designed to address, are likely to occur at such a magnitude as negatively to impact large numbers of the Oregon chub or a substantial area of habitat. Therefore, based on the best available information, we conclude that the inadequacy of existing regulatory mechanisms does not constitute a substantial threat to the Oregon chub now or in the future.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Interspecific Competition with Nonnative Fishes and Amphibians

Along with the adverse impacts of direct predation described in Factor C (above), nonnative fishes compete with the Oregon chub for food resources, such as aquatic invertebrates. Competition with nonnative fishes may contribute to the decline in populations or exclusion of the Oregon chub from suitable habitats. Observed feeding strategies and diet of nonnative fishes, particularly juvenile centrarchids and adult mosquitofish (*Gambusia affinis*) overlap with those described for the Oregon chub (Li *et al.* 1987, pp. 197–198). At South Stayton Pond, a hydrologically isolated site in the Santiam River basin, we observed a population of 6,200 Oregon chub decline to 2,000 after invasion by mosquitofish, a nonnative fish too small to act as a predator on the Oregon chub. The source of this invasion is unknown, but it is likely that the mosquitofish were illegally introduced into the pond. The population has remained around 2,000 for the past 3 years (Bangs 2013, pers. comm.), demonstrating the ability of nonnative fish to competitively suppress Oregon chub populations. It is possible that other populations of the Oregon chub are being suppressed by competition with nonnative fishes. The current abundance of the Oregon chub and distribution throughout floodplain habitats in the Santiam, McKenzie, and Middle Fork Willamette Rivers indicates that competition by nonnative fish is not affecting Oregon chub populations to the degree that population declines may be observed.

Bullfrogs were identified as a threat to the Oregon chub in the recovery plan (Service 1998, p. 13) because they may compete with the Oregon chub for food resources (e.g., invertebrates). However, bullfrogs are prevalent in most of the habitats occupied by the Oregon chub and their presence has not been correlated with a decline in Oregon chub abundance (Bangs 2013, pers. comm.).

Isolated Populations

Twenty-eight populations of the Oregon chub are currently isolated; 20 of these sites are introduction sites where isolation was intentional in order to provide refugia from the threat of nonnative fishes. Other sites are isolated due to the reduced frequency and magnitude of flood events and the presence of migration barriers such as beaver dams. Managing species in isolation may have genetic

consequences. Burkey (1989, p. 78) concluded that, when species are isolated by fragmented habitats, low rates of population growth are typical in local populations, and their probability of extinction is directly related to the degree of isolation and fragmentation. Without sufficient immigration, growth of local populations may be low, and probability of extinction, high (Burkey 1989, p. 78). Although a recent genetic analysis found that the Oregon chub in isolated habitats has levels of genetic diversity equal to or greater than other cyprinids, additional Oregon chub may need to be introduced into these isolated populations in the future to maintain genetic diversity in the event a population shows a significant decline.

In the final rule to reclassify the Oregon chub to threatened, we expressed concern about genetic isolation due to the lack of habitat connectivity between Oregon chub populations. As we stated above in Factor A, we have discovered that many of the habitats occupied by the Oregon chub connect to the adjacent river channel more frequently and for longer duration than previously understood, which may provide opportunities for genetic dispersal. Currently, 51 Oregon chub populations are located in habitat that experiences some level of connectivity to the adjacent river channel; 28 of these populations have been discovered since we downlisted the Oregon chub to threatened status in 2010. Furthermore, ODFW recently documented the Oregon chub in habitat newly created by floodplain processes in the McKenzie River subbasin and documented volitional upstream movement of marked Oregon chub between populations in the Middle Fork Willamette River (Bangs *et al.* 2012, p. 19) and McKenzie River subbasins (Bangs 2013, pers. comm.). These findings demonstrate the ability of the Oregon chub to colonize new habitats and the potential to exchange genetic material between established populations.

Climate Change

Climate change presents substantial uncertainty regarding the future environmental conditions in the Willamette River basin and is expected to place an added stress on the species and its habitats. The Intergovernmental Panel on Climate Change (IPCC) has concluded that recent warming is already strongly affecting aquatic biological systems; this is evident in increased runoff and earlier spring peak discharge in many glacier- and snow-fed rivers (IPCC 2007, p. 8). Projections for

climate change in North America include decreased snowpack, more winter flooding, and reduced summer flows (IPCC 2007, p. 14). Projections for climate change in the Willamette Valley in the next century include higher air temperatures that will lead to lower soil moisture and increased evaporation from streams and lakes (Climate Leadership Initiative (CLI) and the National Center for Conservation Science and Policy 2009, p. 9). While forecasters have high uncertainty regarding the total precipitation projections for the region, effective precipitation (precipitation that contributes to runoff) may be reduced significantly even if total precipitation does not decline (CLI and the National Center for Conservation Science and Policy 2009, p. 9).

Although climate change is almost certain to affect aquatic habitats in the Willamette River basin (CLI 2009, p. 1), researchers have great uncertainty about the specific effects of climate change on the Oregon chub. The Service has developed a strategic plan to address the threat of climate change to vulnerable species and ecosystems; goals of this plan include maintaining ecosystem integrity by protecting and restoring key ecological processes such as nutrient cycling, natural disturbance cycles, and predator-prey relationships (Service 2010; p. 23). The Oregon chub recovery program worked to establish conditions that allow populations of the Oregon chub to be resilient to changing environmental conditions and to persist as viable populations into the future. Our recovery program for the species focused on maintaining large populations distributed across the species' entire historical range in a variety of ecological settings (e.g., across a range of elevations). This approach is consistent with the general principles of conservation biology. In their review of minimum population viability literature, Traill *et al.* (2009, p. 3) found that maintenance of large populations across a range of ecological settings increases the likelihood of species persistence under the pressures of environmental variation, and facilitates the retention of important adaptive traits through the maintenance of genetic diversity. Maintaining multiple populations across a range of ecological settings, as described in the recovery plan, increases the likelihood that many abundant populations will persist under the stresses of a changing climate.

Summary of Factor E

Interspecific competition with nonnative fishes, isolation from genetic exchange, and climate change may

affect Oregon chub populations in the future. However, we have only observed population declines related to competition with nonnative fishes in one Oregon chub population, which occurs in a small habitat area with limited resources. Although this decline was substantial (abundance of 6,000 chub declined to 2,000 chub in one season), the population has since stabilized and persists with about 2,000 chub (Bangs *et al.* 2012, p. 8). We have documented numerous additional abundant Oregon chub populations in habitats that are connected to the floodplain, which facilitates potential genetic exchange between populations. This has reduced the risk of a reduction in genetic diversity. The risks associated with climate change have been reduced by the distribution of many abundant populations in diverse habitats across multiple subbasins. Therefore, based on the best available information, we conclude that other natural or manmade factors do not constitute a substantial threat to the Oregon chub now or in the future.

Cumulative Impacts

Some of the factors discussed in the previous five-factor analysis could work in concert with one another or synergistically to create cumulative impacts to Oregon chub populations. For example, effects from flow and temperature changes downstream of Willamette Project dams may coincide with an increase in nonnative fish species that prey upon and compete with Oregon chub. Although the types, magnitude, or extent of cumulative impacts are difficult to predict, we are not aware of any combination of factors that has not already, or would not be, addressed through ongoing conservation measures that we expect to continue post-delisting and into the future, as described above. The best scientific and commercial data available indicates that the species is genetically diverse, abundant, and well-distributed throughout the recovery subbasins and that the factors are not currently, nor are they anticipated to, cumulatively cause declines in Oregon chub populations or its habitat.

Overall Summary of Factors Affecting Oregon Chub

The primary factors that threatened the Oregon chub were loss of habitat, predation and competition by nonnative fishes, and the inadequacy of existing regulatory mechanisms. The threats that led to the species being listed under the Act have been removed or ameliorated by the actions of multiple conservation partners over the last 20 years. The

introduction of the Oregon chub into several secure habitats has provided populations that are isolated from the threats of habitat loss and invasion by nonnative fishes. The discovery of many natural populations, including a number of populations that are connected to the active floodplain and coexist with nonnative fishes, has increased our understanding of population persistence in spite of the presence of predators in the species' environment. The implementation of minimum water flows from Willamette Project dams that sustain floodplain habitat downstream has reduced the risk of habitat loss due to altered flows. The acquisition of floodplain habitat for long-term conservation and restoration has provided assurance that Oregon chub habitat will continue to be managed for the species into the future.

Many factors still exist that may affect Oregon chub populations; however, most of these factors have been isolated incidents, and the magnitude of their effects have not been observed on a wide scale across the distribution of Oregon chub populations. The abundance and distribution of known Oregon chub populations has increased each year since the downlisting and has exceeded the goals of our recovery criteria for delisting. When the species was listed in 1993, only nine populations of the Oregon chub within a small, restricted range were known to occur. Oregon chub populations are now known to exist in 79 diverse habitats across multiple subbasins. Listing the species under the Act resulted in the implementation of focused recovery actions that have led to protected, abundant, and well-distributed Oregon chub populations across several Willamette River basin tributaries. We expect conservation efforts will continue to support persistent recovered Oregon chub populations post-delisting and in to the future, as described above. Based on this assessment of factors potentially impacting the species, we consider the Oregon chub to have no substantial threats now or in the future.

Finding

An assessment of the need for a species' protection under the Act is based on whether a species is in danger of extinction or likely to become so because of 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. As required by section 4(a)(1) of the Act, we conducted a review of the status of this species and assessed the five factors to evaluate whether the Oregon chub is endangered or threatened throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the information available in our files and other available published and unpublished information, and we consulted with recognized experts and other Federal, State, and Tribal agencies.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the exposure causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant the threat is. If the threat is significant, it may drive, or contribute to, the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined by the Act. This determination does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of an endangered species or threatened species under the Act.

We found that Oregon chub populations are well-distributed among several subbasins and that many large, stable, or increasing populations have existed with no evidence of decline over the last 7 or more years. During our analysis, we did not identify any factors that are likely to reach a magnitude that threatens the continued existence of the species; significant impacts at the time of listing that could have resulted in the extirpation of all or parts of populations have been eliminated or reduced since listing, and we do not expect any of these conditions to substantially change post-delisting and into the future. We conclude that the previously recognized impacts to the Oregon chub from the present or threatened destruction, modification, or curtailment of its habitat or range (specifically, operation

of USACE's Willamette Project dams, sedimentation from timber harvest and floods, water quality issues, and succession) (Factor A); predation by nonnative species (Factor C); and interspecific competition with nonnatives, isolation from genetic exchange, and climate change (Factor E), do not rise to a level of significance, such that the species is in danger of extinction now or in the foreseeable future. Thus, our analysis indicates that the Oregon chub is not likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range and does not, therefore, meet the definition of a threatened or endangered species.

Significant Portion of the Range

Having examined the status of Oregon chub throughout all its range, we next examine whether the species is in danger of extinction in a significant portion of its range. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose in analyzing portions of the range that have no reasonable potential to be significant or in analyzing portions of the range in which there is no reasonable potential for the species to be endangered or threatened. To identify only those portions that warrant further consideration, we determine whether substantial information indicates that: (1) The portions may be "significant" and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not "significant," we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is "significant." In practice, a key part of the determination that a species is in danger of extinction in a significant portion of its range is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats to the species occurs only in portions of the species' range that clearly would not meet the biologically based definition of "significant," such portions will not warrant further consideration.

We considered whether any portions of the Oregon chub range might be both significant and in danger of extinction or likely to become so in the foreseeable future. One way to identify portions would be to identify natural divisions within the range that might be of biological or conservation importance. Based on our review of the best available information concerning the distribution of the species and the potential threats, we have determined that the Oregon chub does not warrant further consideration to determine if there is a significant portion of the range that is threatened or endangered. The geographic range of the Oregon chub can readily be divided into four subbasins (Santiam, Mainstem Willamette, Middle Fork Willamette, and Coast Fork Willamette Rivers). Although some of the factors we evaluated in the Summary of Factors Affecting the Species section above occur in specific habitat types (i.e., hydrologically connected sites versus isolated sites) within these subbasins, the factors affecting the Oregon chub generally occur at similarly low levels throughout its range. Because the low level of potential threats to the species is essentially uniform throughout its range, the species is not endangered or threatened in a portion of its range and no portion warrants further consideration to determine if it is significant.

We have carefully assessed the best scientific and commercial data available and determined that the Oregon chub is no longer threatened with becoming endangered throughout all or a significant portion of its range within the foreseeable future. We conclude the Oregon chub no longer requires the protection of the Act, and, therefore, we are proposing to remove it from the Federal List of Endangered and Threatened Wildlife.

Available Conservation Measures

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 encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. This proposed rule, if made final, would remove these Federal conservation measures for Oregon chub.

Effects of the Rule

This proposal, if made final, would revise 50 CFR 17.11(h) to remove the Oregon chub from the Federal List of Endangered and Threatened Wildlife. The prohibitions and conservation measures provided by the Act, particularly through sections 7 and 9, would no longer apply to this species. Federal agencies would no longer be required to consult with the Service under section 7 of the Act in the event that activities they authorize, fund, or carry out may affect the Oregon chub. This proposed rule, if made final, would also revise 50 CFR 17.95(e) to remove the currently designated critical habitat for the Oregon chub throughout its range.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been recovered and delisted (50 CFR 17.11, 17.12). The purpose of this post-delisting monitoring (PDM) is to verify that a species remains secure from risk of extinction after it has been removed from the protections of the Act, by developing a program that detects the failure of any delisted species to sustain itself. If, at any time during the monitoring period, data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing under section 4(b)(7) of the Act.

A draft PDM plan has been developed for the Oregon chub, building upon and continuing the research that was conducted during the listing period. The draft PDM plan will be peer reviewed by experts in the scientific community and available for public comment upon the publication of this proposed rule. Public and peer review comments submitted in response to the draft PDM plan will be addressed within the body of the plan and summarized in an appendix to the plan. The draft PDM plan was developed by the Service and ODFW. In addition, the USACE, USFS, Oregon Parks and Recreation Division, McKenzie River Trust, and Willamette Valley National Wildlife Refuge Complex have agreed to cooperate with us in the implementation of the PDM. The draft PDM plan consists of: (1) A summary of the species' status at the time of proposed delisting; (2) an outline of the roles of PDM cooperators; (3) a description of monitoring methods; (4) an outline of the frequency and duration of monitoring; (5) an outline of data compilation and reporting

procedures; and (6) a definition of thresholds or triggers for potential monitoring outcomes and conclusions of the PDM.

The draft PDM plan proposes to monitor Oregon chub populations following the same sampling protocol used by ODFW prior to delisting. Monitoring will consist of three components: Oregon chub distribution and abundance, potential adverse changes to Oregon chub habitat due to environmental or anthropogenic factors, and the distribution of nonnative fishes in Oregon chub habitats. The PDM period consists of three 3-year cycles (9 years total), which will begin after the final delisting rule is published. The Willamette Project biological opinion continues until 2023, and flow and temperature augmentation will be implemented during this period. Monitoring through this time period will allow us to address any possible negative effects to the Oregon chub associated with changes to flow and temperatures. We will collect data on three generations of Oregon chub in each of the three subbasins, which will allow time to observe fluctuations in population abundance that may be attributed to residual stressors. Sites included in the floodplain study will be sampled annually over the next 9 years in order to continue data collection that will be used to recommend flow and temperature regimes that are beneficial to native fishes. However, sites outside the floodplain study will be sampled only once during each 3-year cycle. This sampling schedule will result in annual sampling costs being reduced from current levels.

The draft PDM plan identifies measurable management thresholds and responses for detecting and reacting to significant changes in Oregon chub protected habitat, distribution, and persistence. If declines are detected equaling or exceeding these thresholds, the Service in combination with other PDM participants will investigate causes of these declines, including considerations of habitat changes, substantial human persecution, stochastic events, or any other significant evidence. The result of the investigation will be to determine if the Oregon chub warrants expanded monitoring, additional research, additional habitat protection, or relisting as a threatened or endangered species under the Act. If relisting the Oregon chub is warranted, emergency procedures to relist the species may be followed, if necessary, in accordance with section 4(b)(7) of the Act.

The final PDM plan and any future revisions will be posted on our

Endangered Species Program's national Web page (<http://endangered.fws.gov>) and on the Oregon Fish and Wildlife Office's Web page (<http://www.fws.gov/oregonfwo/>).

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the names of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), need not be prepared in connection with regulations pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this final rule is available at <http://www.regulations.gov> at Docket No.

FWS-R1-ES-2014-0002, or upon request from the Oregon Fish and Wildlife Office (see **ADDRESSES**).

Authors

The primary authors of this proposed rule are staff members of the Service's Oregon Fish and Wildlife Office (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we hereby propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

- 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; unless otherwise noted.

- 2. Amend § 17.11(h) by removing the entry for “Chub, Oregon” under “Fishes” from the List of Endangered and Threatened Wildlife.

- 3. Amend § 17.95(e) by removing the entry for “Oregon Chub (*Oregonichthys crameri*)”.

Dated: January 27, 2014.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2014–02363 Filed 2–5–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 130722646–4081–01]

RIN 0648–BD54

International Fisheries; Pacific Tuna Fisheries; Establishment of Tuna Vessel Monitoring System in the Eastern Pacific Ocean

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations under the Tuna Conventions Act to

implement Resolution C–04–06 of the Inter-American Tropical Tuna Commission (IATTC). The regulations would establish requirements for a satellite-based vessel monitoring system (VMS) for U.S. commercial fishing vessels, 24 meters or more in overall length, used to target any fish of the genus *Thunnus* or of the species *Euthynnus (Katsuwonus) pelamis* (skipjack tuna) in the area bounded by the west coast of the Americas and on the north, south and west respectively, by the 50° N. and 50° S. parallels, and the 150° W. meridian. This action is necessary for the United States to satisfy its obligations as a member of the IATTC.

DATES: Comments on the proposed rule and the initial regulatory flexibility analysis (IRFA) must be submitted on or before March 10, 2014. A public hearing will be held from 1 p.m. to 4 p.m. PST, February 28, 2014, in Long Beach, CA.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2013–0117, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov

#/docketDetail;D=NMFS-2013-0117,

click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to Rachael Wadsworth, NMFS West Coast Regional Office, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802.

Include the identifier “NOAA–NMFS–2013–0117” in the comments.

- **Public Hearing:** The public is welcome to attend a public hearing and offer comments on this proposed rule from 1 p.m. to 4 p.m. PST, February 28, 2014 at 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802. The public may also participate in the public hearing via conference line: 888–790–6181; participant passcode: 40810.

Instructions: Comments must be submitted by one of the above methods to ensure they are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or

otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will only be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS West Coast Region and by email to OIRA_Submission@omb.eop.gov, or faxed to (202) 395-7285 by the comment date listed above. Copies of the draft Regulatory Impact Review (RIR) and other supporting documents are available via the Federal eRulemaking Portal: <http://www.regulations.gov>, docket NOAA-NMFS-2013-0117 or contact with the Regional Administrator, William Stelle, Jr., NMFS West Coast Regional Office, 7600 Sand Point Way NE., Bldg 1, Seattle, WA 98115-0070 or by email to RegionalAdministrator.WCRHMS@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Heidi Taylor, NMFS West Coast Region, 562-980-4039, or Rachael Wadsworth, NMFS West Coast Region, 562-980-4036.

SUPPLEMENTARY INFORMATION:

Background on the IATTC

The United States is a member of the IATTC, which was established under the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission. The full text of the 1949 Convention is available at: http://www.iattc.org/PDFFiles/IATTC_convention_1949.pdf.

The IATTC facilitates scientific research into, as well as conservation and management of, highly migratory species of fish in the Convention Area (defined as the waters of the eastern Pacific Ocean (EPO)). Since 1998, conservation resolutions adopted by the IATTC have further defined the Convention Area as the area bounded by the west coast of the Americas, the 50° N. and 50° S. parallels, and the 150° W. meridian. The IATTC has maintained a scientific research and fishery monitoring program for many years, and regularly assesses the status of tuna and billfish stocks in the Convention Area to determine appropriate catch limits and other measures deemed necessary to prevent overexploitation of these stocks and to promote sustainable fisheries. Current IATTC member countries include: Belize, Canada, China, Chinese Taipei (Taiwan), Colombia, Costa Rica,

Ecuador, El Salvador, the European Union, France, Guatemala, Japan, Kiribati, the Republic of Korea, Mexico, Nicaragua, Panama, Peru, the United States, Vanuatu, and Venezuela. Bolivia, Honduras, Indonesia and the Cook Islands are cooperating non-members.

International Obligations of the United States under the Convention

As a Contracting Party to the 1949 Convention and a member of the IATTC, the United States is legally bound to implement the decisions of the IATTC. The Tuna Conventions Act (16 U.S.C. 951-962) directs the Secretary of Commerce, after approval by the Secretary of State, to promulgate such regulations as may be necessary to implement recommendations adopted by the IATTC. The Secretary's authority to promulgate such regulations has been delegated to NMFS.

IATTC Vessel Monitoring System (VMS) Resolution

At its 72nd Meeting, in June 2004, the IATTC adopted by consensus Resolution C-04-06: Resolution on the Establishment of a VMS. All resolutions and recommendations of the IATTC are available on the following Web site: <http://iattc.org/ResolutionsActiveENG.htm>. The main objective of Resolution C-04-06 is to establish a satellite-based VMS for tuna-fishing vessels, 24 meters (78.74 feet) or more in length, operating in the EPO and harvesting species for which the IATTC has established conservation and management measures. This regulation would implement Resolution C-04-06 for U.S. fishing vessels and it would broaden U.S. VMS requirements across the Pacific Ocean. VMS requirements in the western and central Pacific Ocean (WCPO) were adopted by the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC), and implemented for U.S. fleets by NMFS under 50 CFR 300.219. VMS requirements exist for U.S. purse seine vessels under regulations implementing the South Pacific Tuna Treaty under 50 CFR 300.45. VMS requirements have also been implemented by NMFS for the West Coast groundfish fisheries under 50 CFR 660.14, for the West Coast longline vessels under 50 CFR 660.712, and for Hawaii and American Samoa longline vessels under 50 CFR 665.19.

Information collected under this VMS would be handled in accordance with NOAA Administrative Order 216-100 for confidential fisheries data.

Proposed Regulations for VMS

The proposed action applies to all owners and operators of U.S. commercial fishing vessels, 24 meters or more in overall length, used to target any fish of the genus *Thunnus* or of the species *Euthynnus (Katsuwonus) pelamis* (skipjack tuna), in the Convention Area. The proposed action requires these vessels to install, activate, carry and operate VMS units (also known as "mobile transmitting units").

The VMS units and mobile communications service providers must be type-approved by NOAA for fisheries in the IATTC Convention Area. Information for current NOAA type-approved VMS units can be obtained from: NOAA, Office of Law Enforcement, 1315 East-West Hwy, Suite 3301, Silver Spring, MD 20910-3282; telephone at (888) 210-9288; fax at (301) 427-0049. Or, by contacting NOAA OLE VMS Helpdesk: Telephone: (888) 219-9228; email: ole.helpdesk@noaa.gov. The business hours of the VMS Helpdesk are: Monday through Friday, except Federal holidays, 7 a.m. to 11 p.m., Eastern Time.

A NOAA-approved VMS unit automatically determines the vessels position and transmits it to a NOAA-approved communications service provider. The communications service provider receives the transmission (also called "position reports") and relays it to NOAA. The vessel owner and operator must authorize NOAA OLE, the U.S. Coast Guard (USCG) and other authorized entities to receive and relay position reports. The owner and operator must authorize NOAA to set up the reporting interval of the VMS unit and the transmission of automated position reports to occur hourly.

Compliance with the existing VMS requirements at 50 CFR 300.219, 50 CFR part 660, or 50 CFR part 665 would satisfy these new requirements relating to the installation, carrying, and operation of VMS units, provided that the VMS unit and mobile communications service provider are type-approved by NOAA specifically for fisheries in the IATTC Convention Area, the VMS unit is operated continuously at all times while the vessel is at sea, the vessel owner or operator have authorized NOAA to receive and relay transmissions from the VMS unit, and the proposed requirements applicable in case of VMS unit failure are followed.

Under these regulations, the vessel owner and operator would be responsible for all costs associated with the purchase, installation and maintenance of the VMS unit, and for all charges levied by the mobile

communications service provider as necessary to ensure the transmission of automatic position reports to NOAA. The unit cost, physical size, available features, transmission fees, and service packages vary between the different type-approved VMS units. Vessel owners may choose the type-approved unit that best fits their needs. Federal funds may be available for reimbursement of type-approved VMS units up to \$3,100.¹ More information on the VMS Reimbursement Program can be obtained from calling the NOAA OLE VMS Helpdesk: Telephone: (888) 219-9228, and online at: <http://www.psmfc.org/program/vessel-monitoring-system-reimbursement-program-vms?pid=17>.

For vessel owners and operators that are carrying and operating VMS units in compliance with the requirements of 50 CFR 300.219, 50 CFR 660.712, or 50 CFR 665.19 relating to the installation, carrying, and operation of VMS units, the vessel owner and operator would not be responsible for costs that are the responsibility of NOAA under those regulations.

Activation of a VMS unit would be required any time the unit is installed or reinstalled, any time the mobile communications service provider has changed, and any time directed by NOAA. Activation would involve submitting to NOAA a report via mail, facsimile or email with information about the vessel, its owner or operator, and the VMS unit, as well as receiving confirmation from NOAA that the VMS unit is transmitting position reports properly. The VMS unit would have to be turned on and operating (i.e., transmitting automated position reports) at all times inside and outside the Convention Area. However, the requirement to operate the VMS unit at all times would not apply in the circumstance described below.

The VMS unit may be turned off while the vessel is in port, but only if the vessel operator or owner notifies NOAA via mail, facsimile or email prior to such shut-down. In such cases, NOAA must also be notified when the VMS unit is subsequently turned back on (these two types of notifications are called "on/off reports"), and the vessel operator must receive confirmation from NOAA that the VMS unit is functioning properly prior to leaving port.

In the case of failure of the VMS unit while at sea, the vessel operator would be required to contact NOAA and follow

the instructions provided by NOAA, which could include, among other actions: Submitting position reports at specified intervals by other means, ceasing fishing, stowing fishing gear, and/or returning to port; and repair or replace the VMS unit and ensure it is operable before starting the next trip.

If the vessel owner or operator informed NOAA in writing that a vessel that had been subject to these VMS requirements would be departing the Convention Area, and not be present in the Convention Area for one year or longer, the VMS requirements of this rule would cease to apply to that vessel only if specifically authorized in writing by NOAA. However, the VMS requirements of this rule would apply again if the vessel were used again to target any fish of the genus *Thunnus* or of the species *Euthynnus* (*Katsuwonus*) *pelamis* (skipjack tuna) in the Convention Area.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tuna Conventions Act and other applicable laws, subject to further consideration after public comment.

National Environmental Policy Act

This action is categorically excluded from the requirement to prepare an environmental assessment in accordance with NAO 216-6. A memorandum for the file has been prepared that sets forth the decision to use a categorical exclusion.

Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires government agencies to assess the impact of regulatory actions on small businesses and other small organizations. An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

All of the entities impacted by this proposed rule are considered small business entities. All impacted vessels will be affected in a similar way and disproportional economic effect between small and large businesses will not exist. This proposed rule would apply to all owners and operators of U.S. commercial fishing vessels, 24 meters or more in overall length, used to target any fish of the genus *Thunnus* or of the species *Euthynnus* (*Katsuwonus*) *pelamis* (skipjack tuna) in the Convention Area. The proposed action requires these vessels to install, activate, carry and operate NOAA type-approved VMS units and mobile communications service providers for fisheries in the IATTC Convention Area. Gear types that would be impacted include: Purse seine, hook-and-line (i.e., bait and troll/jig) and vessels using combinations of these gear types (i.e., multi-gear vessels).

To estimate the number of affected entities, the number of vessels authorized to fish for highly migratory species in the EPO through fishing permits was considered a reasonable proxy. The permits used to estimate affected entities were those issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) through regulations codified at 50 CFR 660.707 and permits under the authority of the High Seas Fishing Compliance Act of 1995 (16 U.S.C. 5501 *et seq.*) through regulations codified at 50 CFR 300.13. Vessels under 24 meters in overall length and vessels already subject to the existing VMS requirements at 50 CFR 300.219, 50 CFR part 660, or 50 CFR part 665, compliance with which would satisfy this new requirement were excluded from the estimate of impacted entities. As of September 2013, approximately 15 vessels did not have VMS units installed, and 2 vessels have VMS units installed that are not type-approved for these regulations.

The VMS units that have been type-approved range in cost and service features. This allows the vessel owner flexibility in choosing the model that best fits the needs their vessel. Compliance for each of the projected 17 small entities would involve the following approximate annualized costs: \$1,000 for the purchase and installation of VMS units (based on \$4,000 per unit and a lifespan of 4 years per unit), \$250 for VMS unit maintenance, and, based on estimated communication costs of about \$1.50 per day (based on hourly reporting cost of some service providers), \$547.50 for VMS unit operation (i.e., the transmission of

¹ The availability of these funds for reimbursement for the cost of purchasing a VMS unit is not guaranteed, but the funds are anticipated to be available on a first-come first-served basis.

automatic vessel position reports to NOAA). Thus, the annualized compliance cost would be about \$1,797.50 per vessel. The analysis assumes that vessels will pay for the required VMS units. However, Federal funds may be available for reimbursement of type-approved units up to \$3,100.²

Under the proposed action, the United States would implement the Resolution C-04-06. This would satisfy international obligations of the United States to implement decisions of the IATTC according to the provisions agreed to in the resolution. The reporting, recordkeeping and other compliance requirements of this proposed rule are described earlier in the preamble and under the Paperwork Reduction Act section.

Paperwork Reduction Act

This proposed rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the PRA. This requirement has been submitted to OMB for approval. Public reporting burden for this collection of information is estimated as an average per individual response for each requirement. The estimated time for initial VMS unit installation is 4 hours. The estimated time to maintain or repair a VMS unit is 1 hour annually. The estimated response time for respondents to prepare and submit activation reports is estimated to be 5 minutes per report. The vessel owner and operator must authorize NOAA OLE, the U.S. Coast Guard (USCG) and other authorized entities to receive and relay position reports. The estimated response time to prepare and submit each on/off report is also 5 minutes. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; 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, including through the use of automated

² The availability of these funds for reimbursement for the cost of purchasing a VMS unit is not guaranteed, but the funds are anticipated to be available on a first-come first-served basis.

collection techniques or other forms of information technology. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS West Coast Region at the ADDRESSES above, and by email to *OIRA_Submission@omb.eop.gov*, or fax to (202) 395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: February 3, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Eastern Pacific Tuna Fisheries

■ 1. The authority citation for 50 CFR part 300, subpart C continues to read as follows:

Authority: 16 U.S.C. 951–961 *et seq.*

■ 2. In § 300.21, definitions for “Commercial”, “Vessel monitoring system (VMS)” and “VMS unit” are added, in alphabetical order, to read as follows:

§ 300.21 Definitions.

* * * * *

Commercial with respect to commercial fishing, means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce through sale, barter or trade.

* * * * *

Vessel monitoring system (VMS) means an automated, remote system that provides information about a vessel’s identity, location and activity, for the purposes of routine monitoring, control, surveillance and enforcement of area and time restrictions and other fishery management measures.

VMS unit, sometimes known as a “mobile transmitting unit,” means a transceiver or communications device,

including all hardware and software that is carried and operated on a vessel as part of a VMS.

■ 3. In § 300.24, paragraphs (u) through (x) are added to read as follows:

§ 300.24 Prohibitions.

* * * * *

(u) Fail to install, activate, or operate a VMS unit as required in § 300.26(c).

(v) In the event of VMS unit failure or interruption, fail to repair or replace a VMS unit, fail to notify the Special-Agent-In-Charge (SAC), NOAA Office of Law Enforcement, Pacific Islands Division (or designee) and follow the instructions provided, or otherwise fail to act as provided in § 300.26(c)(4).

(w) Disable, destroy, damage or operate improperly a VMS unit installed under § 300.26, or attempt to do any of the same, or fail to ensure that its operation is not impeded or interfered with, as provided in § 300.26(e).

(x) Fail to make a VMS unit installed under § 300.26 or the position data obtained from it available for inspection, as provided in § 300.26(f) and (g).

■ 4. Section 300.26 is added to read as follows:

§ 300.26 Vessel monitoring system (VMS).

(a) *Special-Agent-In-Charge (SAC), NOAA Office of Law Enforcement, Pacific Islands Division (or designee), and VMS Helpdesk contact information and business hours:* (1) The contact information for the SAC for the Pacific Islands Division: NOAA/DKIRC, ATTN: OLE/VMS, 1025 Quincy Avenue, Suite 5010, Honolulu, HI 96860-4512; telephone: (808) 725-6100; email: *pidvms@noaa.gov*. The business hours of the SAC for the purpose of this section are: Monday through Friday, except Federal holidays, 8 a.m. to 4:30 p.m., Hawaii Standard Time.

(2) The contact information for the NOAA Office of Law Enforcement’s VMS Helpdesk for the purpose of this section is: Telephone: (888) 219-9228; email: *ole.helpdesk@noaa.gov*. The business hours of the VMS Helpdesk for the purpose of this section are: Monday through Friday, except Federal holidays, 7 a.m. to 11 p.m., Eastern Time.

(b) *Applicability.* This section applies to all owners and operators of U.S. commercial fishing vessels, 24 meters or more in overall length, used to target tuna in the Convention Area. If specifically authorized by NOAA OLE in writing, this section shall no longer be applicable to a vessel that departs the Convention Area and remains outside the Convention Area for 1 year or longer.

(c) *Provisions for Installation, Activation and Operation—*(1) *VMS*

Unit Installation. The vessel owner and operator must obtain and have installed on the fishing vessel, in accordance with instructions provided by the SAC, and the VMS unit manufacturer, a VMS unit that is type-approved by NOAA for fisheries in the IATTC Convention Area. The vessel owner and operator shall arrange for a NOAA-approved mobile communications service provider to receive and relay transmissions from the VMS unit to NOAA. The vessel owner and operator shall authorize NOAA OLE, the U.S. Coast Guard (USCG) and other authorized entities to receive and relay position reports. The owner and operator must authorize NOAA to set up the reporting interval of the VMS unit and the transmission of automated position reports to occur hourly. The NOAA OLE VMS Helpdesk is available to provide instructions for VMS installation and a list of the current type-approved VMS units and mobile communication service providers.

(2) *VMS Unit Activation.* If the VMS unit has not yet been activated as described in this paragraph, or if the VMS unit has been newly installed or reinstalled, or if the mobile communications service provider has changed since the previous activation, or if directed by the SAC, the vessel owner and operator must, prior to leaving port:

(i) Turn on the VMS unit to make it operational;

(ii) Submit a written activation report, via mail, facsimile or email, to the SAC, that includes: The vessel's name; the vessel's official number; the VMS unit manufacturer and identification number; and telephone, facsimile or email contact information for the vessel owner or operator; and

(iii) Receive verbal or written confirmation from the SAC that the proper VMS unit transmissions are being received from the VMS unit.

(3) *VMS Unit Operation.* The vessel owner and operator shall continuously operate the VMS unit at all times, except that the VMS unit may be shut down while the vessel is in port or otherwise not at sea, provided that the owner and operator:

(i) Prior to shutting down the VMS unit, report to the SAC or the NOAA Office of Law Enforcement's VMS Helpdesk via facsimile, email, or web-form the following information: The intent to shut down the VMS unit; the vessel's name; the vessel's official number; an estimate for when the vessel's VMS may be turned back on; and telephone, facsimile or email contact information for the vessel owner or operator; and

(ii) When turning the VMS unit back on, report to the SAC or the NOAA Office of Law Enforcement's VMS Helpdesk, via mail, facsimile or email, the following information: That the VMS unit has been turned on; the vessel's name; the vessel's official number; and telephone, facsimile or email contact information for the vessel owner or operator; and

(iii) Prior to leaving port, receive verbal or written confirmation from the SAC that proper transmissions are being received from the VMS unit.

(4) *Failure of VMS unit.* If the VMS unit has become inoperable or transmission of automatic position reports from the VMS unit has been interrupted, or if notified by NOAA or the U.S. Coast Guard (USCG) that automatic position reports are not being received from the VMS unit or that an inspection of the VMS unit has revealed a problem with the performance of the VMS unit, the vessel owner and operator shall comply with the following requirements:

(i) If the vessel is at port: The vessel owner or operator shall repair or replace the VMS unit and ensure it is operable before the vessel leaves port.

(ii) If the vessel is at sea: The vessel owner, operator, or designee shall contact the SAC by telephone, facsimile, or email at the earliest opportunity during the SAC's business hours and identify the caller and vessel. The vessel operator shall follow the instructions provided by the SAC, which could include, but are not limited to: Ceasing fishing, stowing fishing gear, returning to port, and/or submitting periodic position reports at specified intervals by other means; and, repair or replace the VMS unit and ensure it is operable before starting the next trip.

(5) *Related VMS Requirements.* Installing, carrying and operating a VMS unit in compliance with the requirements in 50 CFR 300.219, 50 CFR 660.712, 50 CFR 660.14, or 50 CFR 665.19 relating to the installation, carrying, and operation of VMS units shall be deemed to satisfy the requirements of paragraph (c) of this section, provided that the VMS unit is operated continuously and at all times while the vessel is at sea, the VMS unit and mobile communications service providers are type-approved by NOAA for fisheries in IATTC Convention Area, the owner and operator have authorized NOAA to receive and relay transmissions from the VMS unit, and the specific requirements of paragraph (c)(4) of this section are complied with. If the VMS unit is owned by NOAA, the requirement under paragraph (c)(4) of this section to repair or replace the VMS

unit will be the responsibility of NOAA, but the vessel owner and operator shall be responsible for ensuring that the VMS unit is operable before leaving port or starting the next trip.

(d) *Costs.* The vessel owner and operator shall be responsible for all costs associated with the purchase, installation and maintenance of the VMS unit and for all charges levied by the mobile communications service provider as necessary to ensure the transmission of automatic position reports to NOAA as required in paragraph (c) of this section. However, if NOAA is paying for the VMS-associated costs because the VMS unit is carried and operated under a requirement of 50 CFR 300.219, 50 CFR 660.712, or 50 CFR 665.19, the vessel owner and operator shall not be responsible to pay the costs.

(e) *Tampering.* The vessel owner and operator must ensure that the VMS unit is not tampered with, disabled, destroyed, damaged or maintained improperly, and that its operation is not impeded or interfered with.

(f) *Inspection.* The vessel owner and operator must make the VMS unit, including its antenna, connectors and antenna cable, available for inspection by authorized officers.

(g) *Access to data.* The vessel owner and operator must make the vessel's position data obtained from the VMS unit or other means immediately and always available for inspection by NOAA personnel, USCG personnel, and authorized officers.

[FR Doc. 2014-02598 Filed 2-5-14; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 131213999-4083-01]

RIN 0648-BD82

Pacific Halibut Fisheries; Catch Sharing Plan

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

ACTION: Proposed rule.

SUMMARY: NMFS proposes to approve changes to the Pacific Halibut Catch Sharing Plan (Plan) for the International Pacific Halibut Commission's (IPHC or Commission) regulatory Area 2A off Washington, Oregon, and California

(Area 2A). In addition, NMFS proposes to implement the portions of the Plan and management measures that are not implemented through the IPHC. These measures include the sport fishery allocations and management measures for Area 2A. These actions are intended to enhance the conservation of Pacific halibut, provide greater angler opportunity where available, and avoid bycatch of overfished groundfish species.

DATES: Comments on the proposed changes to the Plan and on the proposed domestic Area 2A halibut management measures must be received by February 21, 2014.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2014–0009, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov / [#!docketDetail;D=NOAA-NMFS-2014-0009](#), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to William Stelle, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Sarah Williams, phone: 206–526–4646, fax: 206–526–6736, or email: sarah.williams@noaa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access

This rule is accessible via the Internet at the Office of the **Federal Register** Web site at http://www.access.gpo.gov/su_docs/aces/aces140.html. Background information and documents are available at the NMFS West Coast Region Web site at http://www.westcoast.fisheries.noaa.gov/fisheries/management/pacific_halibut_management.html and at the Council’s Web site at <http://www.pcouncil.org>.

Background

The Northern Pacific Halibut Act (Halibut Act) of 1982, 16 U.S.C. 773–773K, gives the Secretary of Commerce (Secretary) general responsibility for implementing the provisions of the Halibut Convention between the United States and Canada (Halibut Convention) (16 U.S.C. 773c). It requires the Secretary to adopt regulations as may be necessary to carry out the purposes and objectives of the Halibut Convention and the Halibut Act. Section 773c of the Halibut Act also authorizes the regional fishery management councils to develop regulations in addition to, but not in conflict with, regulations of the IPHC to govern the Pacific halibut catch in their corresponding U.S. Convention waters.

Each year between 1988 and 1995, the Pacific Fishery Management Council (Council) developed and NMFS implemented a catch sharing plan in accordance with the Halibut Act to allocate the total allowable catch (TAC) of Pacific halibut between treaty Indian and non-treaty harvesters and among non-treaty commercial and sport fisheries in Area 2A. In 1995, NMFS implemented the Pacific Council-recommended long-term Plan (60 FR 14651, March 20, 1995). In each of the intervening years between 1995 and the present, minor revisions to the Plan have been made to adjust for the changing needs of the fisheries.

The Plan allocates 35 percent of the Area 2A Pacific halibut TAC to Washington treaty Indian tribes in Subarea 2A–1, and 65 percent of the Area 2A TAC to non-tribal fisheries. The TAC allocation to non-tribal fisheries is divided into four shares. Three shares, totalling 99%, are as follows: The Washington sport fishery (north of the Columbia River) receives 36.6 percent, the Oregon sport fishery receives 30.7 percent, and the commercial fishery receives 31.7 percent. For 2014, the Council recommended and NMFS proposes as the fourth share, a new allocation for the California sport fishery of 1% of the non-tribal allocation. The commercial fishery is further divided into a directed commercial fishery that is allocated 85 percent of the commercial allocation of Pacific halibut TAC, and an incidental catch in the salmon troll fishery that is allocated 15 percent of the commercial allocation. The directed commercial fishery in Area 2A is confined to southern Washington (south of 46°53.30′ N. lat.), Oregon, and

California. North of 46°53.30′ N. lat. (Pt. Chehalis), the Plan allows for incidental halibut retention in the sablefish primary fishery when the overall Area 2A TAC is above 900,000 lb (408.2 mt). The Plan also divides the sport fisheries into seven geographic subareas, each with separate allocations, seasons, and bag limits.

The IPHC’s annual meeting occurred January 13–17, 2014, in Seattle, WA. At that meeting, the IPHC set the 2014 Area 2A TAC at 960,000 lb (435.45 mt).

Incidental Halibut Retention in the Sablefish Primary Fishery North of Pt. Chehalis, Washington

The Plan provides that incidental halibut retention in the sablefish primary fishery north of Pt. Chehalis, Washington, will be allowed when the Area 2A TAC is greater than 900,000 lb (408.2 mt), provided that a minimum of 10,000 lb (4.5 mt) is available above a Washington recreational TAC of 214,100 lb (97.1 mt). In 2014, the TAC is 960,000 lb (435.45 mt) and the Washington recreational TAC exceeds 224,100 lb; therefore incidental halibut retention will be allowed in this fishery. The Council will recommend landing restrictions for public review at its spring meetings after which NMFS will publish the restrictions in the **Federal Register**.

Opportunity for Public Comment

Through this proposed rule, NMFS requests public comments on the Pacific Council’s recommended modifications to the Plan and the resulting proposed domestic fishing regulations by February 21, 2014. The States of Washington and Oregon will conduct public workshops shortly to obtain input on the sport season dates. Following the proposed rule comment period, NMFS will review public comments and comments from the states, and issue a final rule for Areas 2A, 2C, 3A, 3B, 4A, 4B, 4C, 4D, and 4E. The final rule will also contain the IPHC regulations for the 2014 Pacific halibut fisheries. This proposed rule provides for a 15-day public comment period, which will allow NMFS time to incorporate the final U.S. domestic regulations into the IPHC regulations in order to have the combined regulations in place as close to March 1 as possible. The regulations need to be in effect in early March because the fishing season begins in mid-March. The 2014 commercial season starting date(s) need to be published soon after the IPHC meeting in January 2014 to notify the public of that date so the industry can plan for the season.

Endangered Species Act (ESA) Section 7 Biological Opinion (BiOp) and National Environmental Policy Act (NEPA) Environmental Assessment (EA)

In response to the listing of yelloweye, canary, and bocaccio rockfish in Puget Sound under the ESA (75 FR 22276, April 28, 2010), NMFS commenced a consultation under Section 7 of the Endangered Species Act on the implementation of the 2014 and 2015 Pacific Halibut Catch Sharing Plan for Area 2A. Because the Plan covers fisheries in all of Area 2A (Washington, Oregon, and California), the consultation covers all fisheries (commercial, recreational, treaty Indian) that are allocated halibut through the Plan with respect to their impacts on all ESA-listed species that occur in Area 2A. Specifically, these include listed marine mammals, salmon, eulachon, and the Southern DPS of green sturgeon. NMFS is also drafting an EA to examine the effects of the ongoing implementation of the Catch Sharing Plan for Area 2A, and to update the biological environment, particularly with respect to the ESA listing of species occurring in Area 2A. Both documents are anticipated to be completed prior to issuance of the final rule. The draft EA will be posted at http://www.westcoast.fisheries.noaa.gov/fisheries/management/pacific_halibut_management.html during the comment period on this proposed rule to allow the public the opportunity to review the draft document when submitting comments on the proposed rule. NMFS welcomes public comment on the environmental effects of this fishery generally, and specifically the effects of the fishery on ESA listed species.

Proposed Changes to the Plan

Each year, the Washington Department of Fish and Wildlife (WDFW), Oregon Department of Fish and Wildlife (ODFW), California Department of Fish and Game (CDFG), and the tribes with treaty fishing rights for halibut consider whether to pursue changes to the Plan to meet the needs of the fishery. In determining whether changes are needed, the state agencies hold public meetings prior to the Council's September meeting. Subsequently, they recommend changes to the Council at its September meeting. In 2013, fishery managers from all three state agencies held public meetings on the Plan prior to the Council's September meeting. At the September 2013 Pacific Council meeting, WDFW, ODFW, and CDFW recommended changes to the Plan, while NMFS and

the tribes did not recommend any changes to the Plan. The Council voted to solicit public input on all of the changes recommended by the state agencies, several of which were presented in the form of alternatives. WDFW and ODFW subsequently held public workshops on the proposed changes.

At its October 30–November 6, 2013, meeting the Council considered the results of state-sponsored workshops on the proposed changes to the Plan and public input provided at the September and November Council meetings, and made its final recommendations for modifications to the Plan. NMFS proposes to adopt all of the Council's proposed changes to the Plan, as follows:

1. In section (b), Allocations, this rule proposes several changes to allocations. The non-Indian allocation is divided into four shares, rather than the previous three, to provide a dedicated allocation for the new California sport fishery subarea that would be created through proposed changes described in items 6 and 7, below. The proposed California allocation is one percent of the non-tribal allocation. Because the Oregon/California sport fishery allocation was previously shared, the proposed Oregon sport fishery allocation is lower than the previous combined allocation.

2. In section (e)(4), Commercial license restrictions/declarations, this rule proposes several changes related to the starting date. In 2012 the Council recommended changing the starting date for allowing halibut retention in the salmon troll fishery from May to April and discussed the same date change for halibut retention in the sablefish primary fishery. At the time NMFS informed the Council that the date change for the sablefish primary fishery did not require changes to the Plan section addressing this fishery. However, it does require the proposed changes to the license section of the Plan. The current Plan states that IPHC licenses are due by March 31; this does not allow the IPHC enough time to process applications prior to the start of the fisheries on April 1. Therefore, a change is proposed in the license application due date for halibut retention in both fisheries from March 31 to March 15.

3. In section (f)(1)(ii), Washington north coast subarea, this rule proposes several changes to the text for clarity. The goal of these changes is to more clearly describe the quota management closure and to discontinue the nearshore fishery. The nearshore fishery is open only when there is not enough

quota for another all depth fishing day in this subarea. Due to high fishing effort in this area the nearshore provision has not been used for several years, therefore this rule proposes its discontinuation.

4. In section (f)(1)(iv), Columbia River subarea, this rule proposes several changes to the text to implement several measures. First, there is a change to clarify that the allocation to this area is derived from the Washington and Oregon sport fishery allocations only, not the new California allocation. As explained above, the existing Plan includes a combined Oregon/California allocation. Second, a new nearshore fishery is created. Third, season dates are modified. Finally, the changes clarify how the quota will be managed between the early and late season. The quota in this area has been underutilized for the past several years, therefore the goal of the creation of a nearshore fishery and modification of season dates is intended to increase angler opportunity. Further, in the new nearshore area retention of halibut on groundfish trips will be allowed, which may help turn incidental halibut discards into retained fish improving the recreational experience in this area.

5. In section (f)(1)(v), Oregon central coast subarea, this rule proposes several changes as follows: Modify the language stating that ODFW will sponsor public "workshops" to public "input processes," modify the nearshore fishery season open date and number of days per week, and modify the spring all depth season allocation so that two percent is now allocated to the new Southern Oregon subarea. ODFW has experienced decreasing attendance at their state sponsored meetings and therefore has begun to use online surveys to successfully solicit public input on changes to the Plan each year. The change to the public input language in the Plan reflects that change. The modification to the nearshore fishery open date and number of days per week is in response to public comments stating a preference for a shorter fishery open more days per week versus a longer fishery with closed days per week. The changes to the spring fishery allocation are to provide an allocation to the new Southern Oregon subarea described below.

6. In section (f)(1)(vi), South of Humbug Mountain subarea, this rule proposes several changes. These changes include splitting the existing South of Humbug Mountain subarea, which includes southern Oregon and the entire California coast, into a Southern Oregon subarea and a California subarea. This change will

allow for more effective management by each state with the goal of limiting catch to the respective allocations. Inseason halibut management is different in California than in Oregon. Oregon monitors the halibut catch in this area during the season while California does not. In addition to inseason monitoring, Oregon has established a management system that allows for inseason management of this area, such as closure upon quota attainment. Due to these differences, separation of the previous South of Humbug area into separate Oregon and California areas is the best way to avoid inconsistent management within one subarea, and to allow each state to use its most effective available management techniques to keep the fishery within its quota. This rule proposes modifications to section (f)(1)(vi) to describe the newly created Southern Oregon subarea. The subarea is allocated 2.0 percent of the Oregon Central Coast subarea spring all-depth allocation and is open seven days per week, May 1 through October 31.

7. This rule proposes to add section (f)(1)(vii) describing the newly created California subarea. As described under item 1 above, this new subarea would receive a 1.0 percent allocation from the overall non-Tribal allocation. The subarea will be open May 1–July 31 and September 1–October 31, 7 days per week. Closing the month of August is necessary because analysis completed by a Council-appointed workgroup showed it would result in a projected catch reduction of 39 percent. This reduction combined with closed areas in California state waters is projected to result in a 42 percent reduction in projected catch. The Council-appointed policy group recommended adopting measures with the goal of reducing recreational catch for 2014 in California to 40–60 percent of the 5 year average to bring catch closer to its annual allocation. It is not anticipated that these management strategies will keep the catch in this area under the annual allocation, however, they are a first step towards achieving that purpose.

NMFS proposes to approve the Council's recommendations and to implement the changes described above. A version of the Plan including these changes can be found at http://www.westcoast.fisheries.noaa.gov/fisheries/management/pacific_halibut_management.html.

Proposed 2014 Sport Fishery Management Measures

NMFS also proposes sport fishery management measures that are necessary to implement the Plan in

2014. The annual domestic management measures are published each year through a final rule. For the 2013 fishing season, the final rule was published on March 15, 2013 (78 FR 16423), and the following section numbers refer to sections within that final rule. The final 2014 TAC for Area 2A is 960,000 lb (435.45 mt). Where season dates are not indicated, those dates will be provided in the final rule, following consideration of the 2014 TAC and consultation with the states and the public.

In Section 8 of the annual domestic management measures, "Fishing Periods," paragraph (2)–(3) is proposed to read as follows and paragraph (6) is modified to read as follows:

(1) * * *

(2) Each fishing period in the Area 2A directed fishery shall begin at 0800 hours and terminate at 1800 hours local time on June 25, July 9, July 23, August 6, August 20, September 3, September 17, 2014, unless the Commission specifies otherwise.

(3) Notwithstanding paragraph (2), and paragraph (7) of section 11, an incidental catch fishery is authorized during salmon troll seasons in Area 2A in accordance with regulations promulgated by NMFS. This fishery will occur between 1200 hours local time on (season dates will be inserted when final rule is published) March 8 and 1200 hours local time on (season dates will be inserted when final rule is published).

(4) * * *

(5) * * *

(6) In Area 2A incidental catch of halibut in the primary sablefish fishery has not been determined at this time for the 2014 fishery.

In section 26 of the annual domestic management measures, "Sport Fishing for Halibut," paragraph 1(a)–(b) will be updated with 2014 total allowable catch limits in the final rule. In section 26 of the annual domestic management measures, "Sport Fishing for Halibut" paragraph (8) is proposed to read as follows:

(8) * * *

(a) The area in Puget Sound and the U.S. waters in the Strait of Juan de Fuca, east of a line extending from 48°17.30' N. lat., 124°23.70' W. long. north to 48°24.10' N. lat., 124°23.70' W. long., is not managed in-season relative to its quota. This area is managed by setting a season that is projected to result in a catch of 57,393 lbs (26 mt).

(i) The fishing season in eastern Puget Sound (east of 123°49.50' W. long., Low Point) is open (season dates will be inserted when final rule is published). The fishing season in western Puget Sound (west of 123°49.50' W. long., Low

Point) is open (season dates will be inserted when final rule is published).

(ii) The daily bag limit is one halibut of any size per day per person.

(b) The quota for landings into ports in the area off the north Washington coast, west of the line described in paragraph (2)(a) of section 26 and north of the Queets River (47°31.70' N. lat.), is 108,030 (49 mt).

(i) The fishing seasons are:

(A) Commencing on May 15 and continuing 2 days a week (Thursday and Saturday) until 108,030 (49 mt) are estimated to have been taken and the season is closed by the Commission, or until May 24.

(B) If sufficient quota remains the fishery will reopen on May 29 and/or May 31, continuing 2 days per week (Thursday and Saturday) until there is not sufficient quota for another full day of fishing and the area is closed by the Commission. After May 24, any fishery opening will be announced on the NMFS hotline at 800–662–9825. No halibut fishing will be allowed after May 24 unless the date is announced on the NMFS hotline.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Recreational fishing for groundfish and halibut is prohibited within the North Coast Recreational Yelloweye Rockfish Conservation Area (YRCA). It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the North Coast Recreational YRCA. A vessel fishing in the North Coast Recreational YRCA may not be in possession of any halibut. Recreational vessels may transit through the North Coast Recreational YRCA with or without halibut on board. The North Coast Recreational YRCA is a C-shaped area off the northern Washington coast intended to protect yelloweye rockfish. The North Coast Recreational YRCA is defined in groundfish regulations at § 660.70(a).

(c) The quota for landings into ports in the area between the Queets River, WA (47°31.70' N. lat.), and Leadbetter Point, WA (46°38.17' N. lat.), is 42,739 lb (19.39 mt).

(i) This subarea is divided between the all-waters fishery (the Washington South coast primary fishery), and the incidental nearshore fishery in the area from 47°31.70' N. lat. south to 46°58.00' N. lat. and east of a boundary line approximating the 30 fm depth contour. This area is defined by straight lines connecting all of the following points in the order stated as described by the following coordinates (the Washington South coast, northern nearshore area):

(1) 47°31.70' N. lat., 124°37.03' W. long;

(2) 47°25.67' N. lat., 124°34.79' W. long;

(3) 47°12.82' N. lat., 124°29.12' W. long;

(4) 46°58.00' N. lat., 124°24.24' W. long.

The south coast subarea quota will be allocated as follows: 40,739 lb (18.48 mt) for the primary fishery and 2,000 lb (0.9 mt) for the nearshore fishery. The primary fishery commences on May 4, and continues 2 days a week (Sunday and Tuesday) until May 20. If the primary quota is projected to be obtained sooner than expected, the management closure may occur earlier. Beginning on June 1 the primary fishery will be open at most 2 days per week (Sunday and/or Tuesday) until the quota for the south coast subarea primary fishery is taken and the season is closed by the Commission, or until September 30, whichever is earlier. The fishing season in the nearshore area commences on May 4, and continues 7 days per week. Subsequent to closure of the primary fishery the nearshore fishery is open 7 days per week, until 42,739 lb (19.39 mt) is projected to be taken by the two fisheries combined and the fishery is closed by the Commission or September 30, whichever is earlier. If the fishery is closed prior to September 30, and there is insufficient quota remaining to reopen the northern nearshore area for another fishing day, then any remaining quota may be transferred in-season to another Washington coastal subarea by NMFS via an update to the recreational halibut hotline.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Seaward of the boundary line approximating the 30-fm depth contour and during days open to the primary fishery, lingcod may be taken, retained and possessed when allowed by groundfish regulations at 50 CFR 660.360, subpart G.

(iv) Recreational fishing for groundfish and halibut is prohibited within the South Coast Recreational YRCA and Westport Offshore YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the South Coast Recreational YRCA and Westport Offshore YRCA. A vessel fishing in the South Coast Recreational YRCA and/or Westport Offshore YRCA may not be in possession of any halibut. Recreational vessels may transit through the South Coast Recreational YRCA and Westport Offshore YRCA with or without halibut on board. The South Coast Recreational

YRCA and Westport Offshore YRCA are areas off the southern Washington coast established to protect yelloweye rockfish. The South Coast Recreational YRCA is defined at 50 CFR 660.70(d). The Westport Offshore YRCA is defined at 50 CFR 660.70(e).

(d) The quota for landings into ports in the area between Leadbetter Point, WA (46°38.17' N. lat.), and Cape Falcon, OR (45°46.00' N. lat.), is 11,895 lb (5.4 mt).

(i) This subarea is divided into an all-depth fishery and a nearshore fishery. The nearshore fishery is allocated 10 percent or 1,500 pounds of the subarea allocation, whichever is less. The nearshore fishery is restricted to the area shoreward of the boundary line approximating the 30 fm (55 m) depth contour from Leadbetter Point to the Washington/Oregon border and the boundary line approximating the 40 fm (73 m) depth contour in Oregon. The nearshore fishery opens May 5, and continues 3 days per week (Monday–Wednesday) until the nearshore allocation is taken, or September 30, whichever is earlier. The all depth fishing season commences on May 1, and continues 4 days a week (Thursday–Sunday) until 8,564 lb (3.8 mt) are estimated to have been taken and the season is closed by the Commission, whichever is earlier. The fishery will reopen on August 7 and continue 4 days a week (Thursday–Sunday) until 2,141 lb (0.97 mt) has been taken and the season is closed by the Commission, or until September 30, whichever is earlier. Subsequent to this closure, if there is insufficient quota remaining in the Columbia River subarea for another fishing day, then any remaining quota may be transferred inseason to another Washington and/or Oregon subarea by NMFS via an update to the recreational halibut hotline. Any remaining quota would be transferred to each state in proportion to its contribution.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Pacific Coast groundfish may not be taken and retained, possessed or landed, except sablefish and Pacific cod when allowed by Pacific Coast groundfish regulations, when halibut are on board the vessel, during days open to the all depth fishery only.

(iv) Taking, retaining, possessing or landing halibut on groundfish trips is only allowed in the nearshore area on days not open to all-depth Pacific halibut fisheries.

(e) The quota for landings into ports in the area off Oregon between Cape Falcon (45°46.00' N. lat.) and Humbug

Mountain (42°40.50' N. lat.), is 185,621 lb (84.2 mt).

(i) The fishing seasons are:

(A) The first season (the “inside 40-fm” fishery) commences July 1, and continues 7 days a week, in the area shoreward of a boundary line approximating the 40-fm (73-m) depth contour, or until the sub-quota for the central Oregon “inside 40-fm” fishery of 22,274 lb (10.1 mt), or any in-season revised subquota, is estimated to have been taken and the season is closed by the Commission, whichever is earlier. The boundary line approximating the 40-fm (73-m) depth contour between 45°46.00' N. lat. and 42°40.50' N. lat. is defined at § 660.71(k).

(B) The second season (spring season), which is for the “all-depth” fishery, is open from (season dates will be inserted when final rule is published). The projected catch for this season is 114,602 lb (51.9 mt). If sufficient unharvested catch remains for additional fishing days, the season will re-open. Depending on the amount of unharvested catch available, the potential season re-opening dates will be: (season dates will be inserted when final rule is published). If NMFS decides inseason to allow fishing on any of these re-opening dates, notice of the re-opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No halibut fishing will be allowed on the re-opening dates unless the date is announced on the NMFS hotline.

(C) If sufficient unharvested catch remains, the third season (summer season), which is for the “all-depth” fishery, will be open from 46,405 lb (21 mt), or until the combined spring season and summer season quotas in the area between Cape Falcon and Humbug Mountain, OR, are estimated to have been taken and the area is closed by the Commission, or October 31, whichever is earlier. NMFS will announce on the NMFS hotline in July whether the fishery will re-open for the summer season in August. No halibut fishing will be allowed in the summer season fishery unless the dates are announced on the NMFS hotline. Additional fishing days may be opened if sufficient quota remains after the last day of the first scheduled open period on (season dates will be inserted when final rule is published). If, after this date, an amount greater than or equal to 60,000 lb (27.2 mt) remains in the combined all-depth and inside 40-fm (73-m) quota, the fishery may re-open every Friday and Saturday, beginning (season dates will be inserted when final rule is published) and ending October 31. If after September 1, an amount greater than or

equal to 30,000 lb (13.6 mt) remains in the combined all-depth and inside 40-fm (73-m) quota, and the fishery is not already open every Friday and Saturday, the fishery may re-open every Friday and Saturday, beginning September 5 and 6, and ending October 31. After September 1, the bag limit may be increased to two fish of any size per person, per day. NMFS will announce on the NMFS hotline whether the summer all-depth fishery will be open on such additional fishing days, what days the fishery will be open and what the bag limit is.

(ii) The daily bag limit is one halibut of any size per day per person, unless otherwise specified. NMFS will announce on the NMFS hotline any bag limit changes.

(iii) During days open to all-depth halibut fishing, no Pacific Coast groundfish may be taken and retained, possessed or landed, except sablefish and Pacific cod, when allowed by Pacific Coast groundfish regulations, if halibut are on board the vessel.

(iv) When the all-depth halibut fishery is closed and halibut fishing is permitted only shoreward of a boundary line approximating the 40-fm (73-m) depth contour, halibut possession and retention by vessels operating seaward of a boundary line approximating the 40-fm (73-m) depth contour is prohibited.

(v) Recreational fishing for groundfish and halibut is prohibited within the Stonewall Bank YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the Stonewall Bank YRCA. A vessel fishing in the Stonewall Bank YRCA may not possess any halibut. Recreational vessels may transit through the Stonewall Bank YRCA with or without halibut on board. The Stonewall Bank YRCA is an area off central Oregon, near Stonewall Bank, intended to protect yelloweye rockfish. The Stonewall Bank YRCA is defined at § 660.70(f).

(f) The quota for landings into ports in the area south of Humbug Mountain, OR (42°40.50' N. lat.) to the Oregon/California Border (42°00.00' N. lat.) is 2,339 lb (1 mt).

(i) The fishing season commences on May 1, and continues 7 days per week until the subquota is taken, or October 31, whichever is earlier.

(ii) The daily bag limit is one halibut per person with no size limit.

(g) The quota for landings into ports south of the Oregon/California Border (42°00.00' N. lat.) and along the California coast is 6,240 lb (2.8 mt).

(i) The fishing season will be open May 1 through July 31, 7 days a week

and September 1 through October 31, 7 days per week.

(ii) The daily bag limit is one halibut of any size per day per person.

Classification

Regulations governing the U.S. fisheries for Pacific halibut are developed by the IPHC, the Pacific Fishery Management Council, the North Pacific Fishery Management Council (Council), and the Secretary of Commerce. Section 5 of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773c) provides the Secretary of Commerce with the general responsibility to carry out the Convention between Canada and the United States for the management of Pacific halibut, including the authority to adopt regulations as may be necessary to carry out the purposes and objectives of the Convention and Halibut Act. This proposed rule is consistent with the Secretary of Commerce's authority under the Halibut Act.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS has prepared an RIR/IRFA on the proposed changes to the Plan and the annual domestic Area 2A halibut management measures. Copies of these documents are available from NMFS (see **ADDRESSES**). NMFS prepared an IRFA that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. The IRFA is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows:

These regulations directly affect fin-fish harvesting and charterboat businesses. A fin-fish harvesting business is considered a "small" business by the Small Business Administration (SBA) if it has annual receipts not in excess of \$19.0 million. A charterboat business is considered small if it has annual receipts not in excess of \$7.0 million.

In 2013 (the most recent data available), 608 vessels were issued IPHC licenses to retain halibut. IPHC issues licenses for: The directed commercial fishery in Area 2A (149 licenses in 2013); incidental halibut caught in the salmon troll fishery (332 licenses in 2013); and the charterboat fleet (127 licenses in 2013). No vessel may participate in more than one of these three fisheries per year. A similar situation may occur for charterboat vessels. The number of charterboats in

Northern California, Oregon, and Washington that were involved in groundfish trips including halibut during 2010 was 161 (FEIS Table 3–31). Of the 161 charterboat vessels, 89 vessels fished in either the Columbia River or Central Oregon fisheries. This suggests that 60 percent of the IPHC charterboat license holders may be affected by these regulations.

The IRFA analyzed the impacts of changes to the Plan and regulations. The following changes are proposed in this rule. For 2014, the Council has recommended and NMFS proposes to approve and implement several changes to the recreational fishery in the South of Humbug Mountain subarea in order to address a pattern of quota exceedances in this subarea. These changes include splitting the existing subarea into two state-specific subareas: A Southern Oregon subarea and a California subarea. This change will allow each state to use the most effective available management tools to keep the catch within their respective quotas. The existing Oregon/California sport fishery allocation of 31.7 percent of the non-tribal allocation would be split into a 1 percent California sport fishery allocation and a 30.7 percent Oregon sport fishery allocation. The new California subarea would be open to fishing from May–July and September–October. The month of August would be closed as a quota management measure. The Southern Oregon subarea would be managed in season to avoid exceeding the quota, as the State of Oregon has the capacity to monitor and respond to catch information during the season. Most of these changes did not generate controversy at the relevant Council meetings. Some members of the public testified against the August closure in the California subarea on the basis that this would reduce income in the affected ports. However, the Council determined based on analysis presented at the September meeting that this was the best available measure for avoiding a quota exceedance in 2014. These changes are not expected to result in more than very minor environmental impacts, as they should reduce the catch in the area south of Humbug Mountain compared to the last several years.

In addition, the Council recommended and NMFS is proposing to adopt the following minor adjustments to the Catch Sharing Plan: (1) Change the deadline for applying for IPHC licenses for incidental halibut retention in the salmon troll and sablefish fisheries to accommodate earlier start dates for such retention, (2) eliminate the nearshore fishery in the

Washington North Coast subarea, as the quota in this subarea is generally used entirely by the all depth fishery, (3) modify the season dates and create a nearshore fishery in the Columbia River subarea to create additional opportunity in this underutilized area, and (4) modify the public input provisions for the Oregon central coast subarea to allow the State to use methods other than workshops to obtain public input. None of these changes are controversial and none are expected to result in more than very minor environmental or economic impacts. These actions are intended to enhance the conservation of Pacific halibut, to provide angler opportunity where available, and to protect overfished groundfish species from incidental catch in the halibut fisheries.

The TAC is being reduced by 3% from 990,000 lbs (2013) to 960,000 lbs (2014). Within this 3% decline, different subgroups are being affected differently because of the CSP allocation formula. While the overall tribal allocation decline is by 3%, the tribal ceremonial and subsistence allocation declines by 11% and the tribal commercial allocation by 2%. The non-tribal allocation also declines by 3%, but the commercial allocation declines by 3% compared to a recreational allocation decline of 1%. The commercial allocation decrease includes decreases in directed commercial (3%) and incidental salmon troll (3%). There is also a decrease in the incidental sablefish (-49%) allocation which does not come from the commercial allocation but comes from the portion of the Washington sport allocation that is above 214,110 lbs. According to Pacific Marine Fisheries Commission PacFIN data, commercial vessels including tribal vessels landed halibut with a value of \$7.1 million. Preliminary 2013 data, essentially complete through November, shows commercial landings, worth \$5.9 million.

The total commercial allocation (tribal and non-tribal) for 2014 is 505,308 lb—a 6% decrease from the total 2013 commercial allocation of 539,700 lbs. A 6% allocation decline leads to a projected 6% decline in revenues of just under \$500,000.

The total recreational allocation for 2014 is 412,000 lb—a 1% decrease from the total 2013 recreational allocation of 418,000 lbs. A decrease in 6,000 lbs may lead to a decrease in about 100 recreational trips. If 80 of these trips are from private boats and 20% from charter boats, the expenditures associated with these trips are about \$17,000. Therefore based on changes in allocations, the economic effect of 2014 allocations

compared to the 2013 allocations is under \$600,000 in exvessel revenues and recreational expenditures.

The South of Humbug (SOH) Allocation (southern Oregon-northern California) has averaged 6,000 lbs over the period 2008–2012. However recreational catches in this area have greatly exceeded the allocations, average 25,000 lbs during the period. To address this overage, the SOH allocation is now formally split between the two states (Oregon-2,339 lbs and California-6,240 lbs) and management measures to close the California fishery in August (the fishing season will be open May 1 through July 31, 7 days a week, and September 1 through October 31, 7 days per week. The daily bag limit is one halibut of any size per day per person. This closure is to help reduce the California recreational catch by 40 to 60%. This decrease translates into \$30,000 to \$50,000 in lost recreational trip expenditures.

However, these estimates of lost expenditures do not show the overall effects on communities. In summary the public comments received by the Council at its November meeting were in support of the separation of the southern Oregon area from California and closing the month of August. Further, the comments described the impact a block closure will have on those ports that rely heavily on tourism and have launch facilities. The comments stated that while a one month closure may be the preferred position by the CDFW and the Council, this option will be devastating to some of the small ports in northern California. In making its decision, the California Department of Fish and Wildlife (CDFW) provided this analysis: There was a wide range in public comments received at the CDFW sponsored meeting concerning which, if any, of the proposed management measures to reduce catches should be adopted for 2014. This lack of consensus was likely a result of the apparently disproportionate impacts the various measures would have on particular ports or fishery sectors. Some commenters supporting closing the month of August because this alternative maximizes time on the water, while also providing for some opportunity during the critical summer months.

While there is evidence that the proposed changes will reduce income in the affected ports, NMFS proposes to implement the changes based on analysis presented at the September 2013 Council meeting. This was the best available measure for reducing the magnitude of catch over and above the quota in 2014. The reduction in income

is necessary to bring the fishery closer to the quota which has been exceeded every year since 2008. In 2013, the quota for the South of Humbug area was 6,063 lbs and the projected catch was 50,229 lbs. These changes are expected to result in minimal environmental impacts, and should reduce the catch in the area south of Humbug Mountain compared to the last several years.

The major effect of halibut management on small entities will be from the internationally set TAC decisions made by IPHC. Based on the recommendations of the states, the Council and NMFS are proposing minor changes to the Plan to provide increased recreational and commercial opportunities under the allocations that result from the TAC. There are no large entities involved in the halibut fisheries; therefore, none of these changes will have a disproportionate negative effect on small entities versus large entities. Based on the economic dimensions of the fishery, these minor proposed changes to the Plan are not expected to have a significant economic impact on a substantial number of small entities. In terms of ex-vessel revenues and recreational expenditures, decreased TAC and associated management measures lead to declines of under \$700,000.

The proposed changes to the Plan are authorized under the Pacific Halibut Act, implementing regulations at 50 CFR 300.60–300.65, and the Pacific Council process of annually evaluating the utility and effectiveness of Area 2A Pacific halibut management under the Plan. The proposed sport and commercial management measures implement the Plan by managing the fisheries to meet the differing fishery needs of the various areas along the coast according to the Plans objectives. The proposed changes to the Plan and domestic management measures do not include any reporting or recordkeeping requirements. These changes will also not duplicate, overlap or conflict with other laws or regulations.

Because the goal of the proposed action is to maximize angler participation, and thus to maximize the economic benefits of the fishery, NMFS did not analyze alternatives other than the proposed changes and the status quo for purposes of the IRFA. Status quo would be the 2013 Plan applied to the 2014 TAC. Effects of the status quo and the proposed changes are similar because the changes to the Plan for 2014 are not substantially different from the 2013 Plan. The proposed changes to the Plan are not expected to have a significant impact on a substantial number of small entities. Nonetheless,

NMFS has prepared this IRFA. Through the rulemaking process associated with this action, we are requesting comments on this conclusion.

Pursuant to Executive Order 13175, the Secretary recognizes the sovereign status and co-manager role of Indian tribes over shared Federal and tribal fishery resources. Section 302(b)(5) of the Magnuson-Stevens Fishery Conservation and Management Act establishes a seat on the Pacific Council for a representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho.

The U.S. Government formally recognizes that the 13 Washington Tribes have treaty rights to fish for Pacific halibut. In general terms, the quantification of those rights is 50 percent of the harvestable surplus of

Pacific halibut available in the tribes' usual and accustomed (U and A) fishing areas (described at 50 CFR 300.64). Each of the treaty tribes has the discretion to administer their fisheries and to establish their own policies to achieve program objectives. Accordingly, tribal allocations and regulations, including the proposed changes to the Plan, have been developed in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

In 2011, NMFS initiated consultation on the halibut fishery under Section 7 of the ESA because of the listing of yelloweye, canary, and bocaccio rockfish of the Puget Sound/Georgia Basin. This consultation covers the 2014 and 2015 Catch Sharing Plans and implementing regulations for Area 2A. In addition to the listed rockfish species NMFS is also consulting on the effects

of the fishery on green sturgeon, marine mammals, eulachon and salmon. At this time the consultation is not completed. It is anticipated that the consultation will be completed before the final rule is issued. Preliminary analysis indicates that the effects of the fishery on marine mammals, eulachon, green sturgeon, and salmon are minor. Further analysis is needed to determine the effects of the fishery on listed Puget Sound rockfish.

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

Dated: February 3, 2014.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2014-02633 Filed 2-5-14; 8:45 am]

BILLING CODE 3510-22-P

Notices

Federal Register

Vol. 79, No. 25

Thursday, February 6, 2014

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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Privacy Act of 1974, System of Records

AGENCY: United States Agency for International Development.

ACTION: Altered system of records.

SUMMARY: Pursuant to the Privacy Act, 5 U.S.C. 552a, the United States Agency for International Development (USAID) is issuing public notice for an altered system of records entitled, "USAID-25 Freedom of Information Act, Privacy Act, and Mandatory Declassification Review Requests Records" last published at 42 FR 47386 (Sept. 20, 1977). This action is necessary to meet the requirements of the Privacy Act, 5 U.S.C. 522a(e)(4), to publish in the **Federal Register** notice of the existence and character of record systems maintained by the agency.

DATES: In accordance with 5 U.S.C. 522a(e)(4) and (11), the public is given a 30-day period in which to comment. Therefore, any comments must be received on or before March 10, 2014. Unless comments are received that would require a revision, this altered system of records will become effective on March 10, 2014.

ADDRESSES: You may submit comments:

Electronic

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.
- *Email:* privacy@usaid.gov.

Paper

- *Fax:* (703) 666-5670.
- *Mail:* Chief Privacy Officer, United States Agency for International Development, 2733 Crystal Drive, 11th Floor, Arlington, Va. 22202.

FOR FURTHER INFORMATION CONTACT: The USAID Privacy Office at United States Agency for International Development,

2733 Crystal Drive, 11th Floor, Arlington, VA 22202; or via email at privacy@usaid.gov.

SUPPLEMENTARY INFORMATION: USAID is upgrading the information technology system (IT system) that assists with the management of Freedom of Information Act (FOIA) and Privacy Act (PA) request and administrative appeal processing. The IT system provides the ability to manage the entire lifecycle of FOIA/PA requests and administrative appeals. Components include request management, correspondence management, document management, fee/payment management, document review/redaction, and reporting. The new Public Access Link (PAL) is a public-facing Web portal that complements the IT system and allows requesters to submit their FOIA and Privacy Act requests on-line; attach supporting documents; correspond with the Government Information Specialist assigned to the request; receive status updates; view the request submission history; and receive the final response letter and records.

Dated: January 10, 2014.

William Morgan,

Chief Information Security Officer and Chief Privacy Officer, United States Agency for International Development.

USAID-25

SYSTEM NAME:

Freedom of Information Act, Privacy Act, and Mandatory Declassification Review Requests Records.

SECURITY CLASSIFICATION:

Unclassified, Sensitive but unclassified, and Classified.

SYSTEM LOCATION:

United States Agency for International Development (USAID), 1300 Pennsylvania Avenue NW., Washington, DC 20523; Terremark, 50 NE 9th Street, Miami, FL 33132; U.S. Department of State COOP Beltsville (BIMC), 8101 Odell Road, Floor/Room—173, Beltsville, MD 20705; and other USAID offices in the United States and throughout the world.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system encompasses all individuals who submit Freedom of Information Act (FOIA), Privacy Act, and Mandatory Declassification Review

requests and administrative appeals to the United States Agency for International Development (USAID); individuals whose requests and/or records have been referred to USAID by other agencies; attorneys or other persons authorized to represent individuals submitting requests and appeals; individuals whose records are the subjects of such requests or appeals; and USAID personnel assigned to process such requests or appeals.

CATEGORIES OF RECORDS COVERED BY THE SYSTEM:

This system consists of records created or compiled in response to FOIA, Privacy Act, and Mandatory Declassification Review requests and administrative appeals to USAID, including: The original requests and administrative appeals; responses to such requests and administrative appeals; all related memoranda, correspondence with the requester or requester's representative, notes, internal USAID correspondence and memoranda, and other related or supporting documentation; memoranda to or from other agencies having a substantial interest in the determination of the request; and, in some instances, copies of requested records and records under administrative appeal. These records contain names, addresses, email addresses, telephone numbers; online identity verification information (username and password); copies of identity verification documents such as passports and drivers licenses; and any other information voluntarily submitted such as tracking numbers. These records may contain personal information retrieved in response to a request. These records may contain inquiries and requests regarding other USAID systems of records subject to the FOIA and PA. In addition, information about individuals from such other USAID systems of records may become part of this system of records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The system was established and is maintained pursuant to 5 U.S.C. 301; 5 U.S.C. 552; 5 U.S.C. 552a; 44 U.S.C. 3101; and 22 CFR 212 and 215, and the applicable executive order(s) governing classified national security information.

PURPOSE(S):

The records are collected, used, maintained, and disseminated for the

purpose of processing access requests and administrative appeals made under the FOIA, access and amendment requests and administrative appeals under the Privacy Act, and requests and administrative appeals for mandatory declassification review under the applicable executive order(s) governing national security information; for the purpose of participating in litigation regarding agency action on such requests and appeals; and for the purpose of assisting USAID in carrying out any other responsibilities related to FOIA and Privacy Act such as reporting to USAID and other federal executive officials.

ROUTINE USE 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, all or portion of the records or information contained in this system may be disclosed outside of the USAID as a routine use as follows:

(1) To a court, magistrate, or other administrative body in the course of presenting evidence, including disclosures to counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal proceedings, when USAID is a party to the proceeding or has a significant interest in the proceeding, to the extent that the information is determined to be relevant and necessary.

(2) To the Department of Justice or other appropriate United States Government Agency when the records are arguably relevant to a proceeding in a court or other tribunal in which USAID or a USAID official in his or her official capacity is a party or has an interest, or when the litigation is likely to affect USAID.

(3) To the Department of Justice for the purpose of obtaining advice as to whether or not the records or information should be disclosed.

(4) To a Federal government agency or entity that furnished the record or information for the purpose of permitting that agency or entity to make a decision as to access to or correction of the record or information, or to a federal agency entity for purposes of providing guidance or advice regarding the handling of particular requests.

(5) To appropriate agencies, for the purpose of resolving an inquiry regarding federal agency compliance with the Freedom of Information Act.

(6) In the event of an indication of a violation or potential violation of law, whether civil, criminal or regulatory in

nature, and whether arising by statute or particular program pursuant thereto, to the appropriate agency, whether federal, state, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto.

(7) To the Department of State and its posts abroad for the purpose of transmission of information between organizational units of the Agency, or for purposes related to the responsibilities of the Department of State in conducting United States foreign policy or protecting United States citizens, such as the assignment of employees to positions abroad, the reporting of accidents abroad, evacuation of employees and dependents, and other purposes for which officers and employees of the Department of State have a need for the records in the performance of their duties.

(8) To a foreign government or international agency in response to its request for information to facilitate the conduct of U.S. relations with that government or agency through the issuance of such documents as visas, country clearances, identification cards, drivers' licenses, diplomatic lists, licenses to import or export personal effects, and other official documents and permits routinely required in connection with the official service or travel abroad of the individual and his or her dependents.

(9) To Federal agencies with which the Agency has entered into an agreement to provide services to assist the Agency in carrying out its functions under the Foreign Assistance Act of 1961, as amended. Such disclosures would be for the purpose of transmission of information between organizational units of the Agency; of providing to the original employing agency information concerning the services of its employee while under the supervision of the Agency, including performance evaluations, reports of conduct, awards and commendations, and information normally obtained in the course of personnel administration and employee supervision; or of providing other information directly related to the purposes of the inter-agency agreement as set forth therein, and necessary and relevant to its implementation.

(10) To appropriate officials and employees of a federal agency or entity when the information is relevant to a decision concerning the hiring, appointment, or retention of an employee; the assignment, detail or

deployment of an employee; the issuance, renewal, suspension, or revocation of a security clearance; the execution of a security or suitability investigation; the letting of a contract; or the issuance of a grant or benefit.

(11) To a Congressional Committee or Subcommittee.

(12) To the National Archives and Records Administration, Information Security Oversight Office, Interagency Security Classification Appeals Panel, for the purpose of adjudicating an appeal from a USAID denial of a request for mandatory declassification review of records, made under the applicable executive order(s) governing classification.

(13) To the National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures, and compliance with the Freedom of Information Act, and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

(14) To the National Archives and Records Administration for the purposes of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

(15) To a former employee of USAID for purposes of responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, in accordance with applicable agency regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the agency requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

(16) To the Foreign Service Grievance Board in the course of the Board's consideration of matters properly before it.

(17) To appropriate agencies, entities, and persons when (1) USAID suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) USAID has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the USAID or another Agency or entity) that rely upon the compromised information; and (3) the disclosure

made to such agencies, entities, and persons is reasonably necessary to assist in connection with USAID's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

These records are not disclosed to consumer reporting agencies.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper and/or electronic form; and are maintained in locked cabinets and/or user-authenticated, password-protected systems. Records that contain national security information and are classified are stored in accordance with applicable executive orders, statutes, and agency implementing regulations.

RETRIEVABILITY:

Records are retrieved by the name of the requester or appellant; the number assigned to the request or appeal; and in some instances, the name of the attorney representing the requester or appellant, the name of an individual who is the subject of such a request or appeal, and/or the name of other personal identifiers.

SAFEGUARDS:

Information in this system is safeguarded in accordance with applicable laws, rules and policies, including the agency's automated directive system. Classified information is appropriately stored in safes and in accordance with other applicable requirements. In general, records and technical equipment are maintained in buildings with restricted access. The required use of password protection identification features and other system protection methods also restrict access. Access is limited to those officers and authorized USAID employees who have an official need to access the records in the performance of their official duties.

RETENTION AND DISPOSAL:

Records are retained and disposed of in accordance with the National Archives Records Administration's General Records Disposition Schedules and the agency's approved disposition schedules.

SYSTEM MANAGER(S) AND ADDRESS:

USAID FOIA Public Liaison Officer, United States Agency for International Development, Bureau for Management, Office of Management Services, Information and Records Division (M/

MS/IRD), 1300 Pennsylvania Avenue NW., Room 2.7-C, Washington, DC 20523.

NOTIFICATION PROCEDURES:

Same as Record Access Procedures.

RECORD ACCESS PROCEDURES:

Under the Privacy Act, individuals may request access to records about themselves. If an agency or a person, who is not the individual who is the subject of the records, requests access to records about an individual, the written consent of the individual who is the subject of the records is required.

Requesters may submit requests for records under the Privacy Act in the following four ways: (1) By mail to the USAID FOIA Office, Bureau for Management, Office of Management Services, Information and Records Division, 1300 Pennsylvania Avenue NW., Room 2.07C—RRB, Washington, DC 20523—2701; (2) via email to foia@usaid.gov; (3) on the USAID Web site at <http://www.usaid.gov/foia-requests>; or (4) by completing the USAID Form 508—2, Privacy Request Form, which is available: (a) By writing to the USAID FOIA Office, Bureau for Management, Office of Management Services, Information and Records Division, 1300 Pennsylvania Avenue NW., Room 2.07C—RRB, Washington, DC 20523—2701; (b) via email to foia@usaid.gov or (c) on the USAID Web site at <http://www.usaid.gov/foia-requests>.

Requesters must provide the information that is necessary to identify the records, including the following: Requester's full name; present mailing address; home telephone; work telephone; name of subject, if other than requester; requester relationship to subject; description of type of information or specific records; and purpose of requesting information. Requesters should provide the system of record identification name and number, if known; and, to facilitate the retrieval of records contained in those systems of records which are retrieved by Social Security Numbers, the Social Security Number of the individual to whom the record pertains.

In addition, requesters must include proof of identity information by providing copies of two (2) source documents that must be notarized by a valid (un-expired) notary public. Acceptable proof-of-identity source documents include: An unexpired United States passport; Social Security Card (both sides); unexpired driver's license or identification card issued by a state or United States possession, provided that it contain a photograph; certificate of United States citizenship;

certificate of naturalization; card showing permanent residence in the United States; United States alien registration receipt card with photograph; United States military card or draft record; or United States military dependent's identification card.

Requesters must also provide a signed and notarized statement that they are the person named in the request; that they understand that any falsification of their statement is punishable under the provision of 18 U.S.C. 1001 by a fine, or by imprisonment of not more than five years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisonment of not more than eight years, or both; and that requesting or obtaining records under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) as a misdemeanor and by a fine of not more than \$5,000. The notarized statement with an embossed notary seal must be submitted in the original paper to the USAID FOIA Office, Bureau for Management, Office of Management Services, Information and Records Division, 1300 Pennsylvania Avenue NW., Room 2.07C—RRB, Washington, DC 20523—2701.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest or amend records maintained on himself or herself must clearly and concisely state that information is being contested, and the proposed amendment to the information sought. Requests to amend a record must follow the Record Access Procedures above.

RECORD SOURCE CATEGORIES:

Individuals and organizations submitting initial requests and administrative appeals pursuant to the FOIA and Privacy Act, or other applicable executive order(s) governing classified national security information; the agency records searched in the process of responding to such requests and appeals; USAID personnel assigned to handle such requests and appeals; agency records searched in the process of responding to such requests and appeals; other agencies that refer to, search for and provide the records and related correspondence that are maintained in the case files; and submitters or subject of records or information that have provided assistance to USAID in making access or amendment determinations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

USAID has claimed exemptions for several of its other systems of records under 5 U.S.C. 552a(j)(2) and (k).

Additional exemptions are delineated in 22 CFR 215.13 and 215.14. During the processing of FOIA and Privacy Act requests and administrative appeals, exempt records from these other systems of records may become part of the case record in this system of records. To the extent that exempt records from other USAID systems of records are entered or become part of this system, USAID has claimed the same exemptions. In addition, any such records compiled in this system of records from any other system of records continues to be subject to any exemption(s) applicable for the records as they have in the primary systems of records of which they are a part.

[FR Doc. 2014-02525 Filed 2-5-14; 8:45 am]

BILLING CODE P

AGENCY FOR INTERNATIONAL DEVELOPMENT

Privacy Act of 1974, System of Records

AGENCY: United States Agency for International Development.

ACTION: Deleted systems of records.

SUMMARY: The United States Agency for International Development (USAID) is issuing public notice for two deleted systems of records maintained in accordance with the Privacy Act of 1974, as amended at 5 U.S.C. 552a. This action is necessary to meet the requirements of the Privacy Act, 5 U.S.C. 522a(e)(4), to publish in the **Federal Register** notice of the existence and character of record systems maintained by the agency.

DATES: In accordance with 5 U.S.C. 522a(e)(4) and (11), the public is given a 30-day period in which to comment. Therefore, any comments must be received on or before March 10, 2014. Unless comments are received that would require a revision, this altered system of records will become effective on March 10, 2014.

ADDRESSES: You may submit comments:

Electronic

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.
- *Email:* privacy@usaid.gov.

Paper

- *Fax:* (703) 666-5670.
- *Mail:* Chief Privacy Officer, United States Agency for International Development, 2733 Crystal Drive, 11th Floor, Arlington, Va. 22202.

FOR FURTHER INFORMATION CONTACT: The USAID Privacy Office at United States Agency for International Development, 2733 Crystal Drive, 11th Floor, Arlington, VA 22202; or via email at privacy@usaid.gov.

SUPPLEMENTARY INFORMATION: USAID has recently conducted a review of system of records notices and has determined that the following two systems or records are covered by government-wide systems of records and the USAID systems of records will be deleted as detailed below: USAID-3 Employees Automated Records; and USAID-23 Employees' Equal Employment Opportunity Complaint Investigative Records.

Dated: January 15, 2014.

William Morgan,

Chief Information Security Officer and Chief Privacy Officer, U.S. Agency for International Development.

USAID-3

SYSTEM NAME:

Employees Automated Records.

Reason: USAID-3 Employees Automated Records is covered by several government-wide systems of records notices OPM/Govt-1 General Personnel Records (December 11, 2013, 77 FR 73694); OPM/Govt-2 Employee Performance File System of Records (June 19, 2006, 71 FR 35342, 35347); OPM/Govt-3 Records of Adverse Actions, Performance Based Reduction in Grade and Removal Actions, and Termination of Probationers (June 19, 2006, 71 FR 35342, 35350); OPM/Govt-5 Recruiting, Examining, and Placement Records (June 19, 2006, 71 FR 35342, 35351); OPM/Govt-7 Applicant Race, Sex, National Origin, and Disability Status Records (June 19, 2006, 71 FR 35342, 35356); and EEOC/Govt-1 Equal Employment Opportunity in the Federal Government Complaint and Appeal Records (July 30, 2002, 67 FR 49338, 49354, as amended April 6, 2006, 71 FR 24704, 24705). USAID-3 can therefore be deleted.

USAID-23

SYSTEM NAME:

Employees' Equal Employment Opportunity Complaint Investigative Records.

Reason: USAID-23 Employees' Equal Employment Opportunity Complaint Investigative Records is covered by the government-wide system of records notice EEOC/Govt-1 Equal Employment Opportunity in the Federal Government Complaint and Appeal Records (July 30,

2002, 67 FR 49354); and USAID-23 can therefore be deleted.

[FR Doc. 2014-02534 Filed 2-5-14; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Forest Service

Ravalli County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Ravalli County Resource Advisory Committee will meet in Hamilton, MT. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110-343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to provide information regarding the monitoring of RAC projects.

DATES: The meeting will be held March 11, 2014 6:30 p.m.

ADDRESSES: The meeting will be held at the Bitterroot National Forest Supervisor's Office located at 1801 N. 1st, Hamilton, MT. Written comments may be submitted as described under Supplementary Information. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Bitterroot National Forest Supervisor's Office. Please call ahead to 406-363-7100 to facilitate entry into the building and to view comments.

FOR FURTHER INFORMATION CONTACT: Dan Ritter, Acting Forest Supervisor or Joni Lubke, Executive Assistant at 406-363-7100.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday. Please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accommodation for access to the facility or proceedings by contacting the person listed *For Further Information*.

SUPPLEMENTARY INFORMATION: The following business will be conducted: Project proposal presentations for 2014 funding. Contact Joni Lubke at 406-363-7100 for a full agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before the meeting. Individuals wishing to make an oral statement should request in writing by March 10, 2014 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Joni Lubke at 1801 N. 1st, Hamilton, MT 59840 or by email to jmlubke@fs.fed.us or via facsimile to 406-363-7159. A summary of the meeting will be posted at https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/Web_Agendas?OpenView&Count=1000&RestrictToCategory=Ravalli+County within 21 days of the meeting.

Dated: January 22, 2014.

Daniel G. Ritter,

Acting Forest Supervisor.

[FR Doc. 2014-02263 Filed 2-5-14; 8:45 am]

BILLING CODE 3410-11-P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS-2014-0001]

Conservation Innovation Grants Fiscal Year (FY) 2014 Announcement for Program Funding

AGENCY: Natural Resources Conservation Service, United States Department of Agriculture.

ACTION: Notice of program funding.

SUMMARY: The Natural Resources Conservation Service (NRCS), an agency under the United States Department of Agriculture (USDA), is announcing availability of Conservation Innovation Grants (CIG) to stimulate the development and adoption of innovative conservation approaches and technologies. Applications will be accepted from all 50 States, District of Columbia, Caribbean Area (Puerto Rico and U.S. Virgin Islands), and the Pacific Islands Area (Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands). NRCS anticipates that the amount available for support of this program in FY 2014 will be up to \$15 million. Applications are requested from eligible governmental or non-governmental organizations or individuals for competitive consideration of grant awards for projects between 1 and 3 years in duration.

Funds will be awarded through a two-phase nationwide competitive grants process that will include: (1) A pre-proposal process, and (2) a full proposal process. The full proposal process will only be open to applicants whose pre-proposal applications are selected by NRCS. Both phases are described in the full announcement found at Grants.gov. Only pre-proposals are being solicited at this time.

Please visit <http://www.nrcs.usda.gov/technical/cig/index.html> for more information about this grant opportunity. In addition, the full notice that identifies the objectives, eligibility criteria, and application instructions for CIG projects can also be found at: www.grants.gov. Applications will be screened for completeness and compliance with the provisions of the announcement. Incomplete applications will be eliminated from competition, and notification of elimination will be mailed to the applicant. NRCS will request a full proposal package only from those applicants selected in the pre-proposal phase.

DATES: Applications for the pre-proposal phase must be received by NRCS before 4:00 p.m. EST on March 7, 2014. NRCS will announce selected pre-proposal applications by April 7, 2014. Selected applicants will then be required to submit a full proposal package to NRCS by 4:00 p.m. EDT on May 5, 2014.

ADDRESSES: Applications sent via express mail or overnight courier service must be sent to the following address: USDA-NRCS, CIG Program, 1400 Independence Avenue SW., Room 6143 South Building, Washington, DC 20250. Applications sent via the United States Postal Service must be sent to the following address: USDA-NRCS, CIG Program, Post Office Box 2890, Washington, DC 20013-2890. Applications sent electronically must be sent through www.grants.gov or nrcscig@wdc.usda.gov.

FOR FURTHER INFORMATION CONTACT: Gregorio Cruz, National CIG Program Manager, NRCS, Post Office Box 2890, Washington, DC 20250; telephone: (202) 720-8644; email: gregorio.cruz@wdc.usda.gov.

Signed this 30th day of January 2014 in Washington, DC.

Jason A. Weller,

Vice President, Commodity Credit Corporation, and Chief, Natural Resources Conservation Service.

[FR Doc. 2014-02476 Filed 2-5-14; 8:45 am]

BILLING CODE 3410-16-P

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: Monday, February 10, 2014. 11:30 a.m. EST.

PLACE: Broadcasting Board of Governors, Cohen Building, Room 3321, 330 Independence Ave. SW., Washington, DC 20237.

SUBJECT: Notice of Special Meeting of the Broadcasting Board of Governors.

SUMMARY: The members of the Broadcasting Board of Governors (BBG) will meet in a special session, to be conducted telephonically, to discuss and approve the agency's Operating Plan for Fiscal Year 2014.

The meeting will be available for public observation via a complete audio recording and a verbatim transcript of the meeting to be promptly posted on the BBG's public Web site at www.bb.gov.

Information regarding this meeting, including any updates or adjustments to its starting time, can also be found on the Agency's public Web site.

CONTACT PERSON FOR MORE INFORMATION:

Persons interested in obtaining more information should contact Paul Kollmer-Dorsey at (202) 203-4545.

Patricia Hargrave,

Acting General Counsel.

[FR Doc. 2014-02700 Filed 2-4-14; 4:15 pm]

BILLING CODE 8610-01-P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Briefing.

DATE AND TIME: Friday, February 14, 2014; 9:30 a.m. EST.

PLACE: 1331 Pennsylvania Ave. NW., Suite 1150, Washington, DC 20425.

Briefing Agenda—9:30 a.m.–2:45 p.m.

This briefing is open to the public.

Topic: *Patient Dumping.*

I. Introductory Remarks by Chairman.

II. Panel I—9:30 a.m.–10:45 a.m.:

Government Panel

Speakers' Remarks and Questions

From Commissioners.

III. Panel II—10:45 a.m.–12:00 p.m.:

Advocate/Practitioner Panel

Speakers' Remarks and Questions

From Commissioners.

IV. Panel III—12:05 p.m.–1:05 p.m.:

Scholar Panel

Speakers' Remarks and Questions

From Commissioners.

V. Adjourn Briefing.

CONTACT PERSON FOR FURTHER

INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit, (202) 376-8591.

Hearing-impaired persons who will attend the briefing and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376-8105 or at signlanguage@usccr.gov at least seven business days before the scheduled date of the meeting.

Dated: February 4, 2014.

David Mussatt,

Acting Chief, RPCU.

[FR Doc. 2014-02639 Filed 2-4-14; 11:15 am]

BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Modification of Temporary Denial Order To Add Evans Meridians Ltd. as a Denied Person

In the matter of: 3K Aviation Consulting & Logistics, a/k/a 3K Havacilik Ve Danismanlik SAN. TIC. LTD. ST., Biniciler Apt. Savas Cad. No. 18/5, Sirinyali Mah. 07160, Antalya, Turkey and Sonmez Apt. No. 4/5 1523 Sokak, Sirinyali Mah. 07160, Antalya, Turkey; Huseyin Engin Borluca, Biniciler Apt. Savas Cad. No. 18/5, Sirinyali Mah. 07160, Antalya, Turkey and Sonmez Apt. No. 4/5 1523 Sokak, Sirinyali Mah. 07160, Antalya, Turkey; Adaero International Trade, LLC, 2326 17th Avenue, Rockford, IL 61104 and IDTM B 1 Blok, Kat 14 No: 439, Yesilkoy, Istanbul, Turkey; Recep Sadettin Ilgin, 2326 17th Avenue, Rockford, IL 61104 and IDTM B 1 Blok, Kat 14 No: 439, Yesilkoy, Istanbul, Turkey; Pouya Airline, a/k/a Pouya Air, Mehrebad Airport, Tehran, Iran; Evans Meridians Ltd., Drake Chambers, 1st Floor, Yamraj Building, P.O. Box 3321, Road Town, Tortola, British Virgin Islands; *Respondents.*

Pursuant to § 766.24 of the Export Administration Regulations (the “Regulations” or “EAR”),¹ I hereby grant the request of the Office of Export Enforcement (“OEE”) to modify the January 3, 2014 Order Denying the Export Privileges of Adaero International Trade LLC, Recep Sadettin Ilgin, 3K Aviation Consulting and Logistics, Huseyin Engin Borluca and

¹ The EAR is currently codified at 15 CFR parts 730-774 (2013). The EAR are issued under the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401-2420 (2000)) (“EAA”). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 8, 2013 (78 FR 49107 (Aug. 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).

Pouya Air, as I find that modification of the Temporary Denial Order (“TDO”) is necessary in the public interest to prevent an imminent violation of the EAR. Specifically, I find it necessary to add the following person as an additional Respondent in order to prevent an imminent violation of the Regulations and the TDO: Evans Meridians Ltd., Drake Chambers, 1st Floor, Yamraj Building, P.O. Box 3321, Road Town, Tortola, British Virgin Islands.

I. Procedural History

On January 3, 2014, I signed a TDO denying for 180 days the export privileges of 3K Aviation Consulting & Logistics, also known as 3K Havacilik Ve Danismanlik SAN. TIC. LTD. ST. (“3K Aviation”); Huseyin Engin Boluca (3K Aviation Consulting & Leasing’s founder and director); Adaero International Trade, LLC (“Adaero”); Recep Sadettin Ilgin (Adaero International Trade’s managing director); and Pouya Airline, also known as Pouya Air. The TDO was issued *ex parte* pursuant to § 766.24(a) and went into effect upon issuance on January 3, 2014. The TDO was published in the **Federal Register** on January 10, 2014. 79 FR 1823 (Jan. 10, 2014).

In connection with the TDO, OEE presented evidence that in December 2013, two U.S.-origin General Electric CF6 aircraft engines² bearing manufacturer’s serial numbers (“MSN”) 695244 and 705112 were transported on behalf of Adaero International Trade, LLC to 3K Aviation Consulting & Logistics (“3K Aviation”), which is located in Turkey, and that 3K Aviation was preparing to re-export the engines to Iran without the U.S. Government authorization required by § 746.7 of the EAR. OEE had further information that Pouya Airline, an Iranian cargo airline, was scheduled to transport both engines from Turkey to Iran on January 7, 2014.

As discussed further below, OEE has obtained evidence following issuance of the TDO of Evans Meridians Ltd.’s involvement in the attempted export or reexport of the items to Iran.

II. Temporarily Denying Evans Meridians Ltd.’s Export Privileges

A. Legal Standard

Pursuant to § 766.24(b) of the Regulations, BIS may issue an order temporarily denying a Respondent’s export privileges upon a showing that

² The engines are items subject to the Regulations, classified under Export Control Classification Number 9A991.d, and controlled for anti-terrorism reasons.

the order is necessary in the public interest to prevent an “imminent violation” of the Regulations. 15 CFR 766.24(b)(1). “A violation may be ‘imminent’ either in time or degree of likelihood.” 15 CFR 766.24(b)(3). BIS may show “either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.” *Id.* As to the likelihood of future violations, BIS may show that “the violation under investigation or charges is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent [.]” *Id.* A “lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.” *Id.*

B. BIS’s Request To Add Evans Meridians Ltd. to the TDO

In its request, OEE has presented evidence demonstrating that Evans Meridians Ltd. (“Evans Meridians”), a British Virgin Islands company, is involved with the transaction described in the TDO. Prior to issuance of the TDO, OEE did not have evidence of Evans Meridians’ relationship to the items or role in the transaction. If the evidence presented in support of this modification had been available during consideration of the TDO, OEE would have sought to include Evans Meridians as a denied person on the TDO when issued on January 3, 2014.

The TDO stated that the engines were transported to 3K Aviation on behalf of Adaero. While it remains true that Adaero was involved in both the sale of the engines and the transfer of the engines from Germany to Turkey, evidence obtained by OEE and presented as part of this request shows that Evans Meridians appears on documents as the purchaser and has acted as the owner of the items in connection with their transfer to 3K Aviation en route to Iran. The two aircraft engines remain in the possession and/or control of 3K Aviation in Turkey in violation of the TDO. Moreover, Evans Meridians has made payment to 3K Aviation, a denied person, for customs storage fees for the engines. The payment to 3K Aviation was made on or about January 21, 2014, that is, 18 days after the TDO issued on January 3, 2014, and 11 days after publication of the TDO on January 10, 2014, in violation of the Regulations and/or the TDO. The evidence presented by OEE also supports its reasonable belief that the continued

possession or control of the items by 3K Aviation in Turkey indicates a continued risk that further attempts likely will be made to reexport the items to Iran and thus violate the Regulations and the TDO.

C. Findings

I find that the evidence presented by OEE demonstrates that a violation of the Regulations is imminent in both time and degree of likelihood. Adding Evans Meridians Ltd. to the TDO is needed to give notice to persons and companies in the United States and abroad that they should cease dealing with Evans Meridians in export and re-export transactions involving items subject to the EAR or other activities prohibited by the TDO. Doing so is consistent with the public interest to preclude future violations of the EAR.

Evans Meridians' export privileges are being temporarily denied on an *ex parte* basis without a hearing based upon BIS's showing of an imminent violation in accordance with § 766.24 of the Regulations.

It is therefore ordered:

First, that 3K AVIATION CONSULTING & LOGISTICS, a/k/a 3K HAVACILIK VE DANISMANLIK SAN. TIC. LTD. ST., Biniciler Apt. Savas Cad. No. 18/5, Sirinyali Mah. 07160, Antalya, Turkey, and Sonmez Apt. No. 4/5 1523 Sokak, Sirinyali Mah. 07160, Antalya, Turkey; HUSEYIN ENGIN BORLUCA, Biniciler Apt. Savas Cad. No. 18/5, Sirinyali Mah. 07160, Antalya, Turkey, and Sonmez Apt. No. 4/5 1523 Sokak, Sirinyali Mah. 07160, Antalya, Turkey; ADAERO INTERNATIONAL TRADE, LLC, 2326 17th Avenue, Rockford, IL 61104, and IDTM B1 Blok, KAT 14 No. 439, Ysilko, Istanbul, Turkey; RECEP SADETTIN ILGIN, 2326 17th Avenue, Rockford, IL 61104, and IDTM B1 Blok, KAT 14 No. 439, Ysilko, Istanbul, Turkey; POUYA AIRLINE, a/k/a POUYA AIR, Mehrebad Airport, Tehran, Iran; and EVANS MERIDIANS LTD., Drake Chambers, 1st Floor, Yamraj Building, P.O. Box 3321, Road Town, Tortola, British Virgin Islands; and when acting for or on their behalf, any successors or assigns, agents, or employees (each a "Denied Person" and collectively the "Denied Persons") 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 Export Administration Regulations ("EAR"), or in any other activity subject to the EAR 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 EAR, or in any other activity subject to the EAR; 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 EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a 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 a Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the EAR 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 EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in § 766.23 of the EAR, any other person, firm, corporation, or business organization related to a Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

In accordance with the provisions of § 766.24(e) of the EAR, the Respondents may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202-4022.

In accordance with the provisions of §§ 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. The Respondents may oppose a request to renew this Order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be served on Evans Meridians and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect until July 2, 2014, unless renewed in accordance with § 766.24(d) of the Regulations.

Dated: January 30, 2014.

David W. Mills,

Assistant Secretary of Commerce, for Export Enforcement.

[FR Doc. 2014-02517 Filed 2-5-14; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XD102

Council Coordination Committee Meeting; Correction

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

ACTION: Notice of a public meeting; correction.

SUMMARY: NMFS will host a meeting of the Council Coordination Committee (CCC), consisting of the Regional Fishery Management Council chairs, vice chairs, and executive directors in February 2014. The intent of this meeting is to discuss issues of relevance to the Councils, including budget allocations for FY2014 and budget planning for FY2015 and beyond, FY2014 Priorities, update from the Marine Fisheries Advisory Committee Endangered Species Act work group report and the seafood certification process, fisheries allocation, national science program review, electronic monitoring workshop report, Magnuson-Stevens Fishery Conservation and

Management Act (MSA) reauthorization, National Fish Habitat Partnership Board's consideration of habitat in the fishery management process, and other topics related to implementation of the MSA. This document corrects an agenda topic for Thursday, February 20, 2014 meeting scheduled from 2:45–3:45 that was published in the **Federal Register** on January 31, 2014. All other information relating to the proposed agenda remains the same and will not be repeated in this document.

DATES: The meeting will begin at 9 a.m. on Wednesday, February 19, 2014, recess at 5:30 p.m. or when business is complete; and reconvene at 9 a.m. on Thursday, February 20, 2014, and adjourn by 4:30 p.m. or when business is complete.

ADDRESSES: The meeting will be held at the Holiday Inn Capitol Hill, 550 C Street SW., Washington, DC 20024, telephone 202–479–4000, fax 202–288–4627.

FOR FURTHER INFORMATION CONTACT: William D. Chappell: Telephone 301–427–8505 or email at William.Chappell@noaa.gov; or Tara Scott: Telephone 301–427–8505 or email at Tara.Scott@noaa.gov.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of January 31, 2014, in FR Doc. 2014–02074, on page 5381, in the second column, the agenda for 2:45–3:45, February 20, 2014 meeting is corrected to read:

Proposed Agenda

Thursday, February 20, 2014

2:45–3:45 NOAA's Habitat Conservation Initiatives and Partnership Opportunities.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tara Scott at 301–427–8505 at least five working days prior to the meeting.

Dated: January 31, 2014.

William D. Chappell,

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

[FR Doc. 2014–02467 Filed 2–5–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. PTO–P–2014–0002]

Request for Comments and Notice of Roundtable Event on the Written Description Requirement for Design Applications

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The United States Patent and Trademark Office (Office) is hosting a roundtable event to solicit public opinions regarding the written description requirement as applied to design applications in certain limited situations. Members of the public are invited to participate. The roundtable will provide a forum for an informal discussion of the topics identified in this notice. Written comments in response to these topics also are requested.

DATES: *Event:* The roundtable event will be held on March 5, 2014, beginning at 1:00 p.m. Eastern Daylight Time (EDT), and ending at 4:00 p.m. EDT.

Comments: Written comments must be received on or before March 14, 2014 to ensure consideration.

Registration: Registration is required to attend the roundtable in person or via Web cast. Additionally, members of the public who wish to participate in the roundtable as a speaker must do so by request in writing no later than February 14, 2014. See the “Registration Information” section of this notice for additional details on how to register.

ADDRESSES: *Event:* The roundtable event will be held in the Madison Auditorium on the concourse level of the Madison Building, which is located at 600 Dulany Street, Alexandria, Virginia 22314.

Comments: Any member of the public, whether attending the roundtable or not, may submit written comments on any of the topics identified in section III, below, for consideration by the Office. Persons submitting written comments should note that the Office will not provide a response because this notice is not a notice of proposed rulemaking. Written comments should be sent by electronic mail addressed to

DesignRoundtable2014@uspto.gov.

Comments also may be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA

22313–1450, marked to the attention of Nicole Dretar Haines. Although comments may be submitted by mail, the Office prefers to receive comments via the Internet. To ensure consideration, written comments must be received on or before March 14, 2014.

Comments will be available via the Office's Internet Web site at http://www.uspto.gov/patents/init_events/index.jsp, and will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia 22314, upon request. Because comments will be available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

Event Registration Information: There is no fee to register for the roundtable, and registration will be on a first-come, first-served basis. Additionally, members of the public who wish to participate in the roundtable as a speaker must do so by request in writing no later than February 14, 2014. Registration on the day of the roundtable will be permitted for members of the public who wish solely to observe on a space-available basis beginning 30 minutes before the roundtable.

To register, please send an email message to DesignRoundtable2014@uspto.gov and provide the following information: (1) Your name, title, and if applicable, company or organization, address, phone number, and email address; (2) whether you wish to attend in person or via Web cast; and (3) if you wish to make an oral presentation at the roundtable, which of the topics identified in section III, below, will be addressed and the approximate desired length of your presentation. Each attendee, even if from the same organization, must register separately.

Due to time constraints, there is the potential that not all persons who wish to make a presentation will be accommodated. However, the Office will attempt to accommodate all persons who wish to make a presentation at the roundtable event. After reviewing the list of speakers and the information regarding the presentations provided in the registration, the Office will contact each speaker prior to the event with the amount of time available and the approximate time that the speaker's presentation is scheduled to begin. The amount of time available for each presentation will be limited to ensure that all persons selected to speak will have a meaningful chance to do so. Speakers must send the final electronic

copies of their presentations in Microsoft PowerPoint or Microsoft Word to DesignRoundtable2014@uspto.gov by February 26, 2014, so that the presentation can be displayed at the roundtable. If time permits, the Office will provide an opportunity for persons in the audience not previously selected as speakers to speak at the roundtable without a formal presentation.

The Office plans to make the roundtable event available via Web cast. Web cast information will be available on the Office's Internet Web site before the roundtable event at http://www.uspto.gov/patents/init_events/index.jsp.

If special accommodations due to a disability are needed, please inform the contact person(s) identified below.

FOR FURTHER INFORMATION CONTACT: Requests for additional information regarding registration and speaker presentations should be directed to the attention of Robert Olszewski, Director, Technology Center 2900, by telephone at 571-272-2200, or by email to robert.olszewski@uspto.gov. Requests for additional information regarding the topics for written comments and discussion at the roundtable event should be directed to Nicole Dretar Haines, Senior Legal Advisor, Office of Patent Legal Administration, by telephone at 571-272-7717, or by email to nicole.haines@uspto.gov.

SUPPLEMENTARY INFORMATION:

I. Purpose of Notice: This notice is directed to announcing a roundtable event to solicit public opinions concerning the topics identified in section III, below, relating to the written description requirement under 35 U.S.C. 112(a) (or for applications filed prior to September 16, 2012, 35 U.S.C. 112, first paragraph) (hereinafter collectively referred to as "35 U.S.C. 112(a)") as applied to design applications. The topics selected for comment and discussion have been chosen based on input the Office received following the Seventh Annual Office Design Patent Conference "Design Day 2013: Designs in the New Digital Age" (Design Day) held on April 23, 2013. The public is invited to provide comments on these topics and to identify future topics for discussion.

II. Background: A question as to whether an originally disclosed design provides an adequate written description may arise where a new or amended claim is presented, or where a claim to entitlement of an earlier priority date or effective filing date (*e.g.*, under 35 U.S.C. 120) has been made. During discussions between the Office and members of the public attending

Design Day, some attendees requested that the Office reconsider how the written description requirement under 35 U.S.C. 112(a) is applied to design applications where only a subset of elements of the original disclosure are shown using solid lines in an amendment or continuation application. In order to obtain a better understanding of the attendees' concerns, the Office is hosting this roundtable event.

III. Topics for Written Comments and Discussion at the Roundtable Event: The Office seeks comments on the application of the written description requirement where only a subset of elements of the original disclosure are shown using solid lines in an amendment or in a continuation application.¹ Specifically, the Office seeks input on the following topics relating to the written description requirement under 35 U.S.C. 112(a) as applied to design applications in certain limited situations.

A. Factors in Determining Whether an Amended/Continuation Design Claim Satisfies the Written Description Requirement

It has been the experience of the Office that in the majority of cases there is no question that the amended/continuation design claim satisfies the written description requirement. However, in some rare situations, it has been the experience of the Office that a question may arise as to whether the applicant had possession of the newly claimed design at the time of filing the original application, where the design results from the applicant including only a subset of seemingly unrelated, originally disclosed elements in the claim by way of an amendment or continuation application.

At Design Day, during the Office's presentation titled "More About Written Description Requirement of 35 U.S.C. 112(a)" (available on the Office's Internet Web site at http://www.uspto.gov/patents/init_events/index.jsp), specific examples illustrating an original design claim and an amended design claim were discussed where, in the amended claim, only a subset of seemingly unrelated elements of the original disclosure were shown using solid lines. Some members of the public attending Design Day raised concerns regarding the Office's position that the inventor may not have had possession of the newly claimed design in some of these examples. *See, e.g.*, the

¹ The Office is not seeking comments on the issue of the introduction of boundary lines via amendment or in a continuation application, as addressed in *In re Owens*, 710 F.3d 1362 (Fed. Cir. 2013).

Office's presentation titled "More About Written Description Requirement of 35 U.S.C. 112(a)" at slide 8. These attendees took the position, relying on *Racing Strollers Inc. v. TRI Industries Inc.*, 878 F.2d 1418, 1420 (Fed. Cir. 1989), that as long as the subset of elements forming the newly claimed design were contained in the originally filed drawings, the written description requirement of 35 U.S.C. 112(a) is satisfied and no further analysis is needed.

Accordingly, input is requested as to whether it would be useful for design examiners to consider any of the following factors in determining whether an amended/continuation design claim, which includes only a subset of the originally disclosed elements (no new elements are introduced that were not originally disclosed), satisfies the written description requirement. These factors would only be applied by design examiners in the rare situation where there is a question as to whether an amended/continuation design claim satisfies the written description requirement. The factors are as follows:

(1) The presence of a common theme among the subset of elements forming the newly identified design claim, such as a common appearance;

(2) the subset of elements forming the newly identified design claim share an operational and/or visual connection due to the nature of the particular article of manufacture (*e.g.*, set of tail lights of an automobile);

(3) the subset of elements forming the newly identified design claim is a self-contained design within the original design;

(4) a fundamental relationship among the subset of elements forming the newly identified design claim is established by the context in which the elements appear; and/or

(5) the subset of elements forming the newly identified design claim gives the same overall impression as the original design claim.

The Office also seeks comments on any additional factors, not listed above, that would be useful for design patent examiners to consider in determining whether an amended/continuation design claim, which includes only a subset of the originally disclosed elements, satisfies the written description requirement. Further, the Office seeks comments on the potential advantages and/or disadvantages of using such a factors-based approach.

Examples that can be used to aid discussion of the factors identified above will be made available on the Office's Internet Web site at <http://>

www.uspto.gov/patents/init_events/index.jsp prior to the roundtable event.

B. Establishing Adequate Written Description Support in the Original Disclosure

Additionally, the Office seeks comments on whether there are mechanisms applicants can use to demonstrate that they had possession of designs claimed in future amendments/continuation applications at the time their original applications were filed. For instance, the Office seeks comments on whether use of a descriptive statement in the originally-filed application (e.g., that specifically identifies different combinations of elements which respectively form additional designs) could be a meaningful way for applicants to demonstrate that they had possession of designs claimed in future amendments/continuation applications. The Office's initial impression is that generic boilerplate statements would not adequately reflect what the designer had in his or her possession at the time of filing the application.

Dated: January 31, 2014.

Michelle K. Lee,

Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.

[FR Doc. 2014-02578 Filed 2-5-14; 8:45 am]

BILLING CODE 3510-16-P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: Vol. 79, No. 20, Thursday, January 29, 2014, page 4885.

ANNOUNCED DATE AND TIME OF OPEN MEETING: Wednesday, February 5, 2014, 9 a.m.–11 a.m.

CHANGES TO ANNOUNCED DATE AND TIME: Thursday, February 6, 2014, 1:30 p.m.–2:30 p.m.

MATTER TO BE CONSIDERED: Briefing Matter—Infant Stroller Final Rule (Sec. 104).

For a recorded message containing the latest agenda information, call (301) 504-7948.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Todd A. Stevenson, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7923.

Dated: February 4, 2014.

Todd A. Stevenson,

Secretary.

[FR Doc. 2014-02681 Filed 2-4-14; 4:15 pm]

BILLING CODE 6355-01-P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday February 12, 2014, 10 a.m.–12 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTER TO BE CONSIDERED: Decisional Matter: Section 1101 update (6(b)) NPR.

A live webcast of the Meeting can be viewed at www.cpsc.gov/live.

For a recorded message containing the latest agenda information, call (301) 504-7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7923.

Dated: February 4, 2014.

Todd A. Stevenson,

Secretary.

[FR Doc. 2014-02682 Filed 2-4-14; 4:15 pm]

BILLING CODE 6355-01-P

DEPARTMENT OF DEFENSE

Department of the Army

Record of Decision for the Conversion of an Armor Brigade Combat Team to a Stryker Brigade Combat Team at Fort Carson, CO

AGENCY: Department of the Army, DOD.

ACTION: Notice; correction.

SUMMARY: The notice of a Record of Decision published in the **Federal Register** on January 30, 2014 (79 FR 4892) had an error for the email address listed under the **FOR FURTHER INFORMATION CONTACT** section. The email address is: USARMY.JBSA.AEC.MBX@mail.mil

FOR FURTHER INFORMATION CONTACT: Public Affairs Office, U.S. Army Environmental Command, at (210) 466-1590 or email USARMY.JBSA.AEC.MBX@mail.mil.

SUPPLEMENTARY INFORMATION: None.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2014-02533 Filed 2-5-14; 8:45 am]

BILLING CODE 3710-08-P

DEPARTMENT OF DEFENSE

Department of the Army; Army Corps of Engineers

Notice of Intent To Prepare a Supplemental Joint Draft Environmental Impact Statement/ Environmental Impact Report for the 2007 Folsom Dam Safety/Flood Damage Reduction Environmental Impact Statement/Environmental Impact Report

AGENCY: Department of the Army, U.S. Army Corps of Engineers; DOD.

ACTION: Notice of Intent.

SUMMARY: The U.S. Army Corps of Engineers, Sacramento District (USACE) intends to prepare a Supplemental Joint Draft Environmental Impact Statement/ Environmental Impact Report (EIS/EIR) for the 2007 Folsom Dam Safety/Flood Damage Reduction EIS/EIR (hereafter referred to as the Project). USACE will serve as lead National Environmental Policy Act (NEPA) agency and the Central Valley Flood Protection Board (CVFPB) will serve as lead agency for compliance with the California Environmental Quality Act (CEQA). The Project was originally authorized in the 2004 Energy and Water Development Appropriations Act (EWDAA) and was later reauthorized in the 2007 Water Resources Development Act (WRDA). The Project is authorized for 4 components: (1) Emergency spillway gate modifications, (2) raising the right and left wings of the main dam, Mormon Island Auxiliary Dam (MIAD), and the reservoir dikes (1–8) by 3.5 feet, (3) temperature control shutter automation and reconfiguration, and 4) downstream ecosystem restoration of Bushy Lake and Woodlake.

The Supplemental Draft Joint SEIS/ SEIR will address two components of the authorized project, specifically the emergency spillway gate modifications and the 3.5 foot raise. These flood damage reduction components of the Project enhance the utilization of the existing surcharge flood storage space (temporary water storage space utilized during rare flood events), as well as increase the surcharge flood storage capacity of the reservoir.

DATES: Written comments regarding the scope of the environmental analysis should be received by March 9th, 2014.

ADDRESSES: Written comments and suggestions concerning this project and requests to be included on the project mailing list may be submitted to Tyler Stalker, U.S. Army Corps of Engineers, Sacramento District, Attn: Public Affairs Office (CESPK-PAO), 1325 J Street, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Tyler Stalker via telephone at (916) 557-5107, email at Tyler.M.Stalker@usace.army.mil, or mail at (see **ADDRESSES**). Study information will also be posted periodically on the Internet at: <http://www.spk.usace.army.mil/Missions/CivilWorks/FolsomDamRaise.aspx>

SUPPLEMENTARY INFORMATION:

1. *Proposed Action.* The Corps is preparing a Supplemental Draft EIS/EIR to analyze Project alternatives to improve flood risk management, specifically by increasing the height of the right and left wings of the main dam, MIAD, and associated dikes by 3.5 feet and refining the three emergency spillway gates to withstand probable maximum flood conditions. The Project would improve flood risk management while also addressing certain dam safety issues associated with passing the probable maximum flood.

2. *Alternatives.*

Emergency Spillway Gate Modifications Alternatives

- **No Action:** Under the No Action Alternative, the Federal government would not implement the emergency spillway gate modifications and improved flood risk management benefits would not occur.

- **Replacement of Emergency Tainter Gates:** Complete replacement of the existing three emergency gates with newly fabricated, taller tainter gates and associated pier modifications.

- **Vertical Top Seal Bulkheads with Existing Emergency Tainter Gates:** Make use of existing strengthened gates (due to Reclamation's structural improvements) and incorporate a top seal bulkhead feature that allows the emergency spillway bays to hold back a higher flood pool.

- **Horizontal Top Seal Bulkheads with Existing Emergency Tainter Gates:** Adds a top seal feature similar to the "Vertical Top Seal Concept," but with a different configuration and includes removable steel bulkhead elements with the most significant segment mounted horizontally.

- **Refined Emergency Gate Replacement:** Complete replacement of the existing three emergency gates, with newly fabricated, larger tainter gates; the gate geometry for this concept would

not require extensive pier modifications such as those required for the original replacement concept.

Dam Raise Alternatives

- **No Action:** Under the No Action Alternative, the Federal government would not implement the 3.5 foot raise and improved flood risk management benefits would not occur.

- **Earthen Raise:** Raise the dams and dikes 3.5 feet through placement of fill derived from the auxiliary spillway excavation and/or from other borrow sources.

- **Concrete Floodwall:** Construct a 3.5-foot high reinforced concrete floodwall that would be placed near the waterside edge of the existing embankment crests.

- **Combination Earthen Raise and Concrete Floodwall:** Dams and dikes would be raised 3.5 feet by either an earthen raise or a concrete floodwall, depending on location and feasibility of either option.

- **Various Additional 3.5 Foot Raise Options:** As the 3.5 foot dam raise is further studied, various other options may be analyzed for technical feasibility.

3. *Scoping Process.*

a. Two public scoping meetings will be held to present an overview of the Dam Raise and the EIS/EIR process, and to afford all interested parties with an opportunity to provide comments regarding the scope of analysis and potential alternatives. The first public scoping meeting will be held at the Folsom Community Center, 52 Natoma Street, Folsom, CA on February 19th, 2014, from 5:00–7:00 p.m. The second public scoping meeting will be held at the Sacramento Library Galleria, 828 I Street, Sacramento, CA on February 24th, 2014, from 5:00–7:00 p.m.

b. Potentially significant issues to be analyzed in depth in the Supplemental Draft EIS/EIR will include: Hydrology, water quality, air quality, special status species, fisheries and aquatic resources, terrestrial vegetation and wildlife, soils, recreation, transportation, noise, visual resources, utilities, and cultural resources. The document will also evaluate cumulative effects.

c. USACE will consult with the U.S. Fish and Wildlife Service to comply with the Endangered Species Act and the Fish and Wildlife Coordination Act. USACE will consult with the State Historic Preservation Officer to comply with the National Historic Preservation Act.

d. A 45-day public review period will be provided for individuals, interested parties, and agencies to review and comment on the Draft EIS/EIR. All

interested parties are encouraged to respond to this notice and provide a current address if they wish to be notified of the Draft EIS/EIR circulation.

4. *Availability.* The Draft EIS/EIR is scheduled to be available for public review and comment in Spring 2015.

Dated: January 24, 2014.

Michael Farrell,

Colonel, U.S. Army, Commander and District Engineer.

[FR Doc. 2014-02530 Filed 2-5-14; 8:45 am]

BILLING CODE 3720-58-P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Wind and Water Power Technologies Office

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of External Merit Review Meeting for the Atmosphere to Electrons Initiative.

SUMMARY: The Atmosphere to Electrons (A2e) Initiative within the U.S. Department of Energy's (DOE) Office of Energy Efficiency and Renewable Energy intends to hold an External Merit Review in Washington, DC, on February 4–5, 2014. The External Review Panel will review the current program planning and provide suggestion on the formulation of A2e strategy, goals and implementation approaches. The review panel will also assess the initiative's potential impact on the wind power industry and identify additional research initiatives and resources that might be required in the future.

DATES: DOE will hold the External Merit Review on Tuesday, February 4, from 8:30 a.m.–5:00 p.m., and Wednesday, February 5, from 8:30 a.m.–12:00 p.m.

ADDRESSES: The public meeting will be held at the Washington Marriott at Metro Center, 775 12th Street NW., Washington, DC, 20005.

You may submit comments, identified by any of the following methods:

- **Email:** [samantha.rooney@nrel.gov]. Include "A2e External Merit Review" in the subject line of the message.

- **Postal Mail:** [Samantha Rooney, 15013 Denver West Parkway, MS 3811, Golden CO, 80401] Due to the potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, DOE encourages respondents to submit comments electronically to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT:

Michael Derby, EERE, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. Telephone: (202) 586-6830. Email: michael.derby@ee.doe.gov.

SUPPLEMENTARY INFORMATION:**Background**

Atmosphere to Electrons (A2e) is a multi-year Department of Energy (DOE) research initiative targeting significant reductions in the cost of wind energy through an improved understanding of the complex physics of the wind resource and interaction with wind farms. Better insight into the flow physics and resource forecasting has the potential to increase wind farm energy capture, reduce annual operational costs, and improve project financing. Achieving these objectives requires a diverse set of expertise and significant R&D resources. The Wind and Water Power Technologies Office (WWPTO) has selected subject matter experts from its national laboratories at NREL, SNL, and PNNL to assist in the integrated program planning for the initiative based on DOE investments in world class computational and testing facilities as well as core expertise in topics critical to the success of the A2e initiative available at these laboratories. These national laboratories are engaging the wider wind energy stakeholder community (e.g., industry, other national labs, other government agencies, universities, international partners) to develop a multi-year strategic plan that addresses wind plant performance under the A2e initiative.

Public Participation

The event is open to the public based upon space availability. DOE will also accept public comments as described above for purposes of developing the A2e portfolio, but will not respond individually to comments received.

Participants should limit information and comments to those based on personal experience, individual advice, information, or facts regarding this topic. It is not the object of this session to obtain any group position or consensus from the meeting participants. To most effectively use the limited time, please refrain from passing judgment on another participant's recommendations or advice, and instead, concentrate on your individual experiences.

Following the meeting a summary will be compiled by DOE and posted for public comment. For those interested in providing additional public comment, the summary will be posted at wind.energy.gov.

Information on Services for Individuals With Disabilities

Individuals requiring special accommodations at the meeting, please contact Samantha Rooney no later than the close of business on February 3, 2014.

Issued in Washington, DC, on January 30, 2014.

Jose Zayas,

Director, Wind and Water Power Technologies Office, U.S. Department of Energy.

[FR Doc. 2014-02309 Filed 2-5-14; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. IC14-3-000]

Commission Information Collection Activities (Ferc-549d); Comment Request

AGENCY: Federal Energy Regulatory Commission.

ACTION: Comment request.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(a)(1)(D), the Federal Energy Regulatory Commission (Commission or FERC) is submitting the information collection FERC-549D (Quarterly Transportation and Storage Report for Intrastate Natural Gas and Hinshaw Pipelines) to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission issued a Notice in the **Federal Register** (78 FR 69843, 11/21/2013) requesting public comments. FERC received no comments on the FERC-549D and is making this notation in its submittal to OMB.

DATES: Comments on the collection of information are due by March 10, 2014.

ADDRESSES: Comments filed with OMB, identified by the OMB Control No. 1902-0253, should be sent via email to the Office of Information and Regulatory Affairs: oira_submission@omb.gov. Attention: Federal Energy Regulatory Commission Desk Officer. The Desk Officer may also be reached via telephone at 202-395-4718.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission, identified by the Docket

No. IC14-3-000, by either of the following methods:

- *eFiling at Commission's Web site:* <http://www.ferc.gov/docs-filing/efiling.asp>.

- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov/help/submission-guide.asp>. For user assistance contact FERC Online Support by email at ferconlinesupport@ferc.gov, or by phone at: (866) 208-3676 (toll-free), or (202) 502-8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at <http://www.ferc.gov/docs-filing/docs-filing.asp>.

FOR FURTHER INFORMATION CONTACT:

Ellen Brown may be reached by email at DataClearance@FERC.gov, by telephone at (202) 502-8663, and by fax at (202) 273-0873.

SUPPLEMENTARY INFORMATION:

Title: Quarterly Transportation and Storage Report for Intrastate Natural Gas and Hinshaw Pipelines.

OMB Control No.: 1902-0253.

Type of Request: Three-year extension of the FERC-549D information collection requirements with no changes to the reporting requirements.

Abstract: The reporting requirements under FERC-549D are required to carry out the Commission's policies in accordance with the general authority in Sections 1(c) of the Natural Gas Act (NGA)¹ and Sections 311 of the Natural Gas Policy Act of 1978 (NGPA).² This collection promotes transparency by collecting and making available intrastate and Hinshaw pipeline transactional information. The Commission collects the data upon a standardized form with all requirements outlined in 18 CFR 284.126.

The FERC Form 549D collects the following information:

- Full legal name and identification number of the shipper receiving service;
- Type of service performed for each transaction;
- The rate charged under each transaction;
- The primary receipt and delivery points for the transaction, specifying the rate schedule/name of service and docket were approved;

¹ 15 U.S.C. 717-817-w.

² 15 U.S.C. 3301-3432.

- The quantity of natural gas the shipper is entitled to transport, store, and deliver for each transaction;
- The term of the transaction, specifying the beginning and ending month and year of current agreement;
- Total volumes transported, stored, injected or withdrawn for the shipper; and

- Annual revenues received for each shipper, excluding revenues from storage services.
- Filers submit the Form-549D on a quarterly basis.
Access to the FERC-549D Information Collection Materials: A copy of the current form and related materials can be found at <http://www.ferc.gov/docs-filing/forms.asp#549d>, but will not be

included in the **Federal Register**. The Commission will not publish these materials in the **Federal Register**.
Type of Respondents: Intrastate natural gas and Hinshaw pipelines.
*Estimate of Annual Burden:*³ The Commission estimates the total Public Reporting. Burden for this information collection as:

FERC-549D—QUARTERLY TRANSPORTATION AND STORAGE REPORT FOR INTRASTATE NATURAL GAS AND HINSHAW PIPELINES

Format of pipelines' filing	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A)×(B)=(C)	Average burden hours per response (D)	Estimated total annual burden (C)×(D)
Implementation Burden					
PDF filings	3	1	3	68	204
XML ⁴ filings	2	1	2	104	208
Ongoing Burden					
PDF filings	76	4	304	12.5	3,800
XML filings	33	4	132	10	1,320
Total	⁵ 109	.....	109	.....	5,532

The total estimated annual cost burden to respondents is \$436,254 [5,532 hours \$78.86/hour⁶ = \$436,254].

Comments: Comments are invited on:
 (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
 (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used;
 (3) ways to enhance the quality, utility and clarity of the information collection; and
 (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: January 30, 2014.

Kimberly D. Bose,
Secretary.

[FR Doc. 2014-02481 Filed 2-5-14; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL14-21-000]

Southwest Power Pool, Inc. v. Midcontinent Independent System Operator, Inc.; Notice of Complaint

Take notice that on January 28, 2014, pursuant to sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824(e) and 825(e) and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, Southwest Power Pool, Inc. (Complainant) filed a formal complaint against Midcontinent Independent System Operator, Inc. (Respondent) alleging that, the Respondent is violating (1) the Joint Operating Agreement (JOA) between the Complainant and Respondent and (2) Complainant's Open Access Transmission Tariff (Tariff), requiring the Respondent to compensate the Complainant for use of the Complainant's transmission system in accordance with the Complainant's tariff. Alternatively, Complainant

requests that the Commission find that the JOA is no longer just, reasonable, and not unduly discriminatory to the extent it does not provide a mechanism by which the Complaint may assess charges for Respondent's use of the Complainant transmission system.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and

³ Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information

collection burden, reference 5 Code of Federal Regulations 1320.3.

⁴ Extensible Markup Language (XML).

⁵ This figure does not include the five respondents for the "Implementation Burden".

⁶ This cost represents the average cost of four career fields: Legal (\$128.02/hour), Accountants (\$48.58/hour), Management Analyst (\$56.27/hour), and Computer and Information (\$82.67/hour); this cost also includes benefit costs within the hourly estimates.

interventions in lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, DC. There is an “eSubscription” link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on February 18, 2014.

Dated: January 30, 2014.

Kimberly D. Bose,
Secretary.

[FR Doc. 2014-02486 Filed 2-5-14; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP14-173-000]

Discovery Gas Transmission LLC; Notice of Technical Conference

Take notice that a technical conference will be held on Thursday, February 27, 2014, at 10:00 a.m., in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The purpose of the technical conference is to examine the issues raised with regard to the November 15, 2013 filing made by Discovery Gas Transmission LLC (Discovery) wherein Discovery proposed to increase its Hurricane Mitigation and Reliability Enhancement Surcharge.¹

Commission Staff and interested persons will have the opportunity to discuss all of the issues raised by Discovery’s filing. Discovery should be prepared to address all the concerns raised in the protests.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to accessibility@ferc.gov or call toll free

(866) 208-3372 (voice) or 202-502-8659 (TTY), or send a fax to 202-208-2106 with the required accommodations.

All interested persons are permitted to attend. For further information please contact Anna Fernandez at (202) 502-6682 or email Anna.Fernandez@ferc.gov.

Dated: January 30, 2014.

Kimberly D. Bose,
Secretary.

[FR Doc. 2014-02487 Filed 2-5-14; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12704-007]

Maine Tidal Power; Notice of Preliminary Permit Application Accepted For Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On December 2, 2013, Maine Tidal Power filed an application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Half Moon Cove Tidal Power Project (Half Moon Cove Project) to be located in Cobscook and Passamaquoddy Bay, near the cities of Eastport and Perry, Washington County, Maine. 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 1,200-foot-long tidal wall with a crest elevation of approximately 27 feet above mean sea level (msl); (2) a new 60-foot-wide, 20-foot-high filling and emptying gate; (3) the 850-acre Half Moon Cove with a surface elevation of 13.0 feet above msl; (4) a new 60-foot-wide, 125-foot-long gated powerhouse with four turbine generating units with a total capacity of 21.5 megawatts; (5) a new 34.5 kilovolt, 7.1-mile-long transmission line extending from the project powerhouse to an existing substation owned by Bangor Hydroelectric Company located in the town of Pembroke, ME (the point of interconnection with the distribution grid); and (6) appurtenant facilities. The estimated annual generation of the Half

Moon Cove Project would be 30,000 megawatt-hours.

Applicant Contact: Mr. Normand Laberge, Maine Tidal Power, 46 Place Cove Road, Trescott, Maine 04652; phone: (207) 733-5513.

FERC Contact: Tom Dean; phone: (202) 502-6041; or thomas.dean@ferc.gov.

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-12704-007.

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-12704) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: January 30, 2014.

Kimberly D. Bose,
Secretary.

[FR Doc. 2014-02483 Filed 2-5-14; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14556-000]

Gridflex Energy, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On September 12, 2013, the Gridflex Energy, LLC, filed an application for a

¹ See *Discovery Gas Transmission LLC*, 145 FERC ¶ 61,297 (2013).

preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Rose Creek Pumped Storage Project (Rose Creek Project or project) to be located on the Rose Creek Reservoir, near the town of Hawthorne, Mineral County, Nevada. 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 an expansion of the existing Rose Creek Reservoir as upper reservoir and a new lower reservoir, joined by approximately 12,300 feet of conduit. The project would also consist of the following: (1) A 100-foot-high by 1,720-foot-wide roller-compacted concrete or concrete-face rock-fill expansion of the existing Rose Creek Dam; (2) a 40-foot-high by 4,100-foot-wide concrete-face rock-fill or earthen lower reservoir ring embankment; (3) an expanded upper reservoir with a surface area of 35 acres and a total/usable storage capacity of 2,112 acre-feet at normal maximum operation elevation of 6,390 feet msl; (4) a lower reservoir with a surface area of 21 acres and a total/usable storage capacity of 1,056 acre-feet at normal maximum operation elevation of 4,075 feet msl; (5) a 2,200-foot-long, 9.6-foot-diameter concrete-lined low pressure headrace; (6) a 9,600-foot-long, 9.6-foot-diameter concrete and steel-lined high pressure headrace; (7) a 700-foot-long, 11.6-foot-diameter concrete-lined tailrace; (8) a 200-foot-long by 60-foot-wide by 120-foot-high powerhouse located at an elevation of approximately 3,930-foot-high and at a depth of 150 feet below ground level; (9) a new, 20-mile-long, 230-kilovolt (kV) transmission line connected to the 230-kV Dixie Valley Oxbow transmission line or a new, 15-mile-long, 230-kV transmission line connected to Sierra Pacific Power's Thorne substation; and (10) appurtenant facilities. The estimated annual generation of the Rose Creek Project would be 547.5 gigawatt-hours.

Applicant Contact: Matthew Shapiro, CEO, Gridflex Energy, LLC, 1210 W. Franklin St., Ste. 2, Boise, ID 83702; phone: (208) 246-9925.

FERC Contact: Tim Welch; phone: (202) 502-8760.

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-14556-000.

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-14556) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: January 30, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014-02484 Filed 2-5-14; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12680-005]

ORPC Maine, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 2, 2014, ORPC Maine, 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 Western Passage Tidal Energy Project (project) to be located in Western Passage, in the northern Atlantic Ocean, in the vicinity of the City of Eastport, Washington County, Maine. 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) 10 double OCGen® TGU hydrokinetic tidal devices each consisting of a 500-kilowatt turbine generator unit for a combined capacity of 5,000 kilowatts; (2) an anchoring support structure; (3) a mooring system; (4) a 3,700 to 4,200-foot-long submersible cable connecting the turbine-generating units of each device to a shore station; (5) a 2,200-foot-long, 12.7-kilovolt transmission line connecting the shore station to an existing distribution line; and (6) appurtenant facilities. The estimated average annual generation of the Western Passage Tidal Energy Project would be 2.6 to 3.53 gigawatt-hours.

Applicant Contact: Christopher R. Sauer, President and CEO, Ocean Renewable Power Company, LLC, 120 Exchange Street, Suite 508, Portland, Maine 04101; phone: (207) 772-7707.

FERC Contact: Michael Watts; phone: (202) 502-6123.

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-12680-005.

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-12680) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: January 30, 2014.

Kimberly D. Bose,
Secretary.

[FR Doc. 2014-02482 Filed 2-5-14; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP14-58-000]

Cadeville Gas Storage LLC; Notice of Request Under Blanket Authorization

Take notice that on January 29, 2014 Cadeville Gas Storage LLC (Cadeville), Three Riverway, Suite 1350, Houston, Texas 77056, filed in the above Docket, a prior notice request pursuant to section 157.213 of the Commission's regulations under the Natural Gas Act (NGA) and Cadeville's authorization in Docket No. CP10-16-000, for authorization to reclassify the working and base gas capacities in the storage reservoir related to Cadeville's approved natural gas storage facility in Ouachita Parish, Louisiana, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or TTY, contact (202) 502-8659.

Any questions concerning this application may be directed to Kevin Holder, Sr. Vice President and Chief Commercial Officer, Cadeville Gas Storage LLC, Three Riverway, Suite 1350, Houston, Texas 77056, at (713) 350-2500.

Specifically, Cadeville propose to increase the working gas capacity from 16.4 Bcf to 17 Bcf, while decreasing the base gas capacity from 5.4 Bcf to 4.8 Bcf. Cadeville states that its proposal does not change the total capacity of the project of approximately 21.8 Bcf or any of the other approved operating parameters, and no new facilities are required for this activity.

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205)

file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (www.ferc.gov) under the "e-Filing" link.

Dated: January 30, 2014.

Kimberly D. Bose,
Secretary.

[FR Doc. 2014-02485 Filed 2-5-14; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2006-0947; FRL-9906-29-OAR]

Proposed Information Collection Request; Comment Request; Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), "Information Collection Request Renewal for the Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone" (EPA ICR Number 2391.03, OMB Control No. 2060-0667) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the Cross-State Air Pollution Rule ICR, which is currently approved through July 31, 2014. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before April 7, 2014.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-

OAR-2009-0491 online using www.regulations.gov (our preferred method), by email to a-and-r-docket@epamail.epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Karen VanSickle, Clean Air Markets Division, Office of Air and Radiation, (6204J), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343-9220; fax number: (202) 343-2361; email address: vansickle.karen@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA

will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: This is a proposed extension of an ICR that has not been implemented because the underlying rule (known as the Cross-State Air Pollution Rule or Transport Rule) was first stayed before the scheduled start of compliance and was then vacated by the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit's decision vacating the rule is currently under review by the U.S. Supreme Court (*EPA v. EME Homer City Generation, L.P.*, Nos. 12–1182 and 12–1183 (U.S. argued Dec. 10, 2013)). EPA is proceeding with renewal so that the ICR is in place should the Supreme Court reverse the lower court decision.

On July 6, 2011 the U.S. Environmental Protection Agency (EPA) finalized Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Cross-State Air Pollution Rule or CSAPR). CSAPR would supersede the Clean Air Interstate Rule (CAIR), which pursuant to a 2008 D.C. Circuit decision is being implemented pending the promulgation of a replacement rule. CSAPR includes certain new reporting requirements beyond the CAIR reporting requirements, and combines these new requirements with existing requirements from the Emission Reporting Requirements for Ozone State Implementation Plan (SIP) Revisions Relating to Statewide Budgets for NO_x Emissions to Reduce Regional Transport of Ozone (NO_x SIP Call) and the Acid Rain Program (ARP) under Title IV of the Clean Air Act Amendments of 1990. Each of these existing requirements has an approved ICR in place. The current ICRs are: CAIR (EPA ICR Number 2152.05/OMB Control Number 2060–0570), NO_x SIP Call (EPA ICR Number 1857.06/OMB Control Number 2060–0445) and ARP (EPA ICR Number 1633.16/OMB Control Number 2060–0258). This ICR and the accompanying draft supporting statement are being submitted to account for the incremental burden associated with CSAPR as it was to supersede CAIR in 2012. As such, the draft supporting statement references the burden analysis included in EPA ICR Numbers 2152.04, 1857.05, and 1633.15, and estimates the change in burden resulting from CSAPR beyond the scope of the existing ICRs for the NO_x SIP Call requirements and the Acid Rain Program. The burden included in this ICR includes start-up and capital costs for units newly affected by an emissions trading program and/or whose reporting status

has changed (e.g., from ozone season only to annual reporting), annualized capital costs for units previously subject to the NO_x SIP Call requirements or CAIR, and the incremental operation and maintenance costs for all CSAPR-affected units. The burden and costs accounted for under the CAIR ICR (EPA ICR Number 2152.04) would no longer occur following implementation of the CSAPR ICR. Instead, all those burdens and costs would be accounted for under this ICR as part of CSAPR implementation.

In addition to the July 6, 2011 final CSAPR, on December 15, 2011 EPA finalized a supplemental rulemaking that added five additional states to the CSAPR ozone season NO_x program: Iowa, Michigan, Missouri, Oklahoma, and Wisconsin. EPA has included in the CSAPR ICR the costs/burdens associated with CSAPR ozone season-affected units for these five additional states. Further, at the time when the draft supporting statement for this ICR was prepared, EPA had also proposed to add Kansas to the CSAPR ozone season program, so the costs/burdens associated with Kansas facilities, like the facilities in the other five states that were at that time merely proposed to be added to the program, were included to allow for a full accounting of the CSAPR program at maturity. See Appendix A of the draft supporting statement for a separate breakout of the cost/burdens associated with these facilities. The final supplemental rulemaking did not add Kansas to the CSAPR ozone season NO_x program, and the costs/burdens associated with Kansas will therefore be removed from this ICR before finalization. In the event that Kansas should be added to the CSAPR ozone season NO_x program in the future, EPA will amend this ICR accordingly.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are those which are subject to the Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone.

Respondent's obligation to respond: mandatory (Sections 110(a) and 301(a) of the Clean Air Act).

Estimated number of respondents: EPA estimates that there are 17,398 respondents subject to the Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone that will conduct monitoring in accordance with Part 75.

Frequency of response: yearly, quarterly, occasionally.

Total estimated burden: 185,201 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$26,228,962 (per year), includes \$13,150,678 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no increase in hours in the total estimated respondent burden compared with the ICR currently approved by OMB.

Dated: January 29, 2014.

Reid P. Harvey,

Director, Clean Air Markets Division.

[FR Doc. 2014–02606 Filed 2–5–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2005–0161; FRL–9906–21–OAR]

Proposed Information Collection Request; Comment Request; Production Outlook Reports for Un-Registered Renewable Fuels Producers

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), “Production Outlook Reports for Un-Registered Renewable Fuels Producers” (EPA ICR No. 2409.02, OMB Control No. 2060–0640 to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through May 31, 2014. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before April 7, 2014.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2005–0161, online using www.regulations.gov (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential

Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Geanetta Heard, Fuels Compliance Center, 6406J, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 202-343-9017; fax number: 202-565-2085; email address: heard.geanetta@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: With this information collection request (ICR), we are seeking permission to accept production outlook reports from domestic or foreign renewable fuel producers who are not currently regulated parties under the RFS2 program. The respondents for this ICR are not regulated parties under the RFS2 program and are therefore, not required to register or report under the RFS2 regulations. Submission of

production outlook information to EPA under this ICR will be on a *voluntary* basis.

The information that respondents provide will allow EPA to more accurately project cellulosic biofuel volumes for the following calendar year, and these volume projections will form the basis of the percentage standards EPA sets under the RFS2 program. Without information from these respondents, EPA's volume projections are more likely to fall below actual projection volumes. Under such circumstances, actual supply for cellulosic biofuel will exceed the demand created by the standards EPA sets, and the value of cellulosic biofuel Renewable Identification Numbers (RINs) will fall. RINs are marketable credits that correspond to a given volume of renewable fuel. Since RIN market price directly affects the economic viability of cellulosic biofuel production, low RIN prices could present economic difficulties to producers. Thus, it is in the interests of these respondents to provide this information to EPA, as doing so could ensure that the market price of RINs appropriately reflects the value of their cellulosic biofuel. This information also serves a more general program purpose, because it will assist EPA in setting the annual RFS2 standards more accurately for biomass-based diesel, advanced biofuel, and total renewable fuel. Compiling this information may also assist respondents with their planning and compliance activities. We believe that many parties would wish to submit this information in order to receive better assistance in understanding and complying with the RFS2 regulations.

Form Numbers: 5900-283 (RFS2 0900 Production Outlook Report).

Respondents/affected entities: 35.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 35 (total).

Frequency of response: Yearly.

Total estimated burden: 140 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$16,100 (per year), includes no annualized capital or operation & maintenance costs.

Changes in Estimates: There is no increase of hours in the total estimated respondent burden compared with the ICR currently approved by OMB. The respondent universe and responses also remained the same in this collection. There was an increase in cost to the industry of \$6,160 per year due to better numbers used to calculate the industry burden and to account for inflation.

Dated: January 28, 2014.

Byron Bunker,

Director, Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation.

[FR Doc. 2014-02571 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2007-0482; FRL 9906-28-OAR]

Proposed Information Collection Request; Comment Request; Information Collection Activities Associated With SmartWay Transport Partnership

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), "Information Collection Activities Associated with SmartWay Transport Partnership" (EPA ICR No. 2265.02, OMB Control No. 2060-0663 to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through May 31, 2014. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before April 7, 2014.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-OAR-2007-0482 online using www.regulations.gov (our preferred method), by email to smartway_transport@epa.gov, or by mail to EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Patty Klavon, U.S. Environmental

Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734-214-4476; Fax: 734-214-4052; email address: klavon.patty@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The EPA's Office of Air and Radiation (OAR) developed the SmartWay Transport Partnership ("SmartWay") under directives outlined in Subtitle D of the Energy Policy Act of 2005 which calls on EPA to assess the energy and air quality impacts of activities within the freight industry. These activities include long-duration truck idling, the development and promotion of strategies for reducing idling, fuel consumption, and negative air quality effects. SmartWay's objectives also are consistent with the Federal Technology Transfer Act and other laws that support collaborative

partnerships between government and industry.

SmartWay is open to organizations that own, operate, or contract with fleet operations, including truck and multi-modal carriers, logistics companies, and shippers. Organizations that do not operate fleets, but that are working to strengthen the freight industry, such as industry trade associations, state and local transportation agencies and environmental groups, also may join as SmartWay Affiliates. All organizations that join SmartWay are asked to provide EPA with information as part of their SmartWay registration to annually benchmark their transportation-related operations and improve the environmental performance of their freight activities.

A company joins SmartWay when it completes and submits a SmartWay Excel-based Partnership tool ("reporting tool") to EPA. The data outputs from the submitted tool are used by Partners and SmartWay in several ways. First, the data provides confirmation that SmartWay Partners are meeting established objectives as in their Partnership Agreement. The reporting tool outputs enable EPA to assist SmartWay Partners in adjusting their commitments, as appropriate, and to update them with environmental performance and technology information that empower them to improve their efficiency. This information also improves EPA's knowledge and understanding of the environmental and energy impacts associated with goods movement, and the effectiveness of both proven and emerging strategies to lessen those impacts.

In addition to requesting annual transportation-related data, EPA may ask its SmartWay Partners for other kinds of information which could include opinions and test data on the effectiveness of new and emerging technology applications, sales volumes associated with SmartWay-recommended vehicle equipment and technologies, the reach and value of partnering with EPA through the SmartWay Partnership, and awareness of the SmartWay brand. In some instances, EPA might query other freight industry representatives (not just SmartWay Partners), including trade and professional associations, nonprofit environmental groups, energy, and community organizations, and universities, and a small sampling of the general public.

Form Numbers: None.

Respondents/Affected entities: Entities potentially affected by this action include private and public

organizations that join the SmartWay Transport Partnership; freight industry representatives who engage in activities related to the SmartWay Partnership; and representative samplings of consumers in the general public. These entities may be affected by EPA efforts to assess the effectiveness and value of the SmartWay program, awareness of the SmartWay brand, and ideas for improving and developing SmartWay.

Respondent's obligation to respond: Voluntary.

Estimated number of Program respondents: 3,961.

Frequency of response: The information collections described in this ICR must be completed in order for an organization to register as or continue its status as a SmartWay Partner, to become a SmartWay Affiliate, to use the SmartWay logo on an EPA-designated tractor or trailer, or to be considered for a SmartWay Excellence Award.

Total estimated burden: The annual burden for this collection of information that all Respondent Partners incur is estimated to average 11,504 hours with a projected annual aggregate cost of \$628,477. The annual burden for this collection of information that federal agency respondents incur is estimated to average 4,332 hours with a projected annual aggregate cost of \$160,292.

This ICR estimates that approximately 2,901 Respondent partners will incur burden associated with SmartWay in the first year, with a growth of 314 Partners per year projected into the future. The estimated average burden time per Respondent is 2.90 hours annually. This is an average across all SmartWay Partners, regardless of whether they are Affiliates, shippers, carriers, or logistics companies. The average also includes 150 consumer and industry respondents who spend far less time, providing the SmartWay program with basic information on their awareness of the program. Among Respondent Partners, the burden hours are typically higher for larger companies with more complex fleets, than for smaller companies.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of

information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Total Estimated Cost: The total annual cost to all Respondent Partners is \$628,477. The total annual cost to federal agency respondents is \$160,292.

Changes in estimates: There is an increase of 3,203 hours in the total estimated Respondent Partner burden compared with the ICR currently approved by OMB. This increase reflects the following adjustments and program changes:

(1) Adjustments associated with increased interest in SmartWay, and thus, an increase in new annual Respondents and applications for the SmartWay Excellence Award, as well as robust Program retention practices, leading to increased number of Respondent partners reporting annually;

(2) Increased burden associated with the SmartWay Tractor & Trailer program; and,

(3) Reduced burden due to EPA's streamlined Partnership Annual Agreement process.

Dated: January 29, 2014.

Karl Simon,

*Director, Transportation Climate Division,
Office of Transportation and Air Quality.*

[FR Doc. 2014-02575 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OECA-2013-0325; FRL-9906-26-OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Benzene Emission From Benzene Storage Vessels and Coke By-Product Recovery Plants (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "NESHAP for Benzene Emission From Benzene Storage Vessels and Coke By-Product Recovery Plants (40 CFR part 61, subparts L and Y) (Renewal)" (EPA ICR No. 1080.14, OMB Control No. 2060-0185), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through April 30, 2014. Public comments were

previously requested via the **Federal Register** (78 *FR* 35023) on June 11, 2013 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before March 10, 2014.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-HQ-OECA-2013-0325, to: (1) EPA online using www.regulations.gov (our preferred method), or by email to docket.oeca@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to oira_submission@omb.eop.gov. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Learia Williams, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564-4113; fax number: (202) 564-0050; email address: williams.learia@epa.gov.

SUPPLEMENTARY INFORMATION:

Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit: <http://www.epa.gov/dockets>.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 61, subpart A, and to the provisions at 40 CFR part 61, subparts L and Y. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance

tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required quarterly or semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Owners or operators of benzene storage vessels and coke by-product recovery plants.

Respondent's obligation to respond: Mandatory (40 CFR part 61, subparts L and Y).

Estimated number of respondents: 21 (total).

Frequency of response: Semiannually and occasionally.

Total estimated burden: 3,193 hours (per year). "Burden" is defined at 5 CFR 1320.3(b).

Total estimated cost: \$312,347 (per year), which also includes no annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase in burden from the most-recently approved ICR. This increase is not due to any program changes; it is the result of adding the labor burden associated with subpart Y. The most-recently approved ICR only reflected the burden associated with subpart L, while this ICR reflects the total burden associated with subparts L and Y.

For subpart L, note that the labor burden between this ICR and the most-recently approved ICR is virtually identical (there is a one-hour increase, but it is due to differences in rounding). There is an increase in Respondent and Agency burden costs, however. This increase is due to the use of updated labor rates. This ICR references labor rates from the Bureau of Labor Statistics to calculate respondent burden costs and references labor rates from OPM to calculate Agency burden costs.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2014-02537 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2013-0146; FRL-9906-22-OAR]

Release of Draft Integrated Review Plan for the Primary National Ambient Air Quality Standards for Oxides of Nitrogen

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability and public comment period.

SUMMARY: On or about February 10, 2014, the Environmental Protection Agency (EPA) is making available for public review the draft titled, *Integrated Review Plan for the Primary National Ambient Air Quality Standards for Nitrogen Dioxide* (draft IRP). This document contains the plans for the review of the air quality criteria for oxides of nitrogen and national ambient air quality standards (NAAQS) for nitrogen dioxide (NO₂). The primary NO₂ NAAQS provide for the protection of public health from exposure to oxides of nitrogen in ambient air.

DATES: Comments should be submitted on or before March 13, 2014.

ADDRESSES: This document will be available primarily via the Internet at the following Web site: http://www.epa.gov/ttn/naaqs/standards/nox/s_nox_index.html.

Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2013-0146, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *Email*: a-and-r-Docket@epa.gov.
- *Fax*: 202-566-9744.
- *Mail*: Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery*: 1301 Constitution Ave. NW., Room 3334, Washington, DC. EPA Docket Center, 1301 Constitution Ave. NW., Room 3334, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2013-0146. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless

the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov (or email). The www.regulations.gov Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, William Jefferson Clinton Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202-566-1744, and the telephone number for the Air and Radiation Docket and Information Center is 202-566-1742.

FOR FURTHER INFORMATION CONTACT: Ms. Beth Hassett-Sipple, Office of Air Quality Planning and Standards (Mail Code C504-06), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: 919-541-4605; fax number: 919-541-

0237; email address: hassett-sipple.beth@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What should I consider as I prepare my comments for the EPA?

1. *Submitting CBI.* Do not submit this information to the EPA through www.regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Information Specific to This Document

Two sections of the Clean Air Act (CAA) govern the establishment and revision of the NAAQS. Section 108 (42 U.S.C. section 7408) directs the Administrator to identify and list certain air pollutants and then to issue air quality criteria for those pollutants.

The Administrator is to list those air pollutants that in her “judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;” “the presence of which in the ambient air results from numerous or diverse mobile or stationary sources;” and “for which . . . [the Administrator] plans to issue air quality criteria . . .” Air quality criteria are intended to “accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air . . .” 42 U.S.C. 7408(b). Under section 109 (42 U.S.C. 7409), the EPA establishes primary (health-based) and secondary (welfare-based) NAAQS for pollutants for which air quality criteria are issued. Section 109(d) requires periodic review and, if appropriate, revision of existing air quality criteria. The EPA is also required to periodically review and, if appropriate, revise the NAAQS based on the revised criteria. Section 109(d)(2) requires that an independent scientific review committee “shall complete a review of the criteria . . . and the national primary and secondary ambient air quality standards . . . and shall recommend to the Administrator any new . . . standards and revisions of existing criteria and standards as may be appropriate. . . .” Since the early 1980’s, this independent review function has been performed by the Clean Air Scientific Advisory Committee (CASAC).

Presently, the EPA is reviewing the primary NAAQS for NO₂.¹ The draft document, announced today, has been developed as part of the planning phase for the review. This phase began with a science policy workshop to identify issues and questions to frame the review.² Drawing from the workshop discussions, the draft IRP has been prepared jointly by EPA’s National Center for Environmental Assessment, within the Office of Research and Development, and EPA’s Office of Air Quality Planning and Standards, within the Office of Air and Radiation.³ The

¹ The EPA’s call for information for this review was issued on February 10, 2012 (77 FR 7149).

² The EPA held a workshop titled “Kickoff Workshop to Inform EPA’s Review of the Primary NO₂ NAAQS” on February 29 to March 1, 2012 (77 FR 7149).

³ Prior to development of this draft IRP, EPA’s National Center for Environmental Assessment prepared a “Draft Plan for Development of the Integrated Science Assessment for Nitrogen Oxides—Health Criteria” for consultation with CASAC (78 FR 26026; 78 FR 27234). Comments received during that consultation have been considered in preparation of the chapter on the

draft IRP presents the current plan and specifies the schedule for the entire review, the process for conducting the review, and the key policy-relevant science issues that will guide the review. This document will be available on the EPA’s Technology Transfer Network (TTN) Web site at http://www.epa.gov/ttn/naaqs/standards/nox/s_nox_index.html http://www.epa.gov/ttn/naaqs/standards/pb/s_pb_index.html, accessible in the “Documents from Current Review” section under “Planning Documents.”

The draft IRP is being made available for CASAC review and for public comment. Comments should be submitted to the docket, as described above, by March 13, 2014. Information about the CASAC review meeting on this planning document, including the dates and location, will be published as a separate notice in the **Federal Register**. The final IRP will be prepared after considering comments from CASAC and the public. This draft document does not represent and should not be construed to represent any final EPA policy, viewpoint or determination.

Dated: January 28, 2014.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2014-02607 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2011-0037; FRL-9904-18]

Final EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides Within Indian Country; Notice of Implementation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In the **Federal Register** of May 18, 2011, EPA issued a notice of intent to implement a Federal program to certify applicators of restricted use pesticides (RUPs) in Indian country where no other certification plan applies. The program will be administered by EPA. In that notice, EPA solicited comments from the public on EPA’s Proposed Federal Plan for Certifying Applicators of Restricted Use Pesticides within Indian Country (EPA plan). EPA received comments from four commenters. EPA also issued a

development of the integrated science assessment in the draft IRP.

notice of intent to implement a similar plan in EPA Region 8, the Proposed Federal Plan for Certification of Applicators of Restricted Use Pesticides Within EPA Region 8 Indian Country (EPA Region 8 plan) in the **Federal Register** of April 20, 2011. EPA received comments from seven commenters on the EPA Region 8 plan. A complete summary of the comments and the Agency responses is available in the docket. EPA has decided to merge these plans into one EPA plan and hereby implements the final EPA plan.

Applicators must hold the appropriate Federal certification under the final EPA plan to apply RUPs in Indian country where no other EPA-approved or EPA-implemented certification plan applies.

FOR FURTHER INFORMATION CONTACT: Nicole Zinn, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (703) 308-7076; email address: zinn.nicole@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This notice applies to individuals and businesses who are seeking certification to apply RUPs as defined by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in Indian country¹ where no EPA-approved or EPA-implemented plan applies. This action may, however, be of interest to those involved in agriculture and anyone involved with the distribution and application of pesticides for agricultural purposes. Others involved with pesticides and/or pest control applications in a non-agricultural setting may also be affected. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2011-0037, is available at <http://www.regulations.gov> or at the

¹ Indian country is defined at 18 U.S.C. 1151. Consistent with the statutory definition of Indian country, as well as Federal case law interpreting this statutory language, EPA treats lands held by the Federal Government in trust for Indian Tribes that exist outside of formal reservations as informal reservations, and thus as Indian country.

Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>. The final EPA plan and application form, EPA Form 7100-01, to apply for Federal certification under this final EPA plan can be found in the docket and at <http://www2.epa.gov/pesticide-applicator-certification-indian-country>.

II. What action is the agency taking?

EPA is implementing a Federal program to certify applicators of RUPs in Indian country where no other EPA-approved or EPA-implemented plan applies. This final EPA plan describes the process by which EPA will implement a program for the certification of applicators of RUPs in Indian country based upon the certification requirements enumerated at 40 CFR part 171. The entire final EPA plan is included in the docket.

III. Background

Under FIFRA, 7 U.S.C. 136 *et seq.*, the EPA Administrator has the authority to classify all registered pesticide uses as either "restricted use" or "general use." Under FIFRA, pesticides (or the particular use or uses of a pesticide) that may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator, shall be classified for "restricted use." 7 U.S.C. 136a(d)(1)(C). If the classification is made because of hazards to the applicator or other persons, the pesticide may only be applied by or under the direct supervision of a certified applicator. 7 U.S.C. 136a(d)(1)(C)(i), 136j(a)(2)(F). If the classification is made because of potential unreasonable adverse effects on the environment, the pesticide may only be applied by, or under the direct supervision of, a certified applicator or subject to such other restrictions as the EPA Administrator may provide by regulation. 7 U.S.C. 136a(d)(1)(C)(ii), 136j(a)(2)(F). To be certified, an individual must be determined to be competent with respect to the use and handling of the pesticides covered by the certification. 7 U.S.C. 136i(a).

It was the intent of Congress that persons desiring to use RUPs should be able to obtain certification under programs approved by EPA, as reflected in FIFRA sections 11 and 23. 7 U.S.C. 136i, 136u. The regulations addressing tribal and State development and submission of certification plans to EPA are contained at 40 CFR part 171. It is EPA's position that tribal and State plans are generally best suited to the needs of that particular Tribe or State and its citizens; however, Tribes and States are not required to develop their own plans. Where EPA has not approved a State or tribal certification plan, the Agency is authorized to implement an EPA plan for the Federal certification of applicators of RUPs pursuant to FIFRA sections 11 and 23. 7 U.S.C. 136i, 136u; 40 CFR 171.11.

Most of Indian country is not covered by an EPA-approved or EPA-implemented plan, and therefore, applicators do not have a mechanism to become certified. The current lack of approved mechanisms for use of RUPs in Indian country is a concern to EPA for reasons of equity, safety, and enforcement. EPA believes the same pest control tools that are available in State areas should also be available to growers in Indian country. Lack of access to these pesticides could put growers in Indian country at an economic disadvantage to growers in States, who do have access to these pesticides. Without access to certification programs, applicators may not have the competence needed to safely use RUPs, nor would they be legally allowed to use them.

Federal, State, and tribal governments may impose additional, different requirements on the purchase and application of RUPs. Applicators are encouraged to research these particular requirements to determine how they may affect their ability to purchase and apply RUPs, and consider any restrictions or requirements as they decide if this EPA certification will serve their needs.

IV. Summary of the Final EPA Plan

1. *Applicability.* EPA intends to implement this final EPA plan in Indian country, as defined in 18 U.S.C. 1151, where no other EPA-approved or EPA-implemented plan applies.

2. *Provisions of this EPA plan—*a. *Why is EPA developing an EPA plan?* The EPA plan will allow the certification of applicators and legal use of RUPs in those parts of Indian country where there are currently no mechanisms in place for such certification and use. RUPs cannot be legally used in Indian country unless

EPA has explicitly approved a mechanism of certification for such an area. EPA-approved State plans do not cover use of RUPs in Indian country. There are very few areas of Indian country for which there are approved non-Federal plans and only one area that is currently covered under a Federal plan.

b. *To whom will the EPA plan apply?* The EPA plan will only apply to persons who intend to apply RUPs in Indian country not covered by another EPA-approved or EPA-implemented plan. Tribes may continue to pursue options available under 40 CFR 171.10 for their areas of Indian country, including seeking EPA approval of tribal plans for such areas under 40 CFR 171.10(a)(2) or the utilization of a State's certification program under 40 CFR 171.10(a)(1). An option implemented under 40 CFR 171.10 would replace this final EPA plan for the relevant area of Indian country.

Applicators must hold the appropriate Federal certification under this final EPA plan to apply RUPs in Indian country where no other EPA-approved or EPA-implemented certification plan applies. During the 6-months after publication of this notice announcing this final EPA plan, EPA will allow applicators to apply RUPs under the final EPA plan in Indian country only for the categories for which they already have a valid State, tribal, or Federal certificate² if they submit a complete application to the relevant EPA Region showing proof of a valid State, tribal, or Federal certification.³ Beginning August 6, 2014, applicators who are covered under this EPA plan and have not received a written Federal certification from the relevant EPA Region are prohibited from applying RUPs in Indian country located in that EPA Region. Failure to hold the appropriate Federal certification after August 6, 2014 may result in Federal enforcement action in accordance with FIFRA section 12(a)(2)(F).

c. *Certification procedures.* The appropriate EPA regional office will administer this EPA plan for each covered area of Indian country. To become certified to use RUPs in Indian country, applicators must submit an

² Please see section IX of the EPA plan for applicator categories recognized under the EPA plan, as there are exceptions for sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars. These exceptions will also apply during the 6-months after publication of this notice announcing the final EPA plan.

³ Although predicated in part on the applicator's existing valid certification, any use permitted under this EPA plan is allowed by and will be enforced only under Federal authority.

application form, EPA Form 7100-01, to the EPA regional office that covers the Indian country where they wish to apply RUPs, as well as proof of the valid Federal, State, or tribal certification upon which their Federal certification will be based. The final EPA plan and form to apply for Federal certification under the final EPA plan can be found in the docket (see Unit I.B. of this notice) and on EPA's Web site at <http://www2.epa.gov/pesticide-applicator-certification-indian-country>.

The certification on which the Federal certificate will be based must be from a State or Tribe with a contiguous boundary to the relevant area of Indian country.⁴ The EPA regional offices also have limited discretion to allow Federal certification under the final EPA plan based on a valid certification from another nearby State or Tribe that is not directly contiguous to the area of Indian country at issue. The Federal certification based on a valid Federal, State, or tribal certification, will expire when the underlying Federal, tribal, or State certificate expires, unless the certificate is suspended or revoked.

In lieu of submitting proof of a valid Federal, State, or tribal certification, private applicators also have the option of completing the online training developed by EPA. An interim option to use available State training to obtain private applicator certification in lieu of a valid Federal, State, or tribal certificate was developed and included in the plan and on the application form for private applicator certification. However, since EPA has developed online training, this option will not be used while the online training is available. Federal certification under this option is valid for 4 years from the date of issuance, unless suspended or revoked.

d. Applicator categories. EPA will recognize the categories authorized in the Federal, State, or tribal certification upon which the Federal certification is based, and applicators will be authorized to apply RUPs in Indian country for uses covered by those categories. See Unit VI. of this notice for specific information on categories for sodium cyanide capsules used with ejector devices for livestock predator control and for sodium fluoroacetate used in livestock protection collars.

e. Implementation. EPA will administer routine maintenance activities associated with implementation of this final EPA plan

(e.g., application processing, database management, recordkeeping) and will conduct inspections and take enforcement actions as appropriate.

V. Response to Comments

EPA received comments from the Tribal Pesticide Program Council (TPPC); Cherokee Nation; Kashia Band of Pomo Indians; the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS); the Colorado Department of Agriculture; the Montana Department of Agriculture; and some pesticide applicators. EPA sought comment on several topics for the proposed EPA plan and the proposed EPA Region 8 plan: Issuing Federal certification to applicators with certificates from contiguous States or Tribes, a request to include a notification provision in the EPA plan, the private applicator certification option, and a suggestion from the Tribes to include an opt-out provision in the EPA plan.

All comments on these issues, as well as additional comments received, and EPA's responses are available in the docket. EPA has also made changes to the final EPA plan based on some of the comments received. These changes are described in Unit VI. of this notice.

VI. Highlights of Changes Made in the Final EPA Plan

EPA adjusted the final EPA plan based on questions and comments received on the proposed EPA plan. Below are some noteworthy clarifications. Please refer to the Response to Comments document and the final EPA plan for details.

A. Change to Title

The title of the final EPA plan has been changed from "Federal Plan for Certification of Applicators of Restricted Use Pesticides within Indian Country" to "EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides within Indian Country" to align it with 40 CFR 171.11 and to differentiate it from non-EPA Federal agency plans. EPA also merged the EPA Region 8 plan with this final EPA plan since the plans were very similar in nature and goals. Indeed, the EPA Region 8 plan, which was developed first, was the basis for the national EPA plan. Further, the two plans ended up with similar expected timeframes for implementation.

B. Notification of Tribes Prior to RUP Use

The Agency received comments suggesting the inclusion of a provision in the final EPA plan that would require

applicators to notify a Tribe prior to application of RUPs in their Indian country. Further, it was suggested that EPA should create an "opt-in" process for Indian Tribes that want to be notified in advance of an RUP application on their land. Tribes that wanted notification prior to RUP use would be expected to identify a contact person to whom advance notification of a pesticide application should be provided. The commenters also believed EPA should develop a form for applicators to use to notify the Tribes about proposed pesticide applications.

It was also requested that EPA make a database publicly available that lists applicators with their contact information and current certifications by State and EPA Region. The database would provide Indian Tribes with a better sense as to the applicators with Federal certificates who might potentially apply RUPs in their Indian country.

While some commenters pointed to the notification process for soil fumigants as a precedent for EPA requiring notification of Tribes prior to the application of RUPs, the justification and authorities that supported the notification requirements for soil fumigants are not available to support applicator notification requirements under a Federal certification plan. In the case of the soil fumigants, notification is required as part of the reregistration risk mitigation decision to assure the soil fumigants meet the FIFRA registration standard. EPA generally has not made that determination for other RUPs. Under FIFRA section 11, which provides the authority for issuing Federal certification plans, rulemaking is the mechanism required for commercial applicator reporting, which would include a notification requirement. Additionally, FIFRA section 11 does not provide EPA authority to require any reporting from, or recordkeeping by, private applicators. Development of a rulemaking to require commercial applicators to notify Tribes prior to RUP application could take several years. EPA does not believe that we should delay the benefits of proceeding with the final EPA plan while rulemaking is considered to require commercial applicators to notify Tribes prior to use. Therefore, EPA will proceed with finalizing this EPA plan at this time. As the Agency gains experience implementing the final EPA plan, the Agency will re-evaluate if rulemaking to implement a tribal notification requirement is advisable or needed.

In the meantime, to assist Tribes in identifying and communicating directly

⁴ The area of Indian country where the applicator intends to apply must be within, or the border must be touching, the State or Tribe that issued the underlying Federal, tribal, or State certificate.

with applicators certified under this final EPA plan, EPA will implement the suggestion to make a database publicly available that lists applicators (with their location and current certifications) by State upon which the Federal certification is based. EPA expects to implement this recommendation by posting a list of federally certified applicators at <http://www2.epa.gov/pesticide-applicator-certification-indian-country>.

EPA also recognizes that tribal notification requirements may exist under tribal law. Federal certifications issued by EPA under this EPA plan will explicitly inform applicators that they should take steps to determine if there are additional requirements under tribal law for RUP application, including tribal notification requirements.

C. Private Applicator Option

EPA sought comment on the proposed private applicator "no-test" certification option required by FIFRA section 11. There was a concern raised that it may be difficult for an applicator to obtain the training necessary to apply for a private applicator certification if not relying on the State certification. In addition, several commenters were concerned that the training that pesticide applicators receive through States does not specifically require applicators to demonstrate that they are competent to apply pesticides in Indian country. Also, commenters stated that EPA-approved training should include a discussion of tribal government, cultural practices, natural resources, examples of tribal regulations, information about the Web site identifying Tribes that want to be notified prior to a RUP application, and other pertinent tribal information.

The Agency revised the private applicator certification option. For individuals seeking certification as a private applicator under the final EPA plan, EPA will exercise its authority contained in 40 CFR 171.11(d)(1) and (e) to issue certifications if the applicator completes one of two requirements:

1. The applicator may submit documentation of a current and valid certification as a private applicator authorized to apply federally designated RUPs through a Federal plan or an EPA-approved State or tribal plan with a contiguous boundary to the relevant area of Indian country. The EPA Region also has limited discretion to allow certification under the plan based on a valid certification from another nearby State or Tribe that is not directly contiguous to the area of Indian country at issue.

2. The applicator may submit documentation of completion of the

online training course provided by EPA. An interim option to use available State training to obtain private applicator certification in lieu of a valid certification was developed and included on the application form for private applicator certification. Since EPA has developed online training, this option will not be used while the online training is available.

EPA did not include in the online training all of the information relevant to Indian country requested by commenters because of the many differences among federally recognized Tribes. Rather, EPA indicates that Tribes may have more stringent requirements and refers applicators to the relevant Tribe(s) for details.

- a. *Length of certification.* A private applicator certificate issued under the first option will expire at the expiration date of the underlying certificate, unless suspended or revoked. A private applicator certificate issued under the second option is valid for 4 years.

- b. *Renewal/recertification.* Applicators may apply to be recertified through the options listed in the final EPA plan during the 12 months preceding the expiration of their current certificate.

D. Categories for Sodium Cyanide Capsules Used With Ejector Devices and Sodium Fluoroacetate Livestock Protection Collars

While a written comment was not submitted on either of the proposed plans, several States noted during meetings that they would be interested in becoming registrants on behalf of a Tribe, if the Tribes are interested in allowing the sodium cyanide capsules used with ejector devices or sodium fluoroacetate used in livestock protection collars to be used within their Indian country. States questioned how applications of these products will occur if Tribes do not have a pesticide program and cannot monitor the usage in their Indian country, making them ineligible to become a registrant.

States cannot serve as a registrant of these products on behalf of an Indian Tribe. Under the terms of the registrations for sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars, the registrant of these products must be able to supervise the use, and enforce against the misuse, of the product. Since the registrant needs to be able to supervise the use and enforce against the misuse of the product, it would not be appropriate for the State to act as a registrant, since States are not generally approved to

administer programs in Indian country under FIFRA.

Because a registrant of one of these products must have the ability to provide a supervisory role in the application of these products and be able to inspect and enforce against any misapplication of the product (see the **Federal Register** of February 10, 1977 (42 FR 8406)), some Tribes will not have the capacity to serve as a registrant of these products. If a Tribe is not in a position to serve as the registrant but would like to allow use of these products, that Tribe could work with APHIS, which is the only Federal agency that is currently a registrant of these products. APHIS employees, once certified under the EPA plan, can apply sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars within the relevant Indian Tribe's Indian country. EPA expects that an agreement between the Tribe and APHIS that includes application of sodium cyanide capsules used with ejector devices and sodium fluoroacetate used in livestock protection collars will be in effect prior to any application. If another Federal agency were to become a registrant for one or both of these products, it is likely there could be a similar arrangement between that Federal agency and a Tribe seeking applications of these products.

E. Private Applicator Categories

Several States asked if EPA would allow categories in the Federal plan for private applicators. EPA clarified that the private applicator Federal certificate will reflect any categories found in the underlying certificate used to demonstrate applicator competence. For both private and commercial certifications, EPA recognizes that underlying certificates issued pursuant to different State, tribal, and Federal plans may have different categories, and therefore the categories recognized by the EPA will not be uniform.

VII. Consultation With Tribal Governments

Given the absence of an EPA-approved certification program in areas of Indian country, EPA, consistent with its statutory authorities and the Federal government's trust responsibility to federally recognized Tribes, has worked with Tribes on a government-to-government basis to develop a certification program that will help ensure the protection of human health and the environment in Indian country. EPA consulted with Tribes on November 29 and December 13, 2010, to help ensure development of a Federal

plan that effectively meets their needs and those of RUP applicators in Indian country. EPA Region 8 also held three formal consultations with the Tribes in EPA Region 8. In addition to the consultations dedicated specifically to this EPA plan, EPA has also worked closely with the TPPC while developing this EPA plan.

EPA developed the Federal plan in consultation with Tribes consistent with, among other things, the following policies, orders, and guidance: "EPA Policy for the Administration of Environmental Programs on Indian Reservations," November 8, 1984; "Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy," January 17, 2001; Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments," November 6, 2000, which was reaffirmed by Presidential memorandum, "Tribal Consultation," November 5, 2009; and the "EPA Policy on Consultation and Coordination With Indian Tribes," May 4, 2011.

VIII. Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act (PRA) (44 U.S.C.3501 *et seq.*), the information collection activities described in this notice and the revised Information Collection Request (ICR), OMB Control No. 2070-0029, were approved by the Office of Management and Budget. As part of this process, EPA proposed to implement a revised form designed specifically for pesticide applicators who wish to be certified in Indian country. EPA estimates the paperwork burden associated with completing this form to be 10 minutes per response. Under PRA, "burden" means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. For this collection it includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. The information collection activities and the form are included in a separate docket. See <http://www.regulations.gov>, docket ID number EPA-HQ-OPP-2010-0723.

List of Subjects

Environmental protection, Business and industry, Education, Indians-lands, Indians-tribal government, Pesticides and pests.

Dated: January 31, 2014.

James Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2014-02564 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9906-31-Region-2]

Proposed CERCLA Settlements Relating to the Sherwin-Williams Site in Gibbsboro, Camden County, New Jersey

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed administrative settlement and opportunity for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), notice is hereby given by the U.S. Environmental Protection Agency ("EPA"), Region 2, of a proposed Administrative Settlement Agreement for Recovery of Past Response Costs ("Agreement") pursuant to Section 122(h)(1) of CERCLA with the Sherwin-Williams Company ("Settling Party"). The Settling Party is a potentially responsible party, pursuant to Section 107(a) of CERCLA, and thus is potentially liable for response costs incurred at or in connection with the Sherwin-Williams Site ("Site"), located in Gibbsboro, Camden County, New Jersey. Under the Agreement, the Settling Party agrees to pay a total of \$104,000.00 to EPA for past response costs. EPA will consider all comments received and may modify or withdraw its consent to the Agreement if comments received disclose facts or considerations that indicate that the proposed Agreement is inappropriate, improper, or inadequate. EPA's response to any comments received will be available for public inspection at EPA Region 2 offices, 290 Broadway, New York, New York 10007-1866.

DATES: Comments must be provided by March 10, 2014.

ADDRESSES: The Agreement is available for public inspection at EPA Region 2 offices at 290 Broadway, New York, New York 10007-1866. Comments

should reference the Sherwin-Williams Site, located in Gibbsboro, Camden County, New Jersey, Index Nos. CERCLA-02-2014-2002. To request a copy of the Agreements, please contact the EPA employee identified below.

FOR FURTHER INFORMATION CONTACT: Carl Howard, Assistant Regional Counsel, New Jersey Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, 290 Broadway—17th Floor, New York, New York 10007-1866. Telephone: 212-637-3216, email at howard.carl@epa.gov.

Dated: January 15, 2014.

Walter E. Mugdan,

Director, Emergency and Remedial Response Division.

[FR Doc. 2014-02608 Filed 2-5-14; 8:45 am]

BILLING CODE 6560-50-P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act, of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on February 13, 2014, from 9:00 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883-4009, TTY (703) 883-4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090. Submit attendance requests via email to VisitorRequest@FCA.gov. See **SUPPLEMENTARY INFORMATION** for further information about attendance requests.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. Please send an email to VisitorRequest@FCA.gov at least 24 hours before the meeting. In your email include: Name, postal address, entity you are representing (if applicable), and telephone number. You will receive an email confirmation from us. Please be prepared to show a photo identification when you arrive. If you need assistance for accessibility reasons, or if you have any questions, contact Dale L. Aultman, Secretary to the Farm Credit Administration Board, at (703) 883-

4009. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

- January 9, 2014.

B. New Business

- Farmer Mac Board Governance and Standards of Conduct—Advance Notice of Proposed Rulemaking.
- Spring 2014 Abstract of the Unified Agenda of Federal Regulatory and Deregulatory Actions and Spring 2014 Regulatory Projects Plan.

Closed Session*

- Office of Secondary Market Oversight Quarterly Report.

*Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

Dated: February 4, 2014.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2014-02698 Filed 2-4-14; 4:15 pm]

BILLING CODE 6705-01-P

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 97-80; DA 14-46]

Media Bureau Seeks Comment on TiVo's Request for Clarification or Waiver of the Audiovisual Output Requirement of Section 76.640(b)(4)(iii)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Media Bureau seeks comment on a petition for waiver or clarification filed by TiVo Inc. TiVo Inc.'s petition requests that the Bureau waive a rule that requires set-top boxes to have a certain audiovisual output, or clarify that the rule is not in effect.

DATES: Submit comments on or before February 14, 2014. Submit reply comments on or before February 28, 2014.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Brendan Murray, Brendan.Murray@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

SUPPLEMENTARY INFORMATION: TiVo Inc. ("TiVo") has filed a petition for clarification or waiver of 47 CFR 76.640(b)(4)(iii). Section 76.640(b)(4)(iii) requires that set-top boxes provided by cable operators include a digital interface to enable consumers to

connect consumer electronics devices that they own to set-top boxes that they lease from their cable operators for whole-home viewing and recording. TiVo asserts that the "touchstone" solution for home networking has not been published publicly, and therefore requests that the Commission extend waiver until "compliance is achievable on an industry-wide basis that includes TiVo." Alternatively, TiVo requests that we clarify whether the rule is still in effect in the wake of the D.C. Circuit's decision in *Echostar Satellite, LLC v. FCC*. We seek comment on TiVo's request.

This proceeding will be treated as "permit but disclose" for purposes of the Commission's *ex parte* rules. As a result of the permit-but-disclose status of this proceeding, *ex parte* presentations will be governed by the procedures set forth in 47 CFR 1.1206. Comments and oppositions are due February 14, 2014. Petitioner's reply is due February 28, 2014. All filings must be submitted in CS Docket No. 97-80. Pleadings sent via email to the Commission will be considered informal and will not be part of the official record. Interested parties will have access to comments online through the Commission's Electronic Comment Filing System (ECFS), and therefore we waive the requirements of Sections 76.7(b)(1) and 76.7(c)(1) that comments and oppositions be served on interested parties.

Comments may be filed using: (1) (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.

Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Web site for submitting comments.

For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal service mailing address, and the applicable docket number: MB Docket No. 12-230. 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 instructions will be sent in response.

Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be

addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m.

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.

One copy of each pleading must be sent to Brendan Murray, Media Bureau, Room 4-A726, 445 12th Street SW., Washington, DC 20554 or Brendan.Murray@fcc.gov.

Copies of the Waiver Request and any subsequently filed documents in this matter are also available for inspection in the Commission's Reference Information Center: 445 12th Street SW., Room CY-B402, Washington, DC 20554, (202) 418-0270.

Alternate formats of this Public Notice (computer diskette, large print, audio recording, or Braille) are available to persons with disabilities by contacting the Consumer and Governmental Affairs Bureau at (202) 418-0530 or (202) 418-7365 (TTY).

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2014-02443 Filed 2-5-14; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL ELECTION COMMISSION

[Notice 2014-03]

Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold

AGENCY: Federal Election Commission.

ACTION: Notice of adjustments to expenditure limitations and lobbyist bundling disclosure threshold.

SUMMARY: As mandated by provisions of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), the Federal Election Commission ("FEC" or "the Commission") is adjusting certain expenditure limitations and the lobbyist bundling

disclosure threshold set forth in the Act, to index the amounts for inflation. Additional details appear in the supplemental information that follows.

DATES: *Effective Date:* January 1, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, 999 E Street NW., Washington, DC 20463; (202) 694-1100 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: Under the Federal Election Campaign Act, 2 U.S.C. 431 *et seq.*, coordinated party expenditure limits (2 U.S.C. 441a(d)(2) and (3)(A), (B)) and the disclosure threshold for contributions bundled by lobbyists (2 U.S.C. 434(i)(3)(A)) are adjusted periodically to reflect changes in the consumer price index. *See* 2 U.S.C. 434(i)(3)(B) and 441a(c)(1), 11 CFR 104.22(g), 11 CFR 109.32 and 110.17(a), (f). The Commission is publishing this notice to announce the adjusted limits and disclosure threshold.

Coordinated Party Expenditure Limits for 2014

Under 2 U.S.C. 441a(c), the Commission must adjust the expenditure limitations established by 2 U.S.C. 441a(d) (the limits on expenditures by national party committees, state party committees, or subordinate committees of state party

committees in connection with the general election campaign of candidates for Federal office) annually to account for inflation. This expenditure limitation is increased by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 1974).

1. Expenditure Limitation for House of Representatives in States With More Than One Congressional District

Both the national and state party committees have an expenditure limitation for each general election held to fill a seat in the House of Representatives in states with more than one congressional district. This limitation also applies to those states and territories that elect individuals to the office of Delegate or Resident Commissioner.¹ The formula used to calculate the expenditure limitation in such states multiplies the base figure of \$10,000 by the difference in the price index (4.72469), rounding to the nearest \$100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(B), and 11 CFR 109.32(b) and 110.17. Based upon this formula, the expenditure limitation for 2014 general elections for House candidates in these states is \$47,200.

2. Expenditure Limitation for Senate and for House of Representatives in States With Only One Congressional District

Both the national and state party committees have an expenditure limitation for a general election held to fill a seat in the Senate or in the House of Representatives in states with only one congressional district. The formula used to calculate this expenditure limitation considers not only the price index but also the voting age population (“VAP”) of the state. The VAP of each state is published annually in the **Federal Register** by the Department of Commerce. 11 CFR 110.18. The general election expenditure limitation is the greater of: The base figure (\$20,000) multiplied by the difference in the price index, 4.72469 (which totals \$94,500); or \$0.02 multiplied by the VAP of the state, multiplied by 4.72469. Amounts are rounded to the nearest \$100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(A), and 11 CFR 109.32(b) and 110.17. The chart below provides the state-by-state breakdown of the 2014 general election expenditure limitation for Senate elections. The expenditure limitation for 2014 House elections in states with only one congressional district² is \$94,500.

SENATE GENERAL ELECTION EXPENDITURE LIMITS—2014 ELECTIONS

State	Voting age population (VAP)	VAP x .02 x the price index (4.72469)	Senate expenditure limit (the greater of the amount in column 3 or \$94,500)
Alabama	3,722,241	\$351,700	\$351,700
Alaska	547,000	51,700	94,500
Arizona	5,009,810	473,400	473,400
Arkansas	2,249,507	212,600	212,600
California	29,157,644	2,755,200	2,755,200
Colorado	4,030,435	380,900	380,900
Connecticut	2,810,514	265,600	265,600
Delaware	722,191	68,200	94,500
Florida	15,526,186	1,467,100	1,467,100
Georgia	7,502,458	708,900	708,900
Hawaii	1,096,788	103,600	103,600
Idaho	1,184,355	111,900	111,900
Illinois	9,858,828	931,600	931,600
Indiana	4,984,875	471,000	471,000
Iowa	2,366,384	223,600	223,600
Kansas	2,169,865	205,000	205,000
Kentucky	3,381,291	319,500	319,500
Louisiana	3,512,513	331,900	331,900
Maine	1,067,026	100,800	100,800
Maryland	4,584,292	433,200	433,200
Massachusetts	5,298,878	500,700	500,700
Michigan	7,650,421	722,900	722,900
Minnesota	4,141,269	391,300	391,300

¹ Currently, these states are the District of Columbia, the Commonwealth of Puerto Rico, and the territories of American Samoa, Guam, the United States Virgin Islands and the Northern

Mariana Islands. *See* http://www.house.gov/house/MemberWWW_by_State.shtml and <http://about.dc.gov/statehood.asp>.

² Currently, these states are: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming. *See* <http://www.house.gov/representatives/>.

SENATE GENERAL ELECTION EXPENDITURE LIMITS—2014 ELECTIONS—Continued

State	Voting age population (VAP)	VAP x .02 x the price index (4.72469)	Senate expenditure limit (the greater of the amount in column 3 or \$94,500)
Mississippi	2,253,775	213,000	213,000
Missouri	4,646,486	439,100	439,100
Montana	791,184	74,800	94,500
Nebraska	1,404,168	132,700	132,700
Nevada	2,128,531	201,100	201,100
New Hampshire	1,052,337	99,400	99,400
New Jersey	6,877,222	649,900	649,900
New Mexico	1,577,747	149,100	149,100
New York	15,411,151	1,456,300	1,456,300
North Carolina	7,562,455	714,600	714,600
North Dakota	560,705	53,000	94,500
Ohio	8,920,978	843,000	843,000
Oklahoma	2,903,541	274,400	274,400
Oregon	3,072,459	290,300	290,300
Pennsylvania	10,058,156	950,400	950,400
Rhode Island	837,524	79,100	94,500
South Carolina	3,695,041	349,200	349,200
South Dakota	636,918	60,200	94,500
Tennessee	5,004,401	472,900	472,900
Texas	19,406,207	1,833,800	1,833,800
Utah	2,004,283	189,400	189,400
Vermont	503,929	47,600	94,500
Virginia	6,395,870	604,400	604,400
Washington	5,375,611	508,000	508,000
West Virginia	1,472,626	139,200	139,200
Wisconsin	4,434,937	419,100	419,100
Wyoming	444,979	42,000	94,500

Limitations on Contributions by Individuals, Non-Multicandidate Committees and Certain Political Party Committees Giving to U.S. Senate Candidates for the 2013–2014 Election Cycle

contribution limitations for individuals, non-multicandidate committees and for certain political party committees giving to U.S. Senate candidates for the 2013–2014 election cycle:

For the convenience of the readers, the Commission is also republishing the

Statutory provision	Statutory amount	2013–2014 Limit
2 U.S.C. 441a(a)(1)(A)	\$2,000	\$2,600.
2 U.S.C. 441a(a)(1)(B)	\$25,000	\$32,400.
2 U.S.C. 441a(a)(3)(A)	\$37,500	\$48,600.
2 U.S.C. 441a(a)(3)(B)	\$57,500 (of which no more than \$37,500 may be attributable to contributions to political committees that are not political committees of national political parties).	\$74,600 (of which no more than \$48,600 may be attributable to contributions to political committees that are not political committees of national political parties).
2 U.S.C. 441a(h)	\$35,000	\$45,400.

Lobbyist Bundling Disclosure Threshold for 2014

The Act requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant political action committees once the contributions exceed a specified threshold amount. The Commission must adjust this threshold amount annually to account for inflation. The disclosure threshold is increased by multiplying the \$15,000

statutory disclosure threshold by 1.15555, the difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 2006). The resulting amount is rounded to the nearest multiple of \$100. See 2 U.S.C. 434(i)(3)(A) and (B), 441a(c)(1)(B) and 11 CFR 104.22(g). Based upon this formula (\$15,000 × 1.15555), the lobbyist bundling

disclosure threshold for calendar year 2014 is \$17,300.

On behalf of the Commission.

Dated: January 30, 2014.

Lee E. Goodman,

Chairman, Federal Election Commission.

[FR Doc. 2014–02453 Filed 2–5–14; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-14-14HW]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404-639-7570 or send comments to LeRoy Richardson, 1600 Clifton Road, MS-D74, Atlanta, GA 30333 or send an email to omb@cdc.gov.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Evaluating Interventions for Airplane Cargo Baggage Handling—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The mission of the National Institute for Occupational Safety and Health (NIOSH) is to promote worker safety and health through research and prevention. Under Public Law 91-596, sections 20 and 22 (Section 20-22, Occupational Safety and Health Act of 1970), NIOSH has the responsibility to conduct research to advance the health and safety of workers. In this capacity, NIOSH is seeking a three year approval from the Office of Management and Budget (OMB) to conduct a study to assess the effectiveness and cost-benefit of engineering interventions for reducing musculoskeletal disorders

(MSDs) among baggage handlers working at airports. This project is part of the current mission of NIOSH to conduct scientific intervention effectiveness research to support the evidence-based prevention of occupational injuries and illnesses.

In recent years (2009-2012), the overall annual incidence rate of work-related injuries resulting in days away from work, job transfer, or restricted work in the airport passenger transportation industry was approximately 7%. This is one of the highest rates in all job categories tracked by the Bureau of Labor Statistics (BLS). A very large proportion of the injury cases in the airport passenger transportation industry are musculoskeletal disorders (MSDs), especially low back disorders, which were found primarily in baggage handlers working in the ramp or tarmac area, where airplanes are parked for services.

Of the variety of ramp services provided for each flight, baggage handling for narrow-bodied airplane (e.g., McDonnell Douglas or MD Super 80, Boeing 737 and 757) poses a high risk for MSDs.

The baggage handling operations in the ramp area for narrow-bodied airplanes are performed in three main job positions: (1) Lifting baggage from baggage cart to a belt loader (a self-propelled conveyor used for transferring baggage to the cargo compartment of the airplane), (2) lifting/pulling/pushing baggage from the belt loader to the airplane baggage cargo compartment (a small room located in the belly of the airplane) at the compartment door, and (3) stacking baggage in the compartment. The baggage handling tasks are performed in a reversed order when baggage is unloaded from the airplane. The ceiling heights of the cargo compartments in the narrow-bodied airplanes range from 46-55 inches (1.2-1.4 m), resulting in a restricted working environment. Speed, efficiency and accuracy are important for the ground services to minimize operational costs. Short turnaround time and restricted cargo compartments make baggage transfer a very physically demanding job.

Because of the physically demanding working environment, many ergonomic risk factors, such as awkward postures, heavy lifting, high lifting frequencies and dynamic body movements, are inevitably present in the ramp services. These observed risk factors for MSDs have been documented by previous published investigations for baggage handlers. To avoid these risk factors for MSDs and increase baggage handling

efficiency, some companies designed mechanical lifting aids. A recent literature review, however, indicates that there is little published information relating to evaluations of these mechanical lifting aids. No comprehensive risk, injury and cost benefit information associated with the lifting aids was previously reported. This study will provide current important information on selected lifting aids for cargo baggage handling to improve the health and safety of baggage handlers working at airports.

On the basis of previous study findings and field feasibility, the two types of mechanical lifting aids (i.e., engineering interventions) selected for evaluations in the current study are the semi-automatic roller conveyor and vacuum lifting assist system. The vacuum lifting system is planned to be used in job position 1, while the roller conveyor is planned to be used in job positions 2 and 3.

NIOSH will collaborate with a large airline company to evaluate the two above-mentioned interventions at a study site feasible for implementation. A prospective study design will be used with a control group to evaluate the effectiveness of the interventions. An estimate of 960 ramp workers are planned to be recruited into the study. A subset (30) of the study participants will be randomly chosen to use one intervention, resulting in 60 participants total in the two intervention groups and 900 left to serve as the control group. MSD risk and incidence data will be collected by a self-reported questionnaire at baseline, one and two years after implementation of the two interventions. Additional MSD symptoms and intervention compliance information will be requested monthly by a short mail-in questionnaire. The effectiveness of the interventions will be assessed by a reduction in MSD risks or incidence rates at the end of the two follow-up periods.

The primary health outcomes from the questionnaires include self-reported musculoskeletal symptoms in multiple body regions (neck, shoulders, low back and knees), sickness, absence, and medical attention due to the symptoms. The annual questionnaire will be used to collect additional information (demographics, alcohol consumption, health problems, etc.), job demands (work method, time spent on each job position, etc.), and psychosocial job characteristics (perceived job stress, co-worker support, etc.).

Video recording of the job tasks performed by a subset of participants (N=30) in the control group and all (N=60) in the intervention groups will

be conducted by NIOSH investigators. A force gauge will be used by the NIOSH investigators to measure participants' hand forces for baggage handling tasks. Physical risk data will be determined by estimated working posture in the video recording and measured force data using a biomechanical model. Baggage weight information in the airline company baggage record system will be used to estimate the number of baggage handling operations per flight/day to estimate a cumulative risk.

The burden to respondents is determined by the required minimal sample size and the information necessary for a sound study design. The questionnaires will be completed by respondents during their work time. There is no burden to respondents during video recording and hand force sampling because the video and force data collections will be conducted by NIOSH investigators without respondents' involvement. The estimated times for completing the

annual and monthly questionnaires are 30 and 10 minutes per person, respectively.

An informed consent form will be collected one time during the initial enrollment period. An early exit phone interview will be conducted if the respondent decides to leave the study before the end date. The estimated burden of the interview is based on an estimated 20% drop-out rate.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)	Total burden (in hrs)
Airline baggage handlers in the ramp area.	Self-reported annual questionnaire survey for MSD symptoms and risk factors.	960	1	30/60	480
	Self-reported monthly questionnaire for MSD symptoms and work method.	960	12	10/60	1,920
	Informed Consent Form	960	1	5/60	80
	Early Exit Interview	192	1	5/60	16
Total .....	.....	.....	.....	.....	2,496

Leroy Richardson,

Chief, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2014-02509 Filed 2-5-14; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-14-0889]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404-639-7570 or send comments to CDC LeRoy Richardson, 1600 Clifton Road, MS D-74, Atlanta, GA 30333 or send an email to omb@cdc.gov.

Comments are invited on: (a) Whether the proposed collection of information

is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Using Traditional Foods and Sustainable Ecological Approaches for Health Promotion and Diabetes Prevention in American Indian/Alaska Native Communities (OMB No. 0920-0889, exp. 6/30/2014)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Type 2 Diabetes was rare among American Indians until the 1950s. Since that time, diabetes has become one of the most common and serious illnesses among American Indians and Alaska Natives (AI/AN). However, dietary management and physical activity can

help to prevent or control Type 2 diabetes.

In 2008, the CDC's Native Diabetes Wellness Program (NDWP), in consultation with American Indian/Alaska Native (AI/AN) tribal elders, issued a funding opportunity announcement (FOA) entitled, "Using Traditional Foods and Sustainable Ecological Approaches for Health Promotion and Diabetes Prevention in American Indian/Alaska Native Communities." The Traditional Foods program was designed to build on what is known about traditional ways in order to inform culturally relevant, contemporary approaches to diabetes prevention for AI/AN communities. The program supports activities that enhance or re-introduce indigenous foods and practices drawn from each grantee's landscape, history, and culture. Example activities include the cultivation of community gardens, organization of local farmers' markets, and the dissemination of culturally appropriate health messages through storytelling, audio and video recordings, and printed materials. In addition, the program promotes physical activity initiatives, provides social support for healthy lifestyles, and supports collaboration with other agencies and programs. Seventeen (17) tribal organizations received cooperative agreement funding under the initial FOA. Sixteen tribal organizations

applied for a one-year extension that ends September 30, 2014.

CDC currently collects information from awardees about the activities supported with Traditional Foods funding. Twice per year, each awardee submits a shared data elements (SDE) report to CDC through a Web-based interface. The SDE are organized in three domains: Traditional Local Healthy Foods, Physical Activity, and Social Support for Healthy Lifestyle Change and Maintenance. Reports are submitted to CDC in the spring and fall. The spring 2014 report will be submitted to CDC under the current OMB clearance (OMB No. 0920-0889, exp. 6/30/2014).

CDC plans to request OMB approval of a six-month extension of the Traditional Foods information collection, through approximately December 31, 2014. The extension will enable CDC to receive a final report on activities conducted during late spring, summer, and early fall of 2014. Because of the variety of food- and lifestyle-related programs that take place in these seasons, CDC wants to ensure complete and accurate reporting of awardee

activities conducted the last 5–6 months of cooperative agreement funding.

There are no proposed changes to the data collection instrument, data collection methodology, or the estimated burden per response. Changes to be implemented in this Revision request include: (1) A reduction in the number of respondents, from 17 to 16, (2) a change in the frequency of reporting (only one SDE report will be received during the six-month extension period), and (3) discontinuation of the one-time retrospective data collection that was part of the initial three-year clearance request.

CDC will continue to use the SDE reports to compile a systematic, quantifiable inventory of activities, products, and outcomes associated with the Traditional Foods program. The SDE also allow CDC to analyze aggregate data for improved technical assistance and overall program improvement, reporting, and identification of outcomes; allow CDC and grantees to create a comprehensive inventory/resource library of diabetes primary prevention ideas and approaches for AI/AN communities and identify emerging

best practices; and improve dissemination of success stories. The SDE supplements the narrative progress reports that grantees submit to CDC in conjunction with the annual continuation application for funding. Although these reports provide important contextual information and are useful for local program monitoring, they do not support the production of statistical reports that are needed to fully describe the Traditional Foods program and to respond to various administrative inquiries.

Respondents will be 16 Tribes and Tribal organizations that receive funding through the Traditional Foods program. The SDE will continue to be submitted to CDC using Survey Monkey, an electronic Web-based interface. The estimated burden per response is two hours. Each grantee will receive a personalized advance notification letter, followed by an email with a link to the Survey Monkey site.

Participation in this information collection is required for Traditional Foods program awardees. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)	Total burden (in hrs)
AI/AN Tribal Grantees	Traditional Foods Shared Data Elements.	16	1	2	32

Leroy A. Richardson,
 Chief, Information Collection Review Office,
 Office of Scientific Integrity, Office of the
 Associate Director for Science, Office of the
 Director, Centers for Disease Control and
 Prevention.

[FR Doc. 2014-02510 Filed 2-5-14; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention (CDC)

[CDC-2013-0024, Docket Number NIOSH-270]

NIOSH Center for Motor Vehicle Safety: Research and Guidance Strategic Plan 2014-2018

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of draft document for public comment.

SUMMARY: The National Institute for Occupational Safety and Health of the Centers for Disease Control and Prevention announces the availability of a draft document entitled *NIOSH Center for Motor Vehicle Safety: Research and Guidance Strategic Plan 2014-2018* for public comment. To view the notice and related materials, visit <http://www.regulations.gov> and enter CDC-2013-0024 in the search field and click "Search."

Public comment period: Comments must be received within 30 days from publication of the **Federal Register** Notice.

ADDRESSES: You may submit comments, identified by CDC-2013-0024 and Docket Number NIOSH-270, by either of the following two methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.

- **Mail:** NIOSH Docket Office, Robert A. Taft Laboratories, 4676 Columbia Parkway, MS C-34, Cincinnati, Ohio 45226.

Instructions: All information received in response to this notice must include the agency name and docket number (CDC-2013-0024; NIOSH-270). All relevant comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. All electronic comments should be formatted as Microsoft Word. Please make reference to CDC-2013-0024 and Docket Number NIOSH-270.

SUPPLEMENTARY INFORMATION: The purpose of this review is to receive public comments and input on the NIOSH Center for Motor Vehicle Safety: Research and Guidance Strategic Plan for the period 2014-2018. NIOSH is seeking comments on: (1) The relevance of the current draft; (2) the adequacy of the plan in addressing research needs for work-related motor vehicle crashes and fatal/non-fatal injuries; (3) the

adequacy of proposed performance measures; and (4) additional potential partners the NIOSH Center for Motor Vehicle Safety could engage with to enhance the relevance and capacity of the Center's program.

Background: Fatality data show that across all industries, motor vehicle-related incidents are consistently the leading cause of work-related fatalities, and they are the first or second leading cause in every major industry sector. The NIOSH Center for Motor Vehicle Safety is the focal point for research and prevention activities within the Institute to reduce work-related motor vehicle crashes and resulting injuries. The goals for the NIOSH Center for Motor Vehicle Safety were developed based on: (1) Consideration of research gaps based on review of the scientific literature, employer policies, and government regulations; (2) a review of related goals in the NIOSH sector and cross-sector programs; and (3) consideration of the research areas where NIOSH is best-positioned to add to the knowledge base on work-related motor vehicle safety. The draft goals address the following areas:

(1) Epidemiologic research to identify risk factors associated with work-related motor vehicle crashes and injury

(2) Engineering and technology-related research

(3) Research and demonstration projects on motor vehicle safety management strategies

(4) Global collaborations to develop strategies for reducing occupational road traffic injuries worldwide

(5) Research communication products

FOR FURTHER INFORMATION CONTACT:

Stephanie Pratt, Ph.D., NIOSH, Division of Safety Research, Mailstop H-1808, 1095 Willowdale Road, Morgantown, West Virginia 26505-2888. Dr. Pratt may be contacted at (304) 285-5992 or by email at sgp2@cdc.gov.

Dated: January 31, 2014.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2014-02524 Filed 2-5-14; 8:45 am]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2010-N-0623]

Agency Information Collection Activities; Proposed Collection; Comment Request; Voluntary Cosmetic Registration Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) 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 invites comments on the collection of information associated with our Voluntary Cosmetic Registration Program (VCRP).

DATES: Submit either electronic or written comments on the collection of information by April 7, 2014.

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.

Voluntary Cosmetic Registration Program—21 CFR Parts 710 and 720 (OMB Control Number 0910-0027)—Extension

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) provides us with the authority to regulate cosmetic products in the United States. Cosmetic products that are adulterated under section 601 of the FD&C Act (21 U.S.C. 361) or misbranded under section 602 of the FD&C Act (21 U.S.C. 362) may not be distributed in interstate commerce. We have developed the VCRP to assist us in carrying out our responsibility to regulate cosmetics.

In 21 CFR part 710, we request that establishments that manufacture or package cosmetic products register with us on Form FDA 2511 entitled "Registration of Cosmetic Product Establishment." The term "Form FDA 2511" refers to both the paper and electronic versions of the form. The electronic version of Form FDA 2511 is available on our VCRP Web site at <http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm>. We strongly encourage electronic registration of Form FDA 2511 because it is faster and more convenient. A registering facility will receive confirmation of electronic registration, including a registration number, by email, usually within 7 business days. The online system also

allows for amendments to past submissions.

Because registration of cosmetic product establishments is not mandatory, voluntary registration provides us with the best information available about the locations, business trade names, and types of activity (manufacturing or packaging) of cosmetic product establishments. We place the registration information in a computer database and use the information to generate mailing lists for distributing regulatory information and for inviting firms to participate in workshops on topics in which they may be interested. We also use the information for estimating the size of the cosmetic industry and for conducting onsite establishment inspections. Registration is permanent, although we request that respondents submit an amended Form FDA 2511 if any of the originally submitted information changes.

In part 720 (21 CFR part 720), we request that firms that manufacture, pack, or distribute cosmetics file with us an ingredient statement for each of their products. Ingredient statements for new

submissions (§§ 720.1 through 720.4) are reported on Form FDA 2512, "Cosmetic Product Ingredient Statement," and on Form FDA 2512a, a continuation form. Amendments to product formulations (§ 720.6) also are reported on Forms FDA 2512 and FDA 2512a. When a firm discontinues the commercial distribution of a cosmetic, we request that the firm file Form FDA 2514, "Notice of Discontinuance of Commercial Distribution of Cosmetic Product Formulation" (§§ 720.3 and 720.6). If any of the information submitted on or with these forms is confidential, the firm may submit a request for confidentiality under § 720.8.

FDA's online filing system is available on FDA's VCRP Web site at <http://wcms.fda.gov/FDAgov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm>. The online filing system contains the electronic versions of Forms FDA 2512, 2512a, and 2514, which are collectively found within the electronic version of Form FDA 2512.

We place cosmetic product filing information in a computer database and use the information for evaluation of cosmetic products currently on the market. Because filing of cosmetic product formulations is not mandatory, voluntary filings provide us with the best information available about cosmetic product ingredients and their frequency of use, businesses engaged in the manufacture and distribution of cosmetics, and approximate rates of product discontinuance and formula modifications. The information assists our scientists in evaluating reports of alleged injuries and adverse reactions from the use of cosmetics. We also use the information in defining and planning analytical and toxicological studies pertaining to cosmetics.

Information from the database is releasable to the public under our compliance with the Freedom of Information Act. We share nonconfidential information from our files on cosmetics with consumers, medical professionals, and industry.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

21 CFR section or part	Form No.	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Part 710 (registrations)	FDA 2511 ²	81	1	81	0.2	16
720.1 through 720.4 (ingredient statements for new submissions)	FDA 2512 ³	4,877	1	4,877	0.33	1,609
720.6 (amendments)	FDA 2512	1,042	1	1,042	0.17	177
720.6 (notices of discontinuance)	FDA 2512	1,826	1	1,826	0.1	183
720.8 (requests for confidentiality) .....	.....	1	1	1	2.0	2
Total .....	.....	.....	.....	.....	.....	1,987

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

² The term "Form FDA 2511" refers to both the paper Form FDA 2511 and electronic Form FDA 2511 in the electronic system known as the Voluntary Cosmetic Registration Program, which is available at <http://wcms.fda.gov/FDAgov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm>.

³ The term "Form FDA 2512" refers to the paper Forms FDA 2512, 2512a, and 2514 and electronic Form FDA 2512 in the electronic system known as the Voluntary Cosmetic Registration Program, which is available at <http://wcms.fda.gov/FDAgov/Cosmetics/GuidanceComplianceRegulatoryInformation/VoluntaryCosmeticsRegistrationProgramVCRP/OnlineRegistration/default.htm>.

We base our estimate of the total annual responses on paper and electronic submissions received during calendar years 2011, 2012, and 2013. We base our estimate of the hours per response upon information from cosmetic industry personnel and our experience entering data submitted on paper Forms FDA 2511, 2512, 2512a, and 2514 into the electronic system.

We estimate that, annually, 81 establishments that manufacture or package cosmetic products will each submit 1 registration on Form FDA 2511, for a total of 81 annual responses. Each submission is estimated to take 0.2 hour per response for a total of 16.2

hours, rounded to 16. We estimate that, annually, firms that manufacture, pack, or distribute cosmetics will file 4,877 ingredient statements for new submissions on Forms FDA 2512 and FDA 2512a. Each submission is estimated to take 0.33 hour per response for a total of 1,609.41 hours, rounded to 1,609. We estimate that, annually, firms that manufacture, pack, or distribute cosmetics will file 1,042 amendments to product formulations on Forms FDA 2512 and FDA 2512a. Each submission is estimated to take 0.17 hour per response for a total of 177.14 hours, rounded to 177. We estimate that, annually, firms that manufacture, pack,

or distribute cosmetics will file 1,826 notices of discontinuance on Form FDA 2514. Each submission is estimated to take 0.1 hour per response for a total of 182.6 hours, rounded to 183. We estimate that, annually, one firm will file one request for confidentiality. Each such request is estimated to take 2 hours to prepare for a total of 2 hours. Thus, the total estimated hour burden for this information collection is 1,987 hours.

Dated: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014-02512 Filed 2-5-14; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2007-N-0220]

Agency Information Collection Activities: Proposed Collection; Comment Request; Guidance for Industry on Pharmacogenomic Data Submissions

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 resulting from the submission to the Agency of pharmacogenomic data during the drug development process.

DATES: Submit either electronic or written comments on the collection of information by April 7, 2014.

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, PRASStaff@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 Pharmacogenomic Data Submissions—(OMB Control Number 0910-0557)—Extension

The guidance provides recommendations to sponsors submitting or holding investigational new drug applications (INDs), new drug applications (NDAs), or biologics license applications (BLAs) on what pharmacogenomic data should be submitted to the Agency during the drug development process. Sponsors holding, and applicants submitting, INDs, NDAs, or BLAs are subject to FDA requirements for submitting to the Agency data relevant to drug safety and efficacy (21 CFR 312.22, 312.23, 312.31, 312.33, 314.50, 314.81, 601.2, and 601.12).

The guidance interprets FDA regulations for IND, NDA, or BLA submissions, clarifying when the regulations require pharmacogenomics data to be submitted and when the submission of such data is voluntary. The pharmacogenomic data submissions described in the guidance that are required to be submitted to an IND, NDA, BLA, or annual report are covered by the information collection requirements under parts 312, 314, and 601 and are approved by OMB under control numbers 0910-0014 (part 312, INDs); 0910-0001 (part 314, NDAs and annual reports); and 0910-0338 (part 601, BLAs).

The guidance distinguishes between pharmacogenomic tests that may be considered valid biomarkers appropriate for regulatory decisionmaking, and other, less well-developed exploratory tests. The submission of exploratory pharmacogenomic data is not required under the regulations, although the Agency encourages the voluntary submission of such data.

The guidance describes the voluntary genomic data submission (VGDS) that can be used for such a voluntary submission. The guidance does not recommend a specific format for the VGDS, except that such a voluntary submission be designated as a VGDS. The data submitted in a VGDS and the level of detail should be sufficient for FDA to be able to interpret the information and independently analyze the data, verify results, and explore possible genotype-phenotype correlations across studies. FDA does not want the VGDS to be overly burdensome and time-consuming for the sponsor.

FDA has estimated the burden of preparing a voluntary submission described in the guidance that should be designated as a VGDS. Based on FDA’s experience with these submissions over the past few years, and on FDA’s familiarity with sponsors’ interest in submitting pharmacogenomic data during the drug development process, FDA estimates that approximately 4 sponsors will submit approximately 1 VGDS each, and that, on average, each VGDS will take approximately 50 hours to prepare and submit to FDA.

FDA estimates the burden of this information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN¹

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Voluntary Genomic Data Submissions	4	1	4	50	200

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–02511 Filed 2–5–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–N–0252]

Agency Information Collection Activities; Proposed Collection; Comment Request; Color Additive Certification Requests and Recordkeeping

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) 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 provisions of FDA's regulations governing batch certification of color additives manufactured for use in foods, drugs, cosmetics, or medical devices in the United States.

DATES: Submit either electronic or written comments on the collection of information by April 7, 2014.

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.

Color Additive Certification Requests and Recordkeeping—21 CFR Part 80 (OMB Control Number 0910–0216)—Extension

We have regulatory oversight for color additives used in foods, drugs, cosmetics, and medical devices. Section 721(a) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C.

379e(a)) provides that a color additive shall be deemed to be unsafe unless it meets the requirements of a listing regulation, including any requirement for batch certification, and is used in accordance with the regulation. We list color additives that have been shown to be safe for their intended uses in Title 21 of the Code of Federal Regulations (CFR). We require batch certification for all color additives listed in 21 CFR part 74 and for all color additives provisionally listed in 21 CFR part 82. Color additives listed in 21 CFR part 73 are exempted from certification.

The requirements for color additive certification are described in 21 CFR part 80. In the certification procedure, a representative sample of a new batch of color additive, accompanied by a “request for certification” that provides information about the batch, must be submitted to FDA's Office of Cosmetics and Colors. FDA personnel perform chemical and other analyses of the representative sample and, providing the sample satisfies all certification requirements, issue a certification lot number for the batch. We charge a fee for certification based on the batch weight and require manufacturers to keep records of the batch pending and after certification.

Under § 80.21, a request for certification must include: Name of color additive, manufacturer's batch number and weight in pounds, name and address of manufacturer, storage conditions, statement of use(s), certification fee, and signature of person requesting certification. Under § 80.22, a request for certification must include a sample of the batch of color additive that is the subject of the request. The sample must be labeled to show: Name of color additive, manufacturer's batch number and quantity, and name and address of person requesting certification. Under § 80.39, the person to whom a certificate is issued must keep complete records showing the disposal of all the color additive covered by the certificate. Such records are to be made available upon request to any accredited representative of FDA until at least 2 years after disposal of all the color additive.

The purpose for collecting this information is to help us assure that

only safe color additives will be used in foods, drugs, cosmetics, and medical devices sold in the United States. The required information is unique to the batch of color additive that is the subject of a request for certification. The manufacturer's batch number is used for temporarily identifying a batch of color additive until FDA issues a certification lot number and for identifying a certified batch during inspections. The manufacturer's batch number also aids in tracing the disposal of a certified batch or a batch that has been denied certification for noncompliance with the color additive regulations. The manufacturer's batch weight is used for

assessing the certification fee. The batch weight also is used to account for the disposal of a batch of certified or certification-denied color additive. The batch weight can be used in a recall to determine whether all unused color additive in the batch has been recalled. The manufacturer's name and address and the name and address of the person requesting certification are used to contact the person responsible should a question arise concerning compliance with the color additive regulations. Information on storage conditions pending certification is used to evaluate whether a batch of certified color additive is inadvertently or

intentionally altered in a manner that would make the sample submitted for certification analysis unrepresentative of the batch. We check storage information during inspections. Information on intended uses for a batch of color additive is used to assure that a batch of certified color additive will be used in accordance with the requirements of its listing regulation. The statement of the fee on a certification request is used for accounting purposes so that a person requesting certification can be notified promptly of any discrepancies. We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

21 CFR section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
80.21; Request for Certification	35	199	6,965	0.17	1,184
80.22; Sample to accompany request	35	199	6,965	0.05	348
Total				0.22	1,532

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED RECORDKEEPING BURDEN ¹

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
80.39; Record of Distribution	35	199	6,965	0.25	1,741

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

We base our estimate on our review of the certification requests received over the past 3 fiscal years (FY). The annual burden estimate for this information collection is 3,273 hours. The estimated reporting burden for this information collection is 1,532 hours and the estimated recordkeeping burden for this information collection is 1,741 hours. From FY 2011 to FY 2013, we processed an average of 6,954 responses (requests for certification of batches of color additives) per year. There were 35 different respondents, corresponding to an average of approximately 199 responses from each respondent per year. Using information from industry personnel, we estimate that an average of 0.22 hour per response is required for reporting (preparing certification requests and accompanying samples) and an average of 0.25 hour per response is required for recordkeeping.

Our Web-based Color Certification information system allows submitters to request color certification online, follow their submissions through the process, and obtain information on account status. The system sends back the

certification results electronically, allowing submitters to sell their certified color before receiving hard-copy certificates. Any delays in the system result only from shipment of color additive samples to FDA's Office of Cosmetics and Colors for analysis.

Dated: January 31, 2014.
Leslie Kux,
Assistant Commissioner for Policy.
 [FR Doc. 2014-02513 Filed 2-5-14; 8:45 am]
BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2014-D-0085]

Draft Guidance for Industry on Providing Regulatory Submissions in Electronic Format—Submissions Under Section 745A(a) of the Federal Food, Drug, and Cosmetic Act; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the availability of a draft guidance for industry entitled "Providing Regulatory Submissions in Electronic Format—Submissions Under Section 745A(a) of the Federal Food, Drug, and Cosmetic Act." The draft guidance announced in this notice sets forth FDA's interpretation of the Food and Drug Administration Safety and Innovation Act (FDASIA), which amended the Federal Food, Drug, and Cosmetic Act (FD&C Act) to require that certain submissions under the FD&C Act and the Public Health Service Act be submitted in electronic format specified by FDA, beginning no earlier than 24 months after publication of a final version of the draft guidance. This guidance describes how FDA interprets and plans to implement the electronic submission requirements.

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 May 7, 2014.

ADDRESSES: Submit written requests for single copies of the documents to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993-0002 or the Office of Communication, Outreach and Development (HFM-40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the documents.

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: Ron Fitzmartin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 1160, Silver Spring, MD 20993, ronald.fitzmartin@fda.hhs.gov; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852, 301-827-6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled "Providing Regulatory Submissions in Electronic Format—Submissions Under Section 745A(a) of the Federal Food, Drug, and Cosmetic Act." FDASIA (Pub. L. 112-144), signed by the President on July 9, 2012, amended the FD&C Act to add section 745A entitled "Electronic Format for Submissions." Drug and biologic submissions are addressed in section 745A(a).

Section 745A(a)(1) of the FD&C Act describes the general scope of section 745A(a) and provides that submissions under new drug applications (NDAs), abbreviated new drug applications (ANDAs), biological license applications (BLAs), and investigational new drug applications (INDs) must be in electronic format specified in FDA guidance. Section 745A(a)(2) states that the guidance issued by FDA may provide a timetable for future standards and criteria for waivers and exemptions. Section 745A(a)(3) provides that submissions under section 561 are

exempt from the requirements of section 745A(a).

This guidance describes the scope of section 745A(a), the waivers of and exemptions from the electronic submission requirements, and the process and timetable that FDA will use to implement the electronic submission requirements. As described in the guidance, FDA will develop individual guidances to specify the electronic formats for certain submissions under section 745A(a). Under section 745A(a)(1) of the FD&C Act, electronic submissions can be required no earlier than 24 months after a final guidance is issued. Therefore, no earlier than 24 months after issuance of the final version of an individual guidance specifying the format for certain submissions under section 745A(a), the Agency will begin requiring that the submissions under NDAs, ANDAs, BLAs, or INDs be submitted in the specified electronic format.

The required format(s) for specific submissions and corresponding timetable(s) for implementation will be specified in individual guidances. Once an individual guidance is finalized and the timetable for implementation described in that guidance has passed, the guidance is considered to have binding effect and the electronic format(s) specified in that guidance must be used for submissions under certain NDAs, ANDAs, BLAs, or INDs.

In section 745A(a) of the FD&C Act, Congress granted explicit statutory authorization to FDA to specify in guidance the format for the electronic submissions required under this section. Accordingly, to the extent that this draft guidance provides such requirements under section 745A(a) of the FD&C Act, indicated by the use of the words "must" or "required", this document is not subject to the usual restrictions in FDA's good guidance practice regulations, such as the requirement that guidances not establish legally enforceable responsibilities. See 21 CFR 10.115(d). FDA guidances ordinarily contain standard language explaining that guidances should be viewed only as recommendations unless specific regulatory or statutory requirements are cited. FDA is not including this standard language in this guidance because this draft guidance contains binding provisions. The draft guidance, when finalized, will represent the Agency's current thinking on providing regulatory submissions in electronic format, as required under section 745A(a) of the FD&C Act.

II. Paperwork Reduction Act of 1995

This draft guidance contains no collection of information. As discussed in the draft guidance, FDA intends to develop individual draft guidances to specify the electronic formats for certain submissions under section 745A(a). We will discuss any information collection subject to clearance by OMB under the Paperwork Reduction Act in each **Federal Register** notice announcing the availability of the individual draft guidances that specify the required electronic formats.

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 <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>, <http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>, or <http://www.regulations.gov>.

Dated: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014-02553 Filed 2-5-14; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2012-D-0097]

Revised Draft Guidance for Industry on Providing Regulatory Submissions in Electronic Format—Standardized Study Data; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a revised draft guidance for industry entitled "Providing

Regulatory Submissions in Electronic Format—Standardized Study Data.” The draft guidance announced in this notice is being issued in accordance with the Food and Drug Administration Safety and Innovation Act (FDASIA), which amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to require that certain submissions under the FD&C Act and Public Health Service Act (PHS Act) be submitted in electronic format, beginning no earlier than 24 months after issuance of final guidance on that topic. The draft guidance describes how FDA plans to implement the requirements for the electronic submission of standardized study data contained in certain submissions to new drug applications (NDAs), abbreviated new drug applications (ANDAs), biologics license applications (BLAs), and investigational new drug applications (INDs) and is being issued for public comment. This document supersedes the guidance entitled “Providing Regulatory Submissions in Electronic Format—Standardized Study Data” that was issued in February 2012.

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 May 7, 2014. Submit either electronic or written comments concerning the collection of information by April 7, 2014.

ADDRESSES: Submit written requests for single copies of the documents to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993-0002 or the Office of Communication, Outreach and Development (HFM-40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the documents.

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: Ron Fitzmartin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1160, Silver Spring,

MD 20993, ronald.fitzmartin@fda.hhs.gov; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852, 301-827-6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDASIA (Pub. L. 112-144), signed by the President on July 9, 2012, amended the FD&C Act to add section 745A, entitled “Electronic Format for Submissions.” Section 745A(a)(1) of the FD&C Act requires that submissions under section 505(b), (i), or (j) of the FD&C Act (21 U.S.C 355(b), (i), or (j)), and submissions under sections 351(a) or (k) of the PHS Act (42 U.S.C. 262(a) or (k)), be submitted to FDA in electronic format no earlier than 24 months after FDA issues final guidance on that topic.

In accordance with section 745A(a)(1) of the FD&C Act, FDA is issuing this draft guidance, announcing its determination that the study data contained in the submission types identified in this draft guidance must be submitted electronically (except for submissions that are exempted), in a format that FDA can process, review, and archive. Currently, the Agency can process, review, and archive electronic submissions of study data that use the standards, formats, and terminologies specified in the Study Data Standards Catalog¹ posted to FDA’s Study Data Standards Resources Web page.

This revised draft guidance on standardized study data will supersede the draft guidance for industry entitled “Providing Regulatory Submissions in Electronic Format—Standardized Study Data” that was issued in February 2012. When finalized, this guidance implements the electronic submission requirements of section 745A(a) of the FD&C Act by specifying the format for electronic submission of study data contained in NDA, ANDA, BLA, and IND submissions. After publication of the **Federal Register** notice of availability of the final guidance, all studies with a start date² 24 months after the **Federal Register** notice must use the appropriate FDA supported standards, formats, and terminologies specified in the Data Standards Catalog for NDA, ANDA, and certain BLA submissions. Study data contained in

¹ Available at <http://www.fda.gov/forindustry/datastandards/studydatastandards/default.htm>.

² For purposes of this guidance, the study start date is the earliest date of informed consent among any subject that enrolled in the study. For example, see Study Start Date in the SDTM Trial Summary Domain (TSPARMCD = SSTDTC), <http://www.cdisc.org>.

certain IND submissions must use the specified formats for electronic submission in studies with a start date 36 months after the **Federal Register** notice of availability.

In Section 745A(a) of the FD&C Act, Congress granted explicit authorization to FDA to implement the statutory electronic submission requirements by specifying the format for such submissions in guidance. Because this draft guidance provides such requirements under section 745A(a) of the FD&C Act, indicated by the use of the words “must” or “required”, it is not subject to the usual restrictions in FDA’s good guidance practice regulations, such as the requirement that guidances not establish legally enforceable responsibilities. See 21 CFR 10.115(d).

II. Paperwork Reduction Act of 1995

The draft 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 draft guidance pertains to sponsors and applicants making regulatory submissions to FDA in electronic format for NDAs, ANDAs, BLAs, and INDs. The information collection discussed in the draft guidance is contained in our IND regulations (21 CFR part 312) and approved under OMB control number 0910-0014, our NDA regulations (including ANDAs) (21 CFR part 314) and approved under OMB control number 0910-0001, and our BLA regulations (21 CFR part 601) and approved under OMB control number 0910-0338.

Sponsors and applicants have been voluntarily submitting standardized study data in electronic format. Under FDASIA, sponsors and applicants will be required to make all of these submissions electronically in compliance with the specified standards, formats, and terminologies. These requirements will be phased in over 2- and 3-year periods after the issuance of the final guidance.

For many years sponsors and applicants have been submitting electronically using the electronic common technical document format and have included electronic study data in both legacy and standardized formats. For some sponsors and applicants there may be new costs, including capital costs or operating and maintenance costs, which would result from the requirements under FDASIA and the final guidance, because some sponsors and applicants would have to change from submissions that have included

legacy (non-standard) study data to submissions in compliance with the final guidance. FDA estimates that for some sponsors and applicants the costs may be as follows:

- Data management (hardware/software): \$350,000–\$1,000,000
- Initial data management operations: \$500,000–\$1,000,000
- Training \$100,000–\$250,000

III. Comments

Interested persons may submit either electronic comments to <http://www.regulations.gov> or written comments regarding this document 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>, <http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>, or <http://www.regulations.gov>.

Dated: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–02555 Filed 2–5–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–0091]

Draft Guidance for Industry on Analgesic Indications: Developing Drug and Biological Products; 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 “Analgesic Indications: Developing Drug and Biological Products.” This guidance provides recommendations to sponsors on the development of prescription

drugs for the management of acute and chronic pain, as well as the management of breakthrough pain. Specifically, this guidance focuses on drug development and trial design issues and chemistry, manufacturing, and controls concerns that are unique to the study of acute, chronic, and breakthrough pain and the labeling considerations for analgesic drugs.

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 April 7, 2014.

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:

Sharon Hertz, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 3156, Silver Spring, MD 20993–0002, 301–796–2280.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled “Analgesic Indications: Developing Drug and Biological Products.” Analgesic development involves important concepts that should be considered during drug development, such as the duration of drug exposure for the treatment of acute and chronic pain and the subjective nature of pain intensity measurement. It is important that the spectrum of clinical studies planned during analgesic development provide an adequate characterization of the clinical, pharmacological, and, when feasible, pharmacodynamic behavior of the drug. This draft guidance presents the types of indications FDA may be willing to approve at present for analgesic drugs. It also presents general trial design

issues, appropriate endpoints, and important safety considerations. For example, the guidance discusses the importance of appropriate statistical considerations that take into account the amount of nonrandom missing data in analgesic drug trials.

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 the development of drug and biological products for analgesic indications. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

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 collections of information were approved under OMB control numbers 0910–0001, 0910–0338, and 0910–0014.

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: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–02557 Filed 2–5–14; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2010-D-0503]

Guidance for Clinical Investigators, Sponsors, and Institutional Review Boards on Investigational New Drug Applications—Determining Whether Human Research Studies Can Be Conducted Without an Investigational New Drug Application; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA or we) is reopening the comment period for the final guidance for clinical investigators, sponsors, and institutional review boards (IRBs) entitled “Investigational New Drug Applications (INDs)—Determining whether Human Research Studies can be Conducted without an IND,” published in the *Federal Register* of September 10, 2013 (78 FR 55262). We are reopening the comment period only with respect to those subsections of the final guidance that address the applicability of the IND regulations to clinical research studies involving cosmetics and foods (including dietary supplements).

DATES: Submit either electronic or written comments by April 7, 2014.

ADDRESSES: Submit electronic comments on the final 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: Paul L. Ferrari, Center for Food Safety and Applied Nutrition (HFS-024), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740-3835, 240-402-1722.

SUPPLEMENTARY INFORMATION:

I. Background

In the *Federal Register* of October 14, 2010 (75 FR 63189), we published a notice announcing the availability of a draft guidance entitled “Guidance for Industry: Investigational New Drug Applications (INDs)—Determining whether Human Research Studies can be Conducted without an IND” (“the draft guidance”). In the *Federal Register* of September 10, 2013 (78 FR 55262), we published a notice announcing the availability of the final version of the

guidance, entitled “Guidance for Clinical Investigators, Sponsors, and IRBs: Investigational New Drug Applications (INDs)—Determining whether Human Research Studies can be Conducted without an IND” (“the final guidance”). We are reopening the comment period only with respect to those subsections of the final guidance that address the applicability of the IND regulations to clinical research studies involving cosmetics and foods (including dietary supplements), in response to requests from interested persons.

II. Request for Comments

Following publication of the September 10, 2013, *Federal Register* notice of availability of the final guidance, we received correspondence asking us to provide for further opportunity to comment on subsections C (“Cosmetics”) and D (“Foods”) of section VI (“Specific Issues Concerning the Application of the IND Regulations”) of the final guidance. The correspondence explained that more time was needed to review the guidance and consider its effect on researchers and health care providers, among others. In response to these requests, we have decided to reopen the comment period with respect to the foods and cosmetics subsections of the final guidance for 60 days. Accordingly, we invite comment on subsections VI.C and VI.D by April 7, 2014.

III. How To Submit Comments

Interested persons may submit either electronic comments regarding subsections VI.C and VI.D of the final guidance 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: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014-02550 Filed 2-5-14; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2014-D-0092]

Study Data Technical Conformance Guide and Data Standards Catalog; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a Study Data Technical Conformance Guide and an update to the Data Standards Catalog (formerly the Study Data Standards Catalog). The Study Data Technical Conformance Guide supplements the revised draft guidance for industry “Providing Regulatory Submissions in Electronic Format—Standardized Study Data” and provides specifications, recommendations, and general considerations on submitting standardized study data using FDA supported data standards specified in the Data Standards Catalog.

DATES: Although you can comment on these documents at any time, to ensure that the Agency considers your comments, please submit either electronic or written comments by May 7, 2014.

ADDRESSES: Submit written requests for a copy of the Study Data Technical Conformance Guide and the Data Standards Catalog to the Division of Drug Information, Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 51, Rm. 2201, Silver Spring, MD 20993-0002; or Office of Communication, Outreach and Development (HFM-40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852-1448. Send one self-addressed adhesive label to assist that office in processing your requests.

Submit electronic comments on the Study Data Technical Conformance Guide and the Data Standards Catalog 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: Ron Fitzmartin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1160, Silver Spring, MD 20993-0002, CDERDataStandards@

fda.hhs.gov; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852-1448, 301-827-6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a Study Data Technical Conformance Guide (the Guide) and an update to the Study Data Standards Catalog, which will be revised and renamed the Data Standards Catalog (the Catalog). The Guide supplements the guidance for industry, "Providing Regulatory Submissions in Electronic Format—Standardized Study Data," (eStudy Data guidance) (available at <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm>), and provides technical recommendations to sponsors for the electronic submission of standardized animal and human study data and related information contained in certain submissions to new drug applications (NDAs), abbreviated new drug applications (ANDAs), biologic license applications (BLAs), and investigational new drug applications (INDs). The eStudy Data guidance, when finalized, will implement the electronic submission requirements of section 745A(a) of the Federal Food, Drug, and Cosmetic Act with respect to standardized study data contained in NDA, ANDA, BLA, and IND submissions.

The Guide integrates and updates the Study Data Specifications and the CDER Common Data Standards Issues document and is available on FDA's Study Data Standards Resources Web page at <http://www.fda.gov/forindustry/datastandards/studydatastandards/default.htm>. The Guide is intended to complement and promote interactions between sponsors and FDA review divisions. It is not intended to replace the need for sponsors to communicate directly with review divisions regarding data standards implementation approaches or issues. The Guide, when finalized, will supersede the Study Data Specifications (Versions 1.0–2.0) and the CDER Study Data Common Issues Document (Versions 1.0–1.1). The Guide is organized as follows:

Section 1: Introduction—provides information on regulatory policy and guidance background, purpose, and document control.

Section 2: Planning and Providing Standardized Study Data—recommends and provides details on preparing an overall study data standardization plan and a study data reviewer's guide.

Section 3: Exchange Format—Electronic Submissions—presents the specifications, considerations, and recommendations for the file formats currently supported by FDA.

Section 4: Study Data Submission Format: Clinical and Non-Clinical—presents general considerations and specifications for sponsors using, for example, the following standards for the submission of study data: Clinical Data Interchange Standards Consortium, Study Data Tabulation Model, Analysis Data Model, and Standard for Exchange of Nonclinical Data.

Section 5: Therapeutic Area Standards—presents supplemental considerations and specific recommendations when sponsors submit study data using FDA supported TA standards.

Section 6: Terminology—presents general considerations and specific recommendations when using controlled terminologies/vocabularies for clinical trial data.

Section 7: General Electronic Submission Format—provides specifications and recommendations on submitting study data using the electronic Common Technical Document format.

Section 8: Data Fitness—provides general recommendations on standards compliance, data traceability expectations, legacy data conversion, versioning, and data validation rules.

II. Comments

Interested persons may submit either electronic comments regarding this document to <http://www.regulations.gov> or written comments to the Division of Dockets Management (see ADDRESSES). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at <http://www.regulations.gov>.

III. Electronic Access

Persons with access to the Internet may obtain the Guide and the Catalog at either <http://www.fda.gov/forindustry/datastandards/studydatastandards/default.htm> or <http://www.regulations.gov>.

Dated: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014-02554 Filed 2-5-14; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2014-N-0001]

Advancing the Development of Pediatric Therapeutics: Pediatric Bone Health; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration's (FDA) Pediatric and Maternal Health Staff in the Center for Drug Evaluation and Research and the Office of Pediatric Therapeutics are announcing a 1-day public workshop entitled "Advancing the Development of Pediatric Therapeutics (ADEPT): Pediatric Bone Health." The purpose of this initial workshop is to provide a forum to consider issues related to advancing pediatric regulatory science in the evaluation of bone health in pediatric patients.

Date and Time: The public workshop will be held on March 4, 2014, from 8:30 a.m. to 5 p.m.

Location: The public workshop will be held in the Pooks Hill Marriott, 5151 Pooks Hill Rd., Bethesda, MD 20814. The hotel's telephone number is 301-897-9400.

Contact: Denise Pica-Branco, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993-0002, 301-796-1732, Fax: 301-796-9858, email: denise.picabranco@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: FDA has engaged experts in pediatrics to address challenging issues related to the evaluation of effects on bone health for products used to treat pediatric patients. Identification of signals in animal studies and adult clinical trials that warrant further clinical investigation and identification of biomarkers that may be predictive of bone health in children will be discussed. Additionally, strategies and methods to address the challenges of assessing long-term bone health for products used to treat pediatric patients will be discussed.

I. Participation in the Public Workshop

There is no fee to attend the public workshop, but attendees should register in advance. Space is limited, and registration will be on a first-come, first-served basis. Persons interested in attending this workshop must register online at PediatricBoneHealth@fda.hhs.gov before February 28, 2014.

For those without Internet access, please contact Denise Pica-Branco (see *Contact*) to register. Onsite registration will not be available.

If you need special accommodations due to a disability, please contact Denise Pica-Branco (see *Contact*) at least 7 days in advance.

II. Transcripts

Transcripts of the workshop will be available for review at the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and at <http://www.regulations.gov> approximately 30 days after the workshop. A transcript will also be available in either hard copy or on CD-ROM, after submission of a Freedom of Information request. Send written requests to the Division of Freedom of Information (ELEM-1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857. Send faxed requests to 301-827-9267.

Dated: January 31, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014-02552 Filed 2-5-14; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICE

National Institutes of Health

Proposed Information Collection; 60-day Comment Request: Population Assessment of Tobacco and Health (PATH) Study

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on

proposed data collection projects, the National Institute on Drug Abuse (NIDA), the National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) The quality, utility, and clarity of the information to be collected; and (4) The approaches used to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

DATES: Comment Due Date: Comments regarding this information collection are best assured of having their full effect if received by April 7, 2014.

FOR FURTHER INFORMATION CONTACT: *To Submit Comments and for Further Information:* To obtain a copy of the

data collection plans and instruments, submit comments in writing or request more information on the proposed project, contact: Kevin P. Conway, Ph.D., Deputy Director, Division of Epidemiology, Services, and Prevention Research, National Institute on Drug Abuse, 6001 Executive Boulevard, Room 5185; or call non-toll-free number (301) 443-8755; or Email your request, including your address to:

PATHprojectofficer@mail.nih.gov.

Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION:

Proposed Collection: Population Assessment of Tobacco and Health (PATH) Study—Second Wave of Data Collection—0925-0664—Revision—National Institutes of Health (NIH), National Institute on Drug Abuse (NIDA), in partnership with the Food and Drug Administration (FDA).

Need and Use of Information

Collection: This is a revision request (OMB 0925-0664, expires 11/30/2015) for the Population Assessment of Tobacco and Health (PATH) Study to conduct the second wave of data collection. The PATH Study is a large national longitudinal cohort study on tobacco use behavior and health among the U.S. household population of adults age 18 and older and youth ages 12 to 17. The PATH Study conducts annual interviews and collects biospecimens from adults to help inform the development, implementation, and evaluation of tobacco-product regulations by FDA in meeting its mission under the Family Smoking Prevention and Tobacco Control Act (TCA) to regulate tobacco products, including tobacco-product advertising, labeling, marketing, constituents, ingredients, and additives. The longitudinal design of the PATH Study provides it with the capacity to measure and report within-person changes and between-person differences in tobacco product use behaviors and health effects within the cohort over time. These data will help to inform regulatory decisions and actions by FDA and FDA's evaluations of associations between its regulations and tobacco use behaviors and health indicators in the population.

OMB approval is requested for 3 years. There are no capital, operating, or maintenance costs to report. There are no costs to respondents other than their time. The total estimated annualized burden hours are 75,124.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent and instrument	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response (in hours)	Estimated total annual burden hours requested
Adults—Extended Interview	38,740	1	1	38,740
Adults—Baseline youth respondents who age into adult cohort—Consent for Extended Interview	2,717	1	2/60	91
Adults—Baseline youth respondents who age into adult cohort—Extended Interview	2,500	1	68/60	2,833
Adults—Adult respondents who refused biospecimen collection at Baseline but who consent for Wave 2—Consent for Biological Samples	1,452	1	4/60	97
Adults—Baseline youth respondents who age into the adult cohort—Consent for Biological Samples	2,500	1	4/60	167
Adults—Biospecimen Collection: Urine	12,387	1	10/60	2,065
Adults—Biospecimen Collection: Buccal Cell	2,387	1	18/60	716

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent and instrument	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response (in hours)	Estimated total annual burden hours requested
Adults—Biospecimen Collection: Blood	2,303	1	18/60	691
Adults—Tobacco Use Form	17,077	1	4/60	1,138
Adults—Follow-up/Tracking Participant Information Form	41,239	2	8/60	10,997
Youth—Extended Interview	12,392	1	32/60	6,609
Youth—Shadow youth who age into youth cohort—Assent for Extended Interview	2,734	1	2/60	91
Youth—Shadow youth who age into youth cohort—Extended Interview	2,515	1	42/60	1,761
Adult—Parent Interview	12,392	1	14/60	2,891
Adults—Parents of Shadow youth who age into youth cohort—Parent Permission and Consent for Parent Interview	2,734	1	2/60	91
Adults—Parents of Shadow youth who age into youth cohort—Parent Interview	2,515	1	17/60	713
Adults—Follow-up/Tracking Participant Information Form for Youth (completed by parents)	14,907	2	8/60	3,975
Adults—Follow-up/Tracking Participant Information Form for sample Shadow youth (completed by parents)	5,468	2	8/60	1,458

Dated: January 31, 2014.

Glenda J. Conroy,

Executive Officer (OM Director), National Institute on Drug Abuse, NIH.

[FR Doc. 2014-02603 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 209 and 37 CFR Part 404 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852-3804; telephone: 301-496-7057; fax: 301-402-0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

HIV-1 BED: A Simple Serological Assay for Detecting Recent Infection and Estimating Incidence of Multiple, Worldwide HIV-1 Subtypes

Description of Technology: This CDC developed invention is a simple enzyme immunoassay that detects increasing levels of anti-HIV-IgG after seroconversion and can be used for detection of HIV-1 infection. The assay, termed IgG-Capture BED-EIA, incorporates a branched peptide derived from 3 different subtypes to allow equivalent detection of antibodies of different subtypes. The competitive format of the assay allows detection of increasing proportion of HIV-1 IgG for almost 2 years after seroconversion. This is different from what is normally observed in a conventional EIA (with antigen coated plates) that plateaus soon after seroconversion. This assay will be important for HIV prevention activities, targeting resources, and evaluation of ongoing interventions.

Potential Commercial Applications:

- HIV clinical serodiagnostics
 - Informing clinical decision-making
 - Public health/HIV monitoring programs and incidence surveillance
- Competitive Advantages:**
- Ready for commercialization
 - Simple and high-throughput capable
 - Detects HIV-1 subtypes prevalent in N. America, Europe, Japan, Thailand, Australia, and also central and E. Africa

Development Stage: In vitro data available

Inventors: Bharat S. Parekh and J. Steven McDougal (CDC)

Publications:

1. Parekh BS, *et al.* Determination of mean recency period for estimation of HIV

type 1 Incidence with the BED-capture EIA in persons infected with diverse subtypes. AIDS Res Hum Retroviruses. 2011 Mar;27(3):265-73. [PMID 20954834]

2. Dobbs T, *et al.* A comprehensive evaluation of the proficiency testing program for the HIV-1 BED incidence assay. J Clin Microbiol. 2011 Oct;49(10):3470-3. [PMID 21832016]
3. Parekh BS, *et al.* Quantitative detection of increasing HIV type 1 antibodies after seroconversion: a simple assay for detecting recent HIV infection and estimating incidence. AIDS Res Hum Retroviruses. 2002 Mar 1;18(4):295-307. [PMID 11860677]
4. Dobbs T, *et al.* Performance characteristics of the immunoglobulin G-capture BED-enzyme immunoassay, an assay to detect recent human immunodeficiency virus type 1 seroconversion. J Clin Microbiol. 2004 Jun;42(6):2623-8. [PMID 15184443]
5. Nesheim S, *et al.* Temporal trends in HIV Type 1 incidence among inner-city childbearing women in Atlanta: use of the IgG-capture BED-enzyme immunoassay. AIDS Res Hum Retroviruses. 2005 Jun;21(6):537-44. [PMID 15989458]

Intellectual Property: HHS Reference No. E-555-2013/0—Research Tool. Patent protection is not being pursued for this technology.

Related Technologies:

- HHS Reference No. E-357-2013/0—Research Tool. Patent protection is not being pursued for this technology.
 - HHS Reference No. E-358-2013/0—Research Tool. Patent protection is not being pursued for this technology.
- Licensing Contact:** Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Improved Botulism, Botulinum Neurotoxin Type-E Diagnostics

Description of Technology: CDC researchers have improved upon a prior,

HHS patented mass spectrometry-based Endopep-MS assay that is able to rapidly detect and differentiate all seven botulinum neurotoxin (BoNT) types A to G. This current improvement comprises the addition of two optimized substrate peptides that increases the assay's sensitivity, relative to prior substrates, for botulinum neurotoxin type-E (BoNT/E) by greater than 100 fold.

Currently, the primary method of detecting BoNT contamination entails mouse lethality bioassays. In addition to the sacrifice of numerous animals, these lethality assays are expensive and require several days to obtain results. During a suspected BoNT exposure, time is of the essence. The previously patented mass spectrometry approach can provide diagnostic results for all seven BoNT types in a matter of hours, at greater cost-efficiency and without animal toxicity studies. The specific innovation builds upon those earlier improvements by providing new substrates that allow for tremendous increases in the degree of sensitivity for BoNT/E-specific detection within clinical samples.

Potential Commercial Applications:

- Detection of botulinum neurotoxin type-E (BoNT/E) in clinical samples
- Basic research investigating neurotoxin activity, Clostridium botulinum and botulism
- Biodefense, biosecurity
- Food safety assurance

Competitive Advantages:

- More sensitive, greater cost-efficiency and provides results significantly faster than traditional BoNT/E mouse lethality assays
- Builds upon a previously established and patented mass spectrometry-based Endopep-MS assay, adding optimized peptides that improve current BoNT/E detection sensitivity >100 fold

Development Stage: In vitro data available.

Inventors: Dongxia Wang, Suzanne R. Kalb, John R. Barr (all of CDC).

Publications:

1. Kalb SR, *et al.* The use of Endopep-MS for the detection of botulinum toxins A, B, E, and F in serum and stool samples. *Anal Biochem.* 2006 Apr 1;351(1):84–92. [PMID 16500606]
2. Boyer AE, *et al.* From the mouse to the mass spectrometer: detection and differentiation of the endoprotease activities of botulinum neurotoxins A–G by mass spectrometry. *Anal Chem.* 2005 Jul 1;77(13):3916–24. [PMID 15987092]

Intellectual Property: HHS Reference No. E–528–2013/0—PCT Application No. PCT/US2013/073885 filed 09 Dec 2013.

Related Technology: HHS Reference No. E–460–2013/0—US Patent No. 7,611,856 issued 03 Nov 2009.

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov.

Novel One-Well Limiting-Antigen Avidity Enzyme Immunoassay To Detect Recent HIV–1 Infection Using a Multi-Subtype Recombinant Protein

Description of Technology: This CDC developed Limiting-Antigen avidity Enzyme Immunoassay (LAg-avidity-EIA) provides an easy way to measure increasing binding strength (avidity) of HIV antibodies as part of maturation HIV antibodies after seroconversion, providing a method to distinguish early-stage from long-term HIV–1 infection. Surveillance of HIV–1 provides information on prevalence rates of the disease, but determination of new infection rates (HIV–1 incidence) is difficult to deduce. Longitudinal follow up is expensive and can be biased.

Unlike assays which use antigens derived from only one subtype and use two wells, this new approach employs a multi-subtype recombinant protein, rIDR–M, to permit equivalent detection of antibody avidity among different subtypes, and measures binding strength of antibody in one well. This assay will allow the simultaneous testing of more specimens and better overall reproducibility due to its design. Further, the approach is likely to be more robust and provide more accurate results. The assay may be used for individual diagnosis of recent or long-term infection, but may also act as an important tool for worldwide HIV–1 surveillance, assessing new trends of infections, and monitoring success of varied and comparable prevention efforts implemented by major public health agencies.

Potential Commercial Applications:

- Population surveillance: estimation of HIV–1 incidence in cross-sectional specimens
- Identifying recent infection risk factors
- Following antibody avidity maturation over time

Competitive Advantages:

- Assay permits equivalent detection of HIV antibody avidity among different subtypes
- Design of LAg avidity-EIA allows for testing more samples and better reproducibility when compared to two-well avidity index EIA

Development Stage: In vitro data available.

Inventor: Bharat S. Parekh (CDC).

Publications:

1. Duong YT, *et al.* Detection of recent HIV–1 infection using a new limiting-antigen avidity assay: potential for HIV–1 incidence estimates and avidity maturation studies. *PLoS One.* 2012;7(3):e33328. [PMID 22479384]
2. Wei X, *et al.* Development of two avidity-based assays to detect recent HIV type 1 seroconversion using a multisubtype gp41 recombinant protein. *AIDS Res Hum Retroviruses.* 2010 Jan;26(1):61–71. [PMID 20063992]

Intellectual Property: HHS Reference No. E–522–2013/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov.

Stable, Early-Stage Biomarker for Diagnosis of Bacillus Anthracis Infection and Anthrax Vaccine Development

Description of Technology: This invention comprises monoclonal antibodies, proteins, and related nucleic acid coding sequences that identify all or part of the antigenic anthrose oligosaccharide of *Bacillus anthracis*, the causative agent of anthrax toxicity in humans. It is imperative to identify virulent *B. anthracis* with speed and specificity, however there presently is substantial difficulty in early-stage recognition and diagnosis of anthrax inhalation. Improved diagnostic assays that can reliably identify anthrax exposure in its earliest stages and distinguish anthrax from other flu-like illnesses are sorely needed.

CDC and collaborative researchers have developed this technology and confirmed the value of an anthrose biomarker assay as a potentially valuable tool in informing early-stage response decisions following potentially anthrax exposure with *in vivo* primate data. This invention may be used for development of point-of-care anthrax exposure tests, as well as therapeutics and vaccines directed against *B. anthracis*.

Potential Commercial Applications:

- Biodefense, biosecurity
- Point-of-care *B. anthracis*-exposure diagnostic
- Anthrax vaccine development
- Development of *B. anthracis* therapeutics

Competitive Advantages:

- Valuable tools for screening at-risk individuals following possible anthrax exposure
- May be developed as a rapid, lateral-flow assay for emergency point-of-care diagnosis
- *In vivo* primate studies validate efficacy as serologic biomarker following aerosolized spore exposure

- Anthrose biomarker assay readout is critically unaffected by ciprofloxacin (anti-anthrax) treatment

Development Stage:

- In vitro data available
 - In vivo data available (animal)
- Inventors:* Conrad P. Quinn (CDC), Elke Saile (CDC), Geert-Jan Boons (Univ of Georgia), Russell Carlson (Univ of Georgia)

Publication:

Saile E, *et al.* Antibody responses to a spore carbohydrate antigen as a marker of nonfatal inhalation anthrax in rhesus macaques. *Clin Vaccine Immunol.* 2011 May;18(5):743–8. [PMID 21389148]

Intellectual Property: HHS Reference No. E–474–2013/0—PCT Application No. PCT/US2011/021242 filed 14 Jan 2011, which published as WO 2011/088288 on 21 Jul 2011

Related Technologies:

- HHS Reference No. E–158–2013/2
- HHS Reference No. E–167–2013/0
- HHS Reference No. E–196–2013/0
- HHS Reference No. E–203–2013/0
- HHS Reference No. E–210–2013/0

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov

Therapeutic, Bifunctional Janus Microparticles With Spatially Segregated Surface Proteins and Methods of Production

Description of Technology: CDC researchers have developed a fabrication process to create bifunctional microparticles displaying two distinct proteins that are spatially segregated onto a single hemispheric surface. At present, there is no described way of producing biological microparticles with two distinct types of separated proteins. Bifunctional Janus particles generated by the CDC approach possess biologically relevant, native conformation proteins attached to a biologically unreactive and safe substrate. They also display high densities of each type of proteins that may enable a range of capabilities that monofunctional particles cannot, such as improved drug targeting and bioimaging agents.

The possible uses of these particles are limited only by the biological functions of proteins. For example, two recognition proteins could be used to bring different biological effectors together for enzymatic activation or breakdown. A recognition protein plus an activation molecule could simultaneously bind a cell and stimulate the immune system or facilitate the breakdown of toxic products. Alternatively, a protein drug

plus a targeting and internalization motif could target treatment to a specific subset of cells and reduce nonspecific effects of drugs with severe side effects. Such bifunctional Janus particles can be used to create an entirely novel class of smart particle capable of high avidity targeting to and stimulation of multiple cell types. With these new particles, scientists and biomedical engineers can potentially improve the range, specificity and capabilities of therapeutic interventions and research.

Potential Commercial Applications:

- Development of improved bioimaging agents and approaches for basic research and therapeutic use
- Cellular adhesion and uptake promotion
- Innumerable therapeutic and research usages, for example:
 - Microparticle propulsion and targeting: ActA/RGD
 - Nanoparticle Antibiotic: Fc/Ab
 - Targeted cell killing: Fc/RGD
 - Arbitrary linkages: Streptavidin-biotin
- Circumvents issue with current bifunctional microparticles having low density attachment and being operatively impotent
- Enables a range of capabilities that monofunctional particles cannot, such as improved targeting of drugs and bioimaging capabilities
- Provides a dense concentration of antibody binding events to create an artificial immunological recognition milieu that will overcome immunoevasive or -suppressive strategies, and/or mutations by pathogens

Development Stage: In vitro data available

Inventors: David White (CDC), Todd Sulchek (Georgia Tech Research Corp), Jennifer Tang (Georgia Institute of Technology)

Publication:

Tang JL, *et al.* Bifunctional Janus microparticles with spatially segregated proteins. *Langmuir.* 2012 Jul 3;28(26):10033–9. [PMID 22624704]

Intellectual Property: HHS Reference No. E–457–2013/0—U.S. Patent Application No. 61/815,784 filed 24 May 2013

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov

Recombinant Nucleic-Acid Based Flavivirus Nucleic Acids for Development of Vaccines and/or Sero-Diagnostics

Description of Technology: CDC scientists have developed recombinant

flavivirus nucleic acids for the generation of broad protective immunity against flaviviruses, as well as the development of sensitive serologic diagnostic tools. Mosquito borne viral encephalitis is often caused by a flavivirus, such as Japanese encephalitis virus, dengue virus or West Nile virus. Infection by these pathogens is often lethal to both humans and animals.

Specifically, these novel recombinant nucleic acids encode critical structural proteins of flaviviruses, such as yellow fever virus. The invention provides for a method of immunizing a subject against infection by a number of pathogenic flaviviruses. Furthermore, generated antigenic subviral particles can also serve as a tool for the development of specific, antibody detection-based flavivirus diagnostic assays.

Potential Commercial Applications:

- Development of a broadly useful commercial vaccine for pathogenic flaviviruses
- Insect-borne disease monitoring and surveillance programs
- Generated antigen can be used for high-specificity serologic diagnostic assays

Competitive Advantages:

- In vivo animal studies demonstrate specific antibody generation and complete protection
- Desired immune response provided by a single intramuscular injection in both murine and equine studies
- Potential for vaccine use and the development of commercial flavivirus infection diagnostic assays and kits

Development Stage:

- In vitro data available
- In vivo data available (animal)

Inventor: Gwong-Jen J. Chang (CDC)

Publications:

1. Chang GJ, *et al.* Flavivirus DNA vaccines: Current status and potential. *Ann N Y Acad Sci.* 2001 Dec;951:272–85. [PMID 11797784]
2. Chang GJ, *et al.* A single intramuscular injection of recombinant plasmid DNA induces protective immunity and prevents Japanese encephalitis in mice. *J Virol.* 2000 May;74(9):4244–52. [PMID 10756038]

Intellectual Property: HHS Reference No. E–341–2013/0—

- U.S. Patent No. 7,417,136 issued 26 Aug 2008
- U.S. Patent No. 8,105,609 issued 31 Jan 2012
- U.S. Patent Application No. 13/338,529 filed 28 Dec 2011
- Various international patent applications pending or issued

Related Technologies: HHS Reference No. E–341–2013/1—

- U.S. Patent No. 7,227,011 issued 05 Jun 2007
 - U.S. Patent No. 7,521,177 issued 21 Apr 2009
 - U.S. Patent No. 7,632,510 issued 15 Dec 2009
 - U.S. Patent No. 7,662,394 issued 16 Feb 2010
 - U.S. Patent No. 8,221,768 issued 17 Jul 2012
 - U.S. Patent No. 8,232,379 issued 31 Jul 2012
 - Various international patent applications pending or issued
- Licensing Contact:* Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov.

Vaccine Attenuation via Deoptimization of Synonymous Codons

Description of Technology: Research scientists at CDC have developed compositions and methods that can be used to develop attenuated vaccines having well-defined levels of replicative fitness and enhanced genetic stabilities. Infections by intracellular pathogens, such as viruses, bacteria, and parasites, are cleared in most cases after activation of specific T-cell immune responses that recognize foreign antigens and eliminate infected cells. Vaccines against those infectious organisms traditionally have been developed by administration of whole live attenuated or inactivated microorganisms. Although research has been performed using subunit vaccines, the levels of cellular immunity induced are usually low and not capable of eliciting complete protection against diseases caused by intracellular microbes. CDC inventors discovered that replacement of one or more natural (or native) codons in a pathogen with synonymous unpreferred codons can decrease the replicative fitness of the pathogen, thereby attenuating the pathogen. The unpreferred synonymous codon(s) encode the same amino acid as the native codon(s), but have nonetheless been found to reduce a pathogen's replicative fitness.

Potential Commercial Applications:

- Vaccine design and development
 - Functional improvements for current vaccines
 - Increasing the phenotypic stability of live attenuated vaccines
 - Attenuation optimization endeavors
- Competitive Advantages:*
- Retains the protective and immunogenic advantages of native-codon live attenuated vaccine strains
 - Alleviates some critical safety issues associated with using live attenuated vaccines
 - Likely to possess greater long-term genetic stability than single-point mutations (fewer reversions)

Development Stage: In vitro data available

Inventors: Olen M. Kew, Cara C. Burns, Raymond Campagnoli, Jacqueline Quay, Jing Shaw (all of CDC)

Publication:

Burns CC, *et al.* Modulation of poliovirus replicative fitness in HeLa cells by deoptimization of synonymous codon usage in the capsid region. *J Virol.* 2006 Apr;80(7):3259-72. [PMID 16537593]

Intellectual Property: HHS Reference No. E-328-2013/0—

- PCT Application No. PCT/US2005/036241 filed 07 Oct 2005, which published as WO 2006/042156 on 20 Apr 2006
 - U.S. Patent Application No. 11/576,941 filed 19 Nov 2007
 - Various international patent applications pending or issued
- Licensing Contact:* Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Photoinduced Electron Transfer Fluorescent Primer for Nucleic Acid Amplification

Description of Technology: CDC scientists have developed a rapid and cost-efficient method for generating fluorescently labeled primers for PCR and real-time PCR. At present, fluorescent primers are useful for detecting and identifying microbes and specific nucleic acid sequences, amplifying nucleic acids for pyro-sequencing, determining the levels of gene expression, and many other uses. However, problems exist with current techniques used to create fluorescent primers. For one, labeling is not one hundred percent efficient, leading to inaccurate results. Further, it is expensive and time consuming for researchers to make and label their own unique primers. This technology allows for the creation of custom primers in which fluorescent dye attaches to all oligomers.

This technology employs photoinduced electron transfer (PET) nucleic acid molecules that can be used to detect and amplify target nucleic acid molecules. PET tags are attached to the 5'-end of a target-specific oligo for fluorescent labeling of the primer. PET tag activity can be quenched by at least two consecutive guanines (G-G) within the tag sequence and activity is un-quenched when the PET tag hybridizes with its complementary nucleic acid molecule.

Potential Commercial Applications:

- Efficient fluorescence-labeling of oligonucleotides
- Quantitative methods
- Pyro-sequencing

- Basic laboratory research
- Competitive Advantages:*
- Avoids aberrant quantitative data generation resulting from inefficient fluorescent labeling reactions
 - Allows for multiplex reactions
 - Cost-efficient for time, sample preservation and cost of analysis
 - Method can readily be used as part of an oligo-labeling kit
 - No need for HPLC purification
 - Does not require a quencher dye
- Development Stage:* In vitro data available

Inventors: Jothikumar Narayanan, Vincent R. Hill, Brian F. Holloway (all of CDC)

Publication:

Jothikumar N, Hill VR. A novel photoinduced electron transfer (PET) primer technique for rapid real-time PCR detection of *Cryptosporidium* spp. *Biochem Biophys Res Commun.* 2013 Jun 28;436(2):134-9. [PMID 23727382]

Intellectual Property: HHS Reference No. E-292-2013/0—

- PCT Application No. PCT/US2008/084347 filed 21 Nov 2008, which published as WO 2009/067664 on 28 May 2009
 - U.S. Patent Application No. 12/743,607 filed 19 May 2010
 - Various international filings pending
- Licensing Contact:* Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Virus Replicon Particles as Rift Valley Fever Vaccines

Description of Technology: Rift Valley fever (RVF) virus primarily infects animals but also has the capacity to infect humans. The disease causes abortion and death among RVF-infected livestock, resulting in substantial economic loss to people living in many parts of Africa and Arabian Peninsula. Currently, there is no commercial vaccine for RVF. CDC scientists have developed a RVF virus replicon particle (VRP) vaccine candidate. Research findings revealed that immunization of mice with a single dose of the RVF-VRP was found to be safe and elicited immune response that offered 100% protection following exposure to lethal dose of virulent virus. RVF-VRPs have the potential to become effective and efficient RVF vaccines in livestock animals and humans.

Potential Commercial Applications:

- Rift Valley fever vaccine for livestock and/or humans
- VRPs may serve as useful laboratory tool to study the basic mechanisms of virus replication, assembly, kinetics, and virus maturation

Competitive Advantages:

- Murine survival study showed single-dose immunization completely protected mice against a virulent RVFV challenge at 100,000-fold greater than the 50% lethal dose (LD₅₀)
- Rapid onset of a systematic antiviral response suggests conference of early protection
- Low genetic diversity for RVF virus indicates a strong potential for broad-use effectiveness with this vaccine

Development Stage:

- In vitro data available
- In vivo data available (animal)

Inventors: Kimberly Dodd, Cesar G.

Albarino, Brian H. Bird, Stuart T. Nichol (all of CDC)

Publication:

Dodd KA, *et al.* Single-dose immunization with virus replicon particles confers rapid robust protection against Rift Valley fever virus challenge. *J Virol.* 2012 Apr;86(8):4204–12. [PMID 22345465]

Intellectual Property: HHS Reference No. E–272–2013/0—

- U.S. Application No. 61/661,614 filed 19 Jun 2012
- PCT Application No. PCT/US2013/046250 filed 18 Jun 2013, which published as WO 2013/192944 on 27 Dec 2013

Related Technology: HHS Reference No. E–254–2013/2

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov.

Molecular Detection and Viral-Load Quantification for HIV–1 Groups M, N and O, and Simian Immunodeficiency Virus-cpz (SIVcpz)

Description of Technology: This invention provides materials, methods, and assays for detecting HIV–1 groups M and O and optionally HIV–1 group N and simian immunodeficiency virus-cpz (SIV-cpz). Specific nucleic acid primers for hybridization, amplification, and detection of HIV–1 are also provided for. The nucleic acid amplification assays can detect small concentrations of HIV–1 and are also useful for quantitative examinations of viral load concentrations within biological samples.

Potential Commercial Applications:

- Blood and plasma donation screening
- Diagnostic detection of HIV–1
- Public health programs
- Monitoring HIV treatment and disease inhibition/progression

Competitive Advantages:

- Broad-use, generic viral detection for groups M, N and O HIV–1, and also SIVcpz

- Requires minute quantities of virus for use, making this assay ideal for confirmation of early-stage infection
- Sensitive and highly specific
- Easily formulated for kits
- Established efficacy in patient samples

Development Stage:

- In vitro data available
- In situ data available (on-site)

Inventors: Renu B. Lal, Danuta Pieniazek, Chunfu Yang (all of CDC)

Publication:

Yang C, *et al.* Detection of diverse variants of human immunodeficiency virus-1 groups M, N, and O and simian immunodeficiency viruses from chimpanzees by using generic pol and env primer pairs. *J Infect Dis.* 2000 May;181(5):1791–5. [PMID 10823786]

Intellectual Property: HHS Reference No. E–271–2013/0—U.S. Patent No. 8,575,324 issued 05 Nov 2013

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov

Virus Microneutralization Assay Data Analysis for Vaccine Development, Enhancement and Efficacy Improvement

Description of Technology: This CDC generated invention entails improved methods of analyzing microneutralization assays, especially for the purposes of determining specific antibody concentrations and optimizing vaccine formulation. More specifically, the invention is a set of SAS based programs using 4-parameter logistic curve fitting algorithms to interpolate between individual data points, allowing for enhanced accuracy and precision when establishing neutralization titers. This method allows every experiment to be analyzed the same way, provides greater accuracy by interpolating curve fits between dilutions, prevents transcription errors or manual calculation errors, develops and applies consistent quantitative control rules, and improves operational speed and efficiency.

Potential Commercial Applications:

- Commercial virus vaccine evaluation and strain selection
- Virus strain surveillance programs
- Harmonize data analysis and standardize reporting procedures for improved worldwide, health-programs cohesion

Competitive Advantages:

- Demonstrated improvements in accuracy and precision calculating virus microneutralization titers
- Programs produce structured datasets allowing for rapid report generation and high-level analyses

- Useful for improved strain selection in future influenza (or other) vaccine development

Development Stage:

- In vitro data available
- In situ data available (on-site)

Inventors: Jarad Schiffer and Kathy Hancock (CDC)

Publications:

1. Klimov A, *et al.* Influenza virus titration, antigenic characterization, and serological methods for antibody detection. *Methods Mol Biol.* 2012;865:25–51. [PMID 22528152]
2. Vequilla V, *et al.* Sensitivity and specificity of serologic assays for detection of human infection with 2009 pandemic H1N1 virus in U.S. populations. *J Clin Microbiol.* 2011 Jun;49(6):2210–5. [PMID 21471339]

Intellectual Property: HHS Reference No. E–262–2013/0—

- PCT Application No. PCT/US2011/041459 filed 22 Jun 2011, which published as WO 2011/163370 on 29 Dec 2011
- U.S. Patent Application No. 13/700,978 filed 29 Nov 2012

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov

Fluorescent Primer(s) Creation for Nucleic Acid Detection and Amplification

Description of Technology: CDC researchers have developed technology that consists of a simple and inexpensive technique for creating fluorescent labeled primers for nucleic acid amplification. Fluorescent chemical-labeled probes and primers are extensively used in clinical and research laboratories for rapid, real-time detection and identification of microbes and genetic sequences. During nucleic acid amplification, the “UniFluor” primer is incorporated into newly synthesized double stranded DNA. As a consequence, quenching of the dye’s fluorescent signal occurs decreasing the fluorescence of the sample several fold. The decrease in fluorescence can be measured and observed using any commercially available nucleic acid amplification system that measures fluorescence (e.g., real-time PCR/thermocyclers). Because many real-time PCR applications require a multitude of fluorescently labeled primers or probes, the single-labeled primer technique also allows researchers and clinicians to perform their work at lower cost.

Potential Commercial Applications:

- Quantitative detection and/or amplification of specified nucleic acid sequences
- Efficient fluorescence-labeling of oligonucleotides

- Pyro-sequencing
- Basic laboratory research
Competitive Advantages:
- Simple to implement
- Rapid, real-time detection
- Used with standard laboratory equipment capable of monitoring fluorescence-intensity shifts
- Cost-effective
- Easily adapted for use in kits or arrays
Development Stage: In vitro data available
Inventors: Vincent R. Hill and Jothikumar Narayanan (CDC)
Intellectual Property: HHS Reference No. E-252-2013/0—
- PCT Application No. PCT/US2006/000175 filed 03 Jan 2006, which published as WO 2006/074222 on 13 Jul 2006
- U.S. Patent No. 7,709,626 issued 04 May 2010
- Several international patent applications pending or issued
Related Technologies:
- HHS Reference No. E-273-2013/0
- HHS Reference No. E-292-2013/0
Licensing Contact: Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Multi-Antigenic Peptide(s) Vaccine and Immunogen for Conferring *Streptococcus Pneumoniae* Immunity

Description of Technology: Disease caused by *Streptococcus pneumoniae* (pneumococcus) is an important cause of morbidity and mortality in the United States and developing countries. Pneumococcal disease is prevalent among the very young, the elderly and immunocompromised individuals. This invention is an improved, immunogenic peptide construct consisting of a combination of antigenic epitopes of the PsaA (37-kDa) protein from *S. pneumoniae*. In addition, the peptides of the invention have the capability of serving as specific immunogens in a subject, effectively eliciting the production of antibodies and conferring protective immunity against *S. pneumoniae* infection following immunogen administration.

Potential Commercial Applications:

- Development or improvement of *S. pneumoniae* vaccines
- Public health vaccination programs
- Clinical serodiagnostic development
Competitive Advantages:
- May provide better immune protection than current, single-epitope based vaccines
- Broader spectrum of *S. pneumoniae* serotypes addressed

- Immunization with these peptides was shown to reduce carriage in murine studies
Development Stage:
- In vitro data available
- In vivo data available (animal)
Inventors: Edwin W. Ades, George M. Carlone, Jacquelyn S. Sampson, Scott E. Johnson, Danny L. Jue (all of CDC)
Intellectual Property: HHS Reference No. E-248-2013/1—
- PCT Application No. PCT/2001/021626 filed 10 Jul 2001, which published as WO 2002/004497 on 17 Jan 2002
- U.S. Patent No. 6,903,184 issued 07 Jun 2005
- U.S. Patent No. 7,501,132 issued 10 Mar 2009
- U.S. Patent No. 8,642,048 issued 04 Feb 2014
- Various international patent applications pending or issued
Licensing Contact: Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Device To Measure Muscle Contractile-Relaxant and Epithelial Bioelectric Responses of Perfused, Intact Tracheal Airways Tissue In Vitro

Description of Technology: CDC and collaborative researchers have developed a device allowing for simultaneous measurement of smooth muscle contractile/relaxant activity and transepithelial potential difference (Vt) [or short circuit currents (Isc)] and resistance (Rt) within an intact airway *in vitro*. Investigation of the underlying mechanisms of lung diseases, such as asthma or cystic fibrosis, involves understanding the roles of airway smooth muscle and epithelium. Smooth muscle is involved in the control of the airway diameter; epithelium regulates the ionic composition of the liquid lining the airways through electrogenic ion transport and releases factors that regulate the ability of smooth muscle to contract.

This invention allows for the measurement and study of pulmonary diseases under conditions retaining normal spatial relationships between all the cell types and an unmanipulated/undistorted tracheal airway wall. Further, the device permits evaluation of epithelial functional integrity using pharmacological techniques. Agents can be separately added to the lumen, where they must first cross the epithelium to reach the smooth muscle, or to the outside of the airway, where there is no hindrance of said agents to the muscle. The invention also permits the effective *in vitro* screening of the effects of agents and drugs on airway epithelium and

smooth muscle within the same preparation.

Potential Commercial Applications:

- Investigations into physiological mechanisms of airway diseases, such as cystic fibrosis and asthma
- Screening of drugs and therapeutic compounds directed to complex, multi-tissue type matrices
- Biomedical research exploring pharmacology-physiology integration
Competitive Advantages:
- Allows simultaneous measurement of transepithelial potential difference, transepithelial resistance, smooth muscle activity and changes in tracheal diameter
- In vitro analysis of trachea or tracheal segments retaining native, in situ structure
- Pharmacological agents may be added separately to the lumen for screening purposes
- First and only such “single-preparation” device allowing for such broad array of data output
Development Stage:
- Early-stage
- In vitro data available
- In situ data available (on-site)
- Prototype

Inventors: Jeffrey S. Fedan (CDC), Yi Jing (CDC), Michael Van Scott (East Carolina University)

Publication:

Jing Y, *et al.* Simultaneous measurement of mechanical responses and transepithelial potential difference and resistance, in guinea-pig isolated, perfused trachea using a novel apparatus: pharmacological characterization. *Eur J Pharmacol.* 2008 Nov 19;598(1-3):98-103. [PMID 18835555]

Intellectual Property: HHS Reference No. E-246-2013/0—U.S. Patent No. 7,907,999 issued 15 Mar 2011.

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

A Bias-Free Sampling and Collection Trap for Resting Mosquitoes

Description of Technology: This CDC developed collection device is a small (approximately 1 cubic foot) open-sided container that attracts mosquitoes seeking a daytime resting location. The container is dark-colored and constructed of molded wood-fiber or recycled, high-density plastic. Mosquitoes that enter the dark space of the container are aspirated through a battery-powered fan into a collection receptacle. The receptacle is especially attractive to *Culex* and *Anopheles* mosquitoes' vectors of West Nile Virus and malaria parasites, respectively.

For research aims, this device avoids the sampling biases associated with

CO₂-baited traps (attracting mosquitoes in host-seeking mode, about a tenth of the population, and only females) or ovitraps/gravid traps (attract egg-laying females, again about a tenth of the population), making this device superior to other mosquito-sampling traps currently in use. Because all adult mosquitoes must find secluded locations to rest every day, this device samples all sectors of the mosquito population. It also represents a highly effective trap for blood-engorged mosquitoes that rarely enter other types of traps.

Potential Commercial Applications:

- Mosquito sampling for research and epidemiological surveillance purposes
- Mosquito control programs
- Ecological and/or population-genetics interests

Competitive Advantages:

- Receptacle circumvents sampling biases inherent to other mosquito traps
- Device is particularly adept at luring *Culex* and *Anopheles* mosquitoes

Development Stage: In situ data available (on-site)

Inventors: Nicholas A. Panella, Rebekah J. Kent, Nicholas Komar (all of CDC)

Publication:

Panella NA, *et al.* The Centers for Disease Control and Prevention resting trap: a novel device for collecting resting mosquitoes. *J Am Mosq Control Assoc.* 2011 Sep;27(3):323–5. [PMID 22017100]

Intellectual Property: HHS Reference No. E–223–2013/0—U.S. Patent Application No. 12/813,279 filed 10 Jun 2010

Related Technologies:

- HHS Reference No. E–166–2013/0
- HHS Reference No. E–175–2013/0
- HHS Reference No. E–641–2013/0

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov

Real-Time PCR Assays for Human Bocavirus Detection and Diagnosis

Description of Technology: CDC researchers have developed a real-time PCR assay for the detection and viral-load quantitative estimations of human bocavirus (HBoV) from clinical specimens. At present, there have been few reports on the epidemiology, geographic distribution or clinical features of HBoV infection. Additionally, symptoms affiliated with bocavirus infections overlap with numerous other respiratory illnesses. This CDC assay provides sensitive, specific, and quantitative detection of

HBoV in patients with respiratory illness by a method of real-time PCR targeting the HBoV NS1 and NP–1 genes. Use of this assay in conjunction with additional diagnostic methods and treatments should facilitate improved diagnosis and, subsequently, directed treatment and patient outcome.

Potential Commercial Applications:

- Human bocavirus (HBoV) research tools
- Respiratory illness diagnostics and research
- Public health surveillance
- Confirmation/diagnosis of HBoV infection

Competitive Advantages:

- Specific and sensitive
- Capable of rapid HBoV detection and distinction from alternate respiratory-illness linked pathogens
- Superior to other HBoV detection methods in cost-efficiency, accuracy and quantitation of viral load

Development Stage: In vitro data available

Inventors: Dean D. Erdman and Teresa C. Peret (CDC)

Publication:

Lu X, *et al.* Real-time PCR assays for detection of bocavirus in human specimens. *J Clin Microbiol.* 2006 Sep;44(9):3231–5. [PMID 16954253]

Intellectual Property: HHS Reference No. E–213–2013/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301–435–4937; whitney.blair@nih.gov

Simple, Rapid, and Sensitive Real-Time PCR Assays for Detecting Drug Resistance of HIV

Description of Technology: This novel assay features real-time PCR reagents and methods for detecting drug-resistance related mutations in HIV, for newly diagnosed patients and those individuals currently receiving antiretroviral therapies. As the use of antiretroviral compounds to treat HIV infection proliferates, viruses adapt and evolve mutations limiting the efficacy of these drugs and disrupting the success of treatment. To address this problem, CDC researchers have developed this RT–PCR assay, intended for diagnosis of different point mutations in patient samples at an achievable sensitivity of 1–2 log greater than conventional point-mutation sequencing methods. More specifically, this assay measures the differential amplifications of common and mutation-specific reactions that target specific codons of interest. Given its low cost, simplicity, high-throughput

capability, and tremendous diagnostic sensitivity, this assay will be useful for detection and surveillance of drug resistance-associated mutations and will aid in the clinical management of HIV infection.

Potential Commercial Applications:

- Clinical management of HIV infected patients
- Pre-treatment evaluation baseline HIV infection to tailor appropriate drug combinations
- Monitor the spread of resistant viruses
- Blood donation screening
- Research tool to study emergence and biology of drug resistance mutations

Competitive Advantages:

- Cost-effective
- Sensitive and rapid
- Capable of resistance mutation detection in both subtype B and non-B subtypes of HIV–1, and in HIV–2
- Easily formatted for use in kits
- High-throughput capable

Development Stage: In vitro data available

Inventors: Jeffrey A. Johnson, Walid M. Heneine, Jonathan T. Lipscomb (all of CDC)

Publications:

1. Johnson JA, *et al.* Simple PCR assays improve the sensitivity of HIV–1 subtype B drug resistance testing and allow linking of resistance mutations. *PLoS One.* 2007 Jul 25;2(7):e638. [PMID 17653265]
2. Johnson JA, *et al.* Minority HIV–1 drug resistance mutations are present in antiretroviral treatment-naïve populations and associate with reduced treatment efficacy. *PLoS Med.* 2008 Jul 29;5(7):e158. [PMID 18666824]
3. Li JF, *et al.* Detection of low-level K65R variants in nucleoside reverse transcriptase inhibitor-naïve chronic and acute HIV–1 subtype C infections. *J Infect Dis.* 2011 Mar 15;203(6):798–802. [PMID 21257741]
4. Nishizawa M, *et al.* Highly-Sensitive Allele-Specific PCR Testing Identifies a Greater Prevalence of Transmitted HIV Drug Resistance in Japan. *PLoS One.* 2013 Dec 16;8(12):e83150. [PMID 24358257]
5. Wei X, *et al.* Minority HIV mutation detection in dried blood spots indicates high specimen integrity and reveals hidden archived drug resistance. *J Clin Virol.* 2011 Feb;50(2):148–52. [PMID 21130027]

Intellectual Property:

HHS Reference No. E–198–2013/0—

- PCT Application No. PCT/US2005/019907 filed 07 Jun 2005, which published as WO 2005/121379 on 22 Dec 2005
- U.S. Patent No. 8,043,809 issued 25 Oct 2011
- U.S. Patent No. 8,318,428 issued 27 Nov 2012

- U.S. Patent No. 8,592,146 issued 26 Nov 2013
- U.S. Patent Application No. 14/059,085 filed 21 Oct 2013
- Various international patent applications pending or issued

HHS Reference No. E-214-2013/0—

- PCT Application No. PCT/US2012/025638 filed 17 Feb 2012, which published as WO 2012/2112884 on 23 Aug 2012
- U.S. Patent Application No. 13/985,499 filed 14 Aug 2013

HHS Reference No. E-511-2013/0—
 • U.S. Application No. 61/829,473 filed 31 May 2013

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Exposure and Activity Detection Assays for Anthrax Lethal Factor and Lethal Toxin

Description of Technology: This CDC developed invention identifies an assay for extremely fast and sensitive detection of *Bacillus anthracis* lethal toxin (LTx), the toxin responsible for the lethal effects of anthrax infection. This assay has already been successfully tested in animals and will allow for early detection of anthrax exposure and screening of lethal factors to monitor anthrax toxicity, for example for vaccine trial candidates.

LTx is composed of two proteins, protective antigen (PA) and lethal factor (LF). In one scenario, the assay effectively detects LF by first using magnetic protein G beads to capture and concentrate LF in samples, then testing for LF on the bead by reacting it with a peptide substrate designed to mimic LF's natural target. By using techniques such as mass spectrometry, FRET or liquid chromatography, this test can check for LF rapidly and with extraordinary specificity and sensitivity. Methodology and basic assay validation have been confirmed in animals and naturally-exposed (by contaminated meat in a Bangladesh processing facility) human serum samples.

Potential Commercial Applications:

- Emergency anthrax exposure diagnostics
- Testing of and research into anthrax therapeutics, vaccines
- Biodefense, biosecurity
- Livestock health screening

Competitive Advantages:

- Rapid turnaround
- Highly sensitive-detects picomolar toxin levels
- Reproducible and quantitative anthrax lethal factor (LF) assessment
- Easily adaptable for high-throughput screening of numerous specimens

Development Stage:

- In vitro data available
- In vivo data available (animal)
- In vivo data available (human)
- In situ data available (on-site)

Inventors: Anne E. Boyer, Conrad P. Quinn, John R. Barr (all of CDC)

Publications:

1. Boyer AE, *et al.* Detection and quantification of anthrax lethal factor in serum by mass spectrometry. *Anal Chem.* 2007 Nov 15;79(22):8463-70. [PMID 17929949]
2. Boyer AE, *et al.* Kinetics of lethal factor and poly-D-glutamic acid antigenemia during inhalation anthrax in rhesus macaques. *Infect Immun.* 2009 Aug;77(8):3432-41. [PMID 19506008]
3. Kuklennyik Z, *et al.* Comparison of MALDI-TOF-MS and HPLC-ESI-MS/MS for endopeptidase activity-based quantification of Anthrax lethal factor in serum. *Anal Chem.* 2011 Mar 1;83(5):1760-5. [PMID 21302970]
4. Boyer AE, *et al.* Lethal factor toxemia and anti-protective antigen antibody activity in naturally acquired cutaneous anthrax. *J Infect Dis.* 2011 Nov;204(9):1321-7. [PMID 21908727]

Intellectual Property: HHS Reference No. E-196-2013/0—

- PCT Application No. PCT/US2007/004156 filed 15 Feb 2007, which published as WO 2007/136436 on 29 Nov 2007
- U.S. Patent Application No. 11/675,233 filed 15 Feb 2007
- Various international filings pending or issued

Related Technologies:

- HHS Reference No. E-158-2013/2
- HHS Reference No. E-167-2013/0
- HHS Reference No. E-203-2013/0
- HHS Reference No. E-210-2013/0
- HHS Reference No. E-474-2013/0

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Select *M. Tuberculosis* Peptides as Mucosal Vaccines Against Pulmonary Tuberculosis

Description of Technology: This CDC-developed technology relates to novel vaccines or boosters directed against pulmonary tuberculosis. There is currently only a single vaccine against tuberculosis, the (Bacillus Calmette-Guérin) BCG vaccine. Reports suggest widely variable effectiveness for the BCG vaccine and that BCG administration has very limited success against prevention of the primary pulmonary form of the disease. With a marginally useful vaccine and rising rates of multidrug-resistant and extensively drug-resistant (MDR and XDR) tuberculosis strains, it is clear there is a public health need that must be met.

Researchers working at CDC have developed improved vaccine formulations and processes of delivery for enhancing the immune response against *M. tuberculosis*. These improvements may be implemented as stand-alone vaccines or in conjunction with BCG as part of a prime-boost strategy. Intranasal immunization engenders a strong immune response in the lungs, which is beneficial because the *M. tuberculosis* pathogen primarily gains entry through the respiratory/alveolar mucosa. By specifically stimulating mucosal immunity with select recombinant *M. tuberculosis* polypeptides at the typical site of pathogen entry, it is envisioned that these formulations and delivery methods will be able to prevent *M. tuberculosis* infection and subsequent pulmonary tuberculosis disease.

Potential Commercial Applications:

- Tuberculosis vaccine development and improvement
- Public health and BCG vaccination programs

Competitive Advantages:

- Versatile, has potential as stand-alone vaccine or booster for use with current BCG vaccine
- Peptides specifically selected for generating mucosal immunity, to address the protective-failings of the BCG vaccine
- Potential for needle-free delivery that elicits robust, well-directed immune response

Development Stage:

- In vitro data available
- In vivo data available (animal)

Inventors: Suraj Sable, *et al.* (CDC)

Publication:

Sable SB, *et al.* Cellular immune responses to nine Mycobacterium tuberculosis vaccine candidates following intranasal vaccination. *PLoS One.* 2011;6(7):e22718. [PMID 21799939]

Intellectual Property: HHS Reference No. E-192-2013/0—

- PCT Application No. PCT/US09/030754 filed 12 Jan 2009, which published as WO 2009/089535 on 16 Jul 2009
- U.S. Patent Application No. 12/812,541 filed 08 Oct 2010
- Various international patents issued or pending

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Detection of Retroviruses and HIV-1 Groups -M and -O Discrimination Within Clinical Serum Samples

Description of Technology: CDC researchers have developed methods for

detecting retroviruses within a patient blood sample and discriminating HIV-1 samples within serum specimens. HIV-1 can be genetically classified into two major groups, group M (major) and Group O (outlier) with group O comprising all divergent viruses that do not cluster with group M. The identification of group O infections raised public health concerns about the safety of the blood supply because HIV-1 screening by group M-based serologic tests does not consistently detect group O infection.

The assay is based on the selective inhibition of Amp-RT reactivity of Group M viruses by nevirapine, a non-nucleoside RT inhibitor. Group O viruses can be generically identified by the resistance of their Amp-RT activity to nevirapine. The assay can be used to screening of the blood supply and to rapidly differentiate group M from group O virus.

Potential Commercial Applications:

- Clinical monitoring of individual patient antiretroviral therapy
- HIV/AIDS public health programs
- Surveillance of retroviral drug resistance
- Screening of blood donations

Competitive Advantages:

- Rapid diagnostic which greatly reduces time and labor for improved clinical monitoring of HIV treatment
- Ready for commercialization
- Easily adapted to kit format
- Assists continued usefulness of common antiretroviral therapeutics
- Useful for high-throughput serum samples screening

Development Stage: In vitro data available

Inventors: Thomas M. Folks, Walid Heneine, William Marshall Switzer, Shinji Yamamoto (all of CDC)

Publications:

1. Yamamoto S, *et al.* Highly sensitive qualitative and quantitative detection of reverse transcriptase activity: Optimization, validation, and comparative analysis with other detection systems. *J Virol Methods.* 1996 Sep;61(1-2):135-43. [PMID 8882946]
2. Heneine W, *et al.* Detection of reverse transcriptase by a highly sensitive assay in sera from persons infected with human immunodeficiency virus type 1. *J Infect Dis.* 1995 May;171(5):1210-6. [PMID 7538549]
3. Reisler RB, *et al.* Early detection of reverse transcriptase activity in plasma of neonates infected with HIV-1: A comparative analysis with RNA-based and DNA-based testing using polymerase chain reaction. *J Acquir Immune Defic Syndr.* 2001 Jan 1;26(1):93-102. [PMID 11176273]

Intellectual Property:

HHS Reference No. E-232-1993/0 —

- PCT Application No. PCT/US1996/001257 filed 26 Jan 1996, which published as WO 1996/023076 on 01 Aug 1996
- Various international patents issued or pending

HHS Reference No. E-232-1993/1—

- U.S. Patent No. 5,849,494 issued 15 Dec 1998
- U.S. Patent No. 6,136,534 issued 24 Oct 2000

Related Technologies:

HHS Reference No. E-129-2013/0—

- PCT Application No. PCT/US1999/013957 filed 16 Jun 1999, which published as WO 1999/66068 on 23 Dec 1999
- U.S. Patent No. 6,787,126 issued 07 Sep 2004
- Various international patents issued

HHS Reference No. E-129-2013/1—

- U.S. Patent No. 7,691,572 issued 06 Apr 2010

Licensing Contact: Whitney Blair, J.D., M.P.H.; 301-435-4937; whitney.blair@nih.gov

Dated: January 31, 2014.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2014-02491 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 209 and 37 CFR Part 404 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852-3804; telephone: 301-496-7057; fax: 301-402-0220. A signed Confidential Disclosure Agreement will

be required to receive copies of the patent applications.

Multivalent Immunogenic Peptides (Vaccines) for the Treatment of Prostate and Breast Cancer

Description of Technology: The development of more targeted means of treating cancer is vital. One option for a targeted treatment is the creation of a vaccine that induces an immune response only against cancer cells. In this sense, vaccination involves the introduction of a peptide into a patient that causes the formation of antibodies or T cells that recognize the peptide. If the peptide is from a protein found selectively on/in cancer cells, those antibodies or T cells can trigger the death of those cancer cells without harming non-cancer cells. This can result in fewer side effects for the patient.

TARP (T cell receptor gamma alternate reading frame protein) is a protein that is selectively expressed on the cells of about 95% of prostate cancers and about 50% of breast cancers. This invention concerns the identification of a combination of immunogenic peptides within TARP and their use to create an anti-cancer immune response in patients. By introducing these seven peptides into a patient, an immune response against these cancer cells can be initiated by the peptides, resulting in treatment of the cancer.

Potential Commercial Applications:

- Peptides can be used as vaccines to induce an immune response against cancer
- Treatment of any cancer associated with increased or preferential expression of TARP
- Specific diseases include breast cancer and prostate cancer

Competitive Advantages:

- Targeted therapy decreases non-specific killing of healthy, essential cells, resulting in fewer non-specific side-effects and healthier patients
- Use of multiple peptides permits production of a more thorough complement of T cells against the antigen

Development Stage:

- In vitro data available
- In vivo data available (animal)
- In vivo data available (human)

Inventors: Jay A. Berzofsky, et al. (NCI)

Publications:

1. Epel M, et al. Targeting TARP, a novel breast and prostate tumor-associated antigen, with T cell receptor-like human recombinant antibodies. *Eur J Immunol.* 2008 Jun;38(6):1706-20. [PMID

18446790]

2. Oh S, *et al.* Human CTLs to wild-type and enhanced epitopes of a novel prostate and breast tumor-associated protein, TARP, lyse human breast cancer cells. *Cancer Res.* 2004 Apr 1;64(7):2610–8. [PMID 15059918]

Intellectual Property: HHS Reference No. E–047–2014/0—US Provisional Patent Application No. 61/915,948 filed 13 Dec 2013

Related Technologies: HHS Reference No. E–116–2003/0—

- U.S. Patent No. 8,043,623 issued 02 Jun 2009
- U.S. Patent No. 7,541,035 issued 25 Oct 2011

Licensing Contact: David A. Lambertson, Ph.D.; 301–435–4632; lambertson@mail.nih.gov

Collaborative Research Opportunity: The Vaccine Branch, CCR, NCI, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize cancer vaccines to induce T cell immunity against TARP to treat prostate and/or breast cancer. For collaboration opportunities, please contact John D. Hewes, Ph.D. at hewesj@mail.nih.gov.

Novel Immunocytokine for the Treatment of Cancer

Description of Technology:

Mesothelin is a protein that is aberrantly expressed by several cancers, most notably malignant mesothelioma. Immunoconjugates that target mesothelin are currently being evaluated in clinical trials.

Unfortunately, these immunoconjugates often use bacterial toxins as the payload, leading to the formation of neutralizing antibodies by patients and resulting in a reduction in therapeutic effectiveness over multiple administrations.

Interleukin-12 (IL12) is a protein that has potent anti-tumor, anti-angiogenic, and anti-metastatic properties. Although initially considered an attractive candidate as a cancer therapeutic, systemic administration of IL12 is toxic.

Inventors at the NIH have created an immunoconjugate using an anti-mesothelin antibody (SS1) as the targeting moiety and IL12 as the payload molecule. This allows the localized concentration of IL12 at cancer cells, reducing the toxic effects seen with systemic IL12 administration. Furthermore, using IL12 instead of a bacterial toxin helps to reduce the formation of neutralizing antibodies. The IL12–SS1 immunoconjugate is able to inhibit the growth human malignant mesothelioma in mouse xenograft models, suggesting it has significant potential as a cancer therapeutic.

Potential Commercial Applications:

- Selective killing of cells that express mesothelin, such as those seen with particular cancers.
- Specific cancers include malignant mesothelioma, pancreatic cancer and ovarian cancer.

Competitive Advantages:

- Targeted therapy decreases non-specific killing of healthy, essential cells, resulting in fewer non-specific side-effects and healthier patients.
- Use of human IL12 as the payload may reduce formation of neutralizing antibodies against the molecule, increasing therapeutic effectiveness.

Development Stage:

- In vitro data available
- In vivo data available (animal)

Inventors: Mitchell Ho, *et al.* (NCI)

Publication:

Kim H, *et al.* Novel immunocytokine IL12–SS1(Fv) inhibits mesothelioma tumor growth in nude mice. *PLoS One.* 2013 Nov 15;8(11):e81919. [PMID 24260587]

Intellectual Property: HHS Reference No. E–118–2013/0—US Provisional Patent Application 61/820,523 filed 07 May 2013

Related Technology: HHS Reference No. E–139–1999/0—U.S. Patent 7,081,518 issued 25 July 2006

Licensing Contact: David A. Lambertson, Ph.D.; 301–435–4632; lambertson@mail.nih.gov

Collaborative Research Opportunity: The NCI Laboratory of Molecular Biology is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize the immunocytokine-based therapy targeting mesothelin-expressing tumors. For collaboration opportunities, please contact John Hewes, Ph.D. at hewesj@mail.nih.gov.

Improved Personalized Cancer Immunotherapy: Rapid Selection of Tumor Reactive T Cells Based on Expression of Specific Cell Surface Markers From Peripheral Blood

Description of Technology: Scientists at NIH have identified a process to select highly tumor-reactive T cells from a patient's peripheral blood sample based on the expression of two specific T cell surface markers: programmed cell death protein 1 (PD–1; CD279) and/or T cell Ig- and mucin-domain-containing molecule-3 (TIM–3). After this enriched population of tumor-reactive T cells is selected and expanded to large quantities, it gets re-infused into the patient via an adoptive cell transfer (ACT) regimen. The key finding for this process is that the most tumor-reactive T cells found in a bulk population of

cells obtained from a patient's peripheral blood sample reliably exhibit high expression of at least one of these markers. The enrichment of tumor-reactive cells from a patient's peripheral blood based on these markers provides a simple alternative to the current strategies based on isolation tumor-reactive cells from the tumor, as it reduces the cost and complications of tumor resection, as well as provides a T cell product for patients without resectable lesions.

This new method for selecting tumor-reactive T cells from peripheral blood samples should help ACT immunotherapy become more GMP compliant and allow greater standardized of the production process to enable more widespread utilization of this personalized cancer treatment approach outside of NIH.

Potential Commercial Applications:

- Personalized ACT immunotherapy to treat cancers using T cells obtained from a peripheral blood.
- Possible integration into a standard procedure for obtaining tumor-reactive T cells from a peripheral blood as part of a GMP-compliant manufacturing process that gains regulatory approval as a personalized cancer treatment option.
- The immunotherapy component of a combination cancer therapy regimen targeting specific tumor antigens in individual patients.
- More rapid tumor-reactive T cell culturing process for laboratory testing.

Competitive Advantages:

- Simpler: Tumor-reactive T cells can be selected for ACT from a bulk population derived from peripheral blood sample using common laboratory techniques.
- More rapid: Selection of T cells based on expression of specific cell surface markers will reduce the culture time for these T cells before reinfusion into the patient to fight the tumor.
- Less screening: This selection method eliminates the need to screen T cells for autologous tumor recognition before re-infusion into the patient.

Development Stage:

- Early-stage
 - In vitro data available
- Inventors:* Alena Gros and Steven A. Rosenberg (NCI)

Intellectual Property: HHS Reference No. E–085–2013/0—

- U.S. Provisional Application No. 61/771,251 filed 01 March 2013
- PCT Application No. PCT/US2013/38813 filed 30 April 2013

Related Technologies: HHS Reference No. E–059–2013—

- US Provisional Application No. 61/771,247 filed 01 March 2013
- PCT Application No. PCT/US2013/038799 filed 30 April 2013

Licensing Contact: Whitney A. Hastings; 301-451-7337; hastingw@mail.nih.gov

Dated: January 31, 2014.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2014-02490 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; R13 Conference Grant Review (PA12-212).

Date: March 4, 2014.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Virtual Meeting).

Contact Person: Minna Liang, Ph.D., Scientific Review Officer, Grants Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd., Room 4226, MSC 9550, Bethesda, MD 20892-9550, 301-435-1432, liangm@nida.nih.gov.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDA I/START Small Grant Review.

Date: March 6, 2014.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Virtual Meeting).

Contact Person: Minna Liang, Ph.D., Scientific Review Officer, Grants Review

Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd., Room 4226, MSC 9550, Bethesda, MD 20892-9550, 301-435-1432, liangm@nida.nih.gov. (Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS).

Dated: January 30, 2014.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014-02460 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Non-Clinical ADME Studies (8916).

Date: March 11, 2014.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Lyle Furr, Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892-9550, (301) 435-1439, lf33c.nih.gov.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Data, Statistics, and Clinical Trial Support (2237).

Date: March 13, 2014.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Lyle Furr, Scientific Review Officer, Office of Extramural Affairs,

National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892-9550, (301) 435-1439, lf33c.nih.gov.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDAMED: Outreach and Education to Health Care Providers on Substance Use (1152).

Date: March 20, 2014.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Lyle Furr, Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4227, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892-9550, (301) 435-1439, lf33c.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS).

Dated: January 30, 2014.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014-02461 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging And Bioengineering; 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 Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 BTRC Review.

Date: March 6-7, 2014.

Time: 3:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: TownePlace Suites Marriott, Albany Downtown/Medical Center, 22 Holland Avenue, Albany, NY.

Contact Person: Manana Sukhareva, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard, Room 959, Bethesda, MD 20892, 301-451-3397, sukharev@mail.nih.gov.

Dated: January 31, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014-02458 Filed 2-5-14; 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 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 open to the public as indicated below, with attendance limited to space available. 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.

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 Initial Review Group; Digestive Diseases and Nutrition C Subcommittee.

Date: March 13-14, 2014.

Open: March 13, 2014, 8:00 a.m. to 8:30 a.m.

Agenda: To review policy and procedures.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: March 13, 2014, 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.

Closed: March 14, 2014, 8:00 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: Robert Wellner, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 706, 6707 Democracy Boulevard, Bethesda, MD 20892-5452, rw175w@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: January 31, 2014.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014-02457 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Report on Carcinogens Webinar on Trichloroethylene; Notice of Public Webinar and Registration Information

SUMMARY: The National Toxicology Program (NTP) announces a public webinar, "Human Cancer Studies on Exposure to Trichloroethylene (TCE): Methods Used To Assess Exposure and Cancer Outcomes." The Office of the Report on Carcinogens (ORoC), Division of the NTP (DNTP), National Institute of Environmental Health Sciences (NIEHS) will hold the webinar using Adobe® Connect™, and the public can register to attend.

DATES:

Webinar: March 17, 2014, 9:00 a.m. to approximately 1:00 p.m. Eastern Daylight Time (EDT).

Registration for Webinar: February 6, 2014 through March 13, 2014.

Availability of Webinar Materials: March 3, 2014.

ADDRESSES: *Webinar Web page:* <http://ntp.niehs.nih.gov/go/tcewebinar>.

FOR FURTHER INFORMATION CONTACT: Dr. Ruth M. Lunn, Director, ORoC, DNTP, NIEHS, P.O. Box 12233, MD K2-14, Research Triangle Park, NC 27709. Phone: (919) 316-4637; Fax: (301) 480-2970, *Email:* lunn@niehs.nih.gov. *Hand Delivery/Courier:* 530 Davis Drive, Room 2138, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Background: The Report on Carcinogens (RoC) is a congressionally mandated, science-based, public health report that identifies agents, substances, mixtures, or exposures (collectively called "substances") in our environment that are cancer hazards for people living in the United States. The NTP prepares the RoC on behalf of the Secretary of

Health and Human Services following an established, four-part process (<http://ntp.niehs.nih.gov/go/rocprocess>) and using established criteria (<http://ntp.niehs.nih.gov/go/15209>).

Trichloroethylene (TCE) is a chlorinated alkene used primarily as a metal degreaser and is currently listed as *reasonably anticipated to be a human carcinogen* in the RoC. The NTP selected TCE for re-review for possible change in listing status in the RoC following solicitation of public comment and review by the NTP Board of Scientific Counselors on June 21-22, 2012 (<http://ntp.niehs.nih.gov/go/9741>) (for more information on the status of the NTP review of TCE see <http://ntp.niehs.nih.gov/go/37899>).

The purpose of this webinar is (1) to obtain external scientific input, focusing on issues related to the assessment of information (exposure and cancer outcomes) in epidemiologic studies of TCE, which will be used to inform the NTP's evaluation of the level of evidence from human cancer studies of TCE exposure, and (2) to obtain public input on the protocol for preparation of the draft RoC monograph on TCE. The first part of the webinar will consist of three presentations, with a short question-and-answer period after each presentation, followed by a general discussion session on scientific issues across all presentations. The goals of the individual presentations are (1) to address the adequacy of methods used in the epidemiologic studies to assess exposure and cancer outcomes (primarily lymphohematopoietic cancers), (2) to discuss and compare reported or estimated exposure levels or exposure prevalence across studies, (3) to discuss how this information (e.g., data from TCE exposure assessments, quality of exposure assessment, TCE exposure levels or prevalence, classification of non-Hodgkin lymphoma) is used in the epidemiologic studies and can be used to inform the cancer evaluation across studies. The second part of the webinar will be a discussion session when the public can either make comments on or ask questions about the proposed protocol for preparation of the draft RoC monograph on TCE (http://ntp.niehs.nih.gov/NTP/roc/thirteenth/Protocols/TCE_Protocol12-31-13_508.pdf).

Webinar and Registration: The webinar is scheduled for March 17, 2014, from 9:00 a.m. to approximately 1 p.m. EDT. The webinar may end early if the presentations and discussions are finished. Registration for the webinar is required and is open from February 6, 2014 through March 13, 2014, at <http://ntp.niehs.nih.gov/go/pcpwebinar>.

Registrants will receive instructions by email on accessing the webinar (via Adobe® Connect™) on or before March 14, 2014.

The preliminary agenda, list of speakers, and abstracts of the presentations should be posted on the NTP Web site (<http://ntp.niehs.nih.gov/go/tcwebinar>) by March 3, 2014.

Registrants are encouraged to access the webinar Web page to stay abreast of the most current information regarding this event. Any updates will be posted to the Web page. The protocol for preparing the draft RoC monograph on TCE is available on the RoC Web site for TCE (<http://ntp.niehs.nih.gov/go/37899>).

Public Participation: As noted above, the meeting format includes time after each presentation and during the two discussion sessions for the public to ask questions or make brief remarks.

Instructions for public access and participation in the meeting via Adobe® Connect™ will be emailed to registered attendees. Individuals with disabilities who need accommodation to participate in this event should contact Dr. Lunn (see **FOR FURTHER INFORMATION CONTACT**). TTY users should contact the Federal TTY Relay Service at 800-877-8339. Requests should be made at least five business days in advance of the event.

Background Information on the RoC: Published biennially, each edition of the RoC is cumulative and consists of substances newly reviewed in addition to those listed in previous editions. The 12th RoC, the latest edition, was published on June 10, 2011 (available at <http://ntp.niehs.nih.gov/go/roc12>). The 13th RoC is under development.

Dated: January 31, 2014.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2014-02455 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Amended Notice of Meeting

Notice is hereby given of changes in the meeting of the National Institute on Drug Abuse Special Emphasis Panel, February 19, 2014, 08:00 a.m. to February 20, 2014, 05:00 p.m., Hilton Garden Inn, 7301 Waverly Street, Bethesda, MD 20814 which was published in the **Federal Register** on January 22, 2014, 79, 15 FR 2014-01189.

The date and time of the meeting are changed to February 19, 2014, 08:00

a.m. to February 19, 2014, 06:00 p.m. The meeting is closed to the public.

Dated: January 14, 2014.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014-02459 Filed 2-5-14; 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 Conflicts: Kidney and Urological Physiology and Pathophysiology.

Date: February 27, 2014.

Time: 1:00 p.m. to 4:30 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: Martha Garcia, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2186, MSC 7818, Bethesda, MD 20892, 301-435-1243, garciamc@nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Risk, Prevention and Intervention for Addictions Overflow.

Date: March 3-4, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Palomar Hotel, 2121 P Street NW., Washington, DC 20037.

Contact Person: Kristen Prentice, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3112, MSC 7808, Bethesda, MD 20892, 301-496-0726, prenticekj@mail.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Basic and Integrative Bioengineering.

Date: March 5, 2014.

Time: 8:30 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Paul Sammak, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6185, MSC 7892, Bethesda, MD 20892, 301-435-0601, sammakpj@csr.nih.gov.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Host Interactions with Bacterial Pathogens Study Section.

Date: March 6, 2014.

Time: 7:45 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street at Sutter, San Francisco, CA 94102.

Contact Person: Fouad A El-Zaatari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7808, Bethesda, MD 20892, (301) 435-1149, elzaataf@csr.nih.gov.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Drug Discovery for the Nervous System Study Section.

Date: March 6-7, 2014.

Time: 8:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: Lorient Hotel & Spa, 1600 King Street, Alexandria, VA 22314.

Contact Person: Mary Custer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7850, Bethesda, MD 20892, (301) 435-1164, custerm@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Investigations on Primary Immunodeficiency Diseases.

Date: March 6, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Scott Jakes, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4198, MSC 7812, Bethesda, MD 20892, 301-495-1506, jakesse@mail.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular Sciences.

Date: March 6-7, 2014.

Time: 8:00 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: Margaret Chandler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126,

MSC 7814, Bethesda, MD 20892, (301) 435-1743, margaret.chandler@nih.gov.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Virology—A Study Section.

Date: March 6–7, 2014.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Alexandria Old Town, 1456 Duke Street, Alexandria, VA 22314.

Contact Person: Joanna M Pyper, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, (301) 435-1151, pyperj@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business; Cell, Computational and Molecular Biology.

Date: March 6, 2014.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Maria DeBernardi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7892, Bethesda, MD 20892, 301-435-1355, debernardima@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR-13-169; Academic Industrial Partnership.

Date: March 6, 2014.

Time: 11:00 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: Behrouz Shabestari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7854, Bethesda, MD 20892, (301) 435-2409, shabestb@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR-13-169; Academic Industrial Partnership.

Date: March 6, 2014.

Time: 11:00 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: Xiang-Ning Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5112, MSC 7854, Bethesda, MD 20892, 301-435-1744, lixiang@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR-12-259; Lymphatics in Health and Disease in the Digestive, Urinary, Cardiovascular and Pulmonary Systems.

Date: March 6, 2014.

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: Peter J Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435-0682, perrinp@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: January 31, 2014.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2014-02456 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Request for Information on the Proposed Framework for Developing Study Content and Protocols for the National Children's Study (NCS); Correction

The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development and National Children's Study published a Request for Information on the Proposed Study Content Framework in the **Federal Register** on January 23, 2014 (79 FR 3840) (<https://www.federalregister.gov/articles/2014/01/23/2014-01339/request-for-information-on-the-proposed-framework-for-developing-study-content-and-protocols-for-the>). The document incorrectly listed Dr. Dean Coppola as the Acting Director of the National Children's Study. On the day of the posting, he was acting in Dr. Steven Hirschfeld's absence. Dr. Hirschfeld remains the Director of the National Children's Study, and Dr. Coppola is the Deputy Director. We regret any misunderstanding this might have caused.

Dated: January 31, 2014.

Angelee Mullins,

Federal Register Liaison, National Institutes of Health.

[FR Doc. 2014-02450 Filed 2-5-14; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2014-0001; OMB No. 1660-NEW]

Agency Information Collection Activities: Proposed Collection; Comment Request; Emergency Notification System (ENS)

Correction

In notice document 2014-01789 appearing on pages 4940 through 4941 in the issue of Thursday, January 30, 2014, make the following correction:

1. On page 4940, in the third column, in the "DATES" section, "March 3, 2014" should read "March 31, 2014".

[FR Doc. C1-2014-01789 Filed 2-5-14; 8:45 am]

BILLING CODE 1505-01-D

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5752-N-13]

30-Day Notice of Proposed Information Collection: The Appalachia Economic Development Initiative Application and Semi-Annual Reporting

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* March 10, 2014.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202-395-5806. Email: OIRA_Submission@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; email Colette.Pollard@hud.gov or telephone 202-402-3400. Persons with hearing or speech impairments may access this number

through TTY by calling the toll-free Federal Relay Service at (800) 877-8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on November 29, 2013.

A. Overview of Information Collection

Title of Information Collection: The Appalachia Economic Development Initiative Application and Semi-Annual Reporting.

OMB Approval Number: 2506—New.
Type of Request: New collection.
Form Number: SF 424, HUD 2991, HUD-2993, HUD-2994-A, HUD 2880, SF-LLL, HUD-424-CB, HUD-424-CBW, HUD-27300, HUD 27061, HUD-2990.

Description of the need for the information and proposed use: The purpose of this submission is for the

application for the Appalachia Economic Development Initiative grant process. Information is required to rate and rank competitive applications and to ensure eligibility of applicants for funding. Semi-annual reporting is required to monitor grant management.

Respondents (i.e. affected public): Local rural nonprofit organization and federally recognized Indian tribes.

Estimated Number of Responses: 50.
Frequency of Response: 1.
Average Hours per Response: 56.2.
Total Estimated Burdens: 2,801.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Per Respondent	1	1	1	56.02	37.5	25.00	.....
Total	50	.....	1	56.02	2,801	.....	\$937.50

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
 - (2) The accuracy of the agency's estimate of the burden of the proposed collection of information;
 - (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
 - (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.
- HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapters 35.

Dated: January 31, 2014.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2014-02592 Filed 2-5-14; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5752-N-14]

30-Day Notice of Proposed Information Collection: Delta Community Capital Initiative Application and Semi-Annual Reporting

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* March 10, 2014.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202-395-5806. Email: OIRA_Submission@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette.Pollard@hud.gov or telephone 202-402-3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free

Federal Relay Service at (800) 877-8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on November 29, 2013.

A. Overview of Information Collection

Title of Information Collection: Delta Community Capital Initiative Application and Semi-Annual Reporting.

OMB Approval Number: 2506—New.
Type of Request: New collection.
Form Number: SF 424, HUD-424-CBW, SFLLL, HUD 2880, HUD 2990, HUD-424-CB, HUD 2993, HUD 2994-A, HUD 273000, HUD 27061, HUD-2991.

Description of the need for the information and proposed use: The purpose of this submission is for the application for the Appalachia Economic Development Initiative grant process. Information is required to rate and rank competitive applications and to ensure eligibility of applicants for funding. Semi-annual reporting is required to monitor grant management.

Respondents (i.e. affected public): Local rural nonprofit organization and federally recognized Indian tribes.

Estimated Number of Responses: 50.
Frequency of Response: 1.
Average Hours per Response: 56.2.
Total Estimated Burdens: 2,801.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Per Respondent	1	1	1	56.02	37.5	25.00	.....
Total	50	.....	1	56.02	2,801	.....	\$937.50

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
 - (2) The accuracy of the agency's estimate of the burden of the proposed collection of information;
 - (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
 - (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.
- HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapters 35.

Dated: January 31, 2014.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2014-02595 Filed 2-5-14; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5759-N-03]

60-Day Notice of Proposed Information Collection: Operating Fund Formula: Data Collection

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, PIH, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* April 7, 2014.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410-5000; telephone 202-402-5564 (this is not a toll-free number) or email at Colette.Pollard@hud.gov for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877-8339.

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy,

Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202-402-4109, (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877-8339. Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Allocation of Operating Subsidies under the Operating Fund Formula: Data Collection.

OMB Approval Number: 2577-0029.

Type of Request: Extension of currently approved collection.

Form Number: HUD-52722, HUD-52723.

Description of the need for the information and proposed use: Public Housing Agencies (PHAs) use this information in budget submissions which are reviewed and approved by HUD field offices as the basis for obligating operating subsidies. This information is necessary to calculate the eligibility for operating subsidies under the Operating Fund Program regulation, as amended. The Operating Fund Program is designed to provide the amount of operating subsidy that would be needed for well-managed PHAs. PHAs will submit the information electronically with a form.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
HUD-52722	6,997	1	1	5,247.75	5247.75	\$30.23	\$158,639
HUD-52723	6,997	1	1	5,247.75	5247.75	30.23	158,639
Total .....	.....	.....	.....	.....	\$10,495	.....	317,278

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of

information described in Section A on the following:

- (1) Whether the proposed collection of information is necessary for the proper performance of the functions of

the agency, including whether the information will have practical utility;

- (2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: January 30, 2014.

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2014-02596 Filed 2-5-14; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORC01000.L63340000.JP0000.14XL1116AF.241A.00; HAG14-0055]

Notice of Public Meetings, Coos Bay Resource Advisory Committee

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

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) Coos Bay District Resource Advisory Committee will meet as indicated below.

DATES: Thursday, March 13, 2014, 9 a.m.–4 p.m. with public comments at 11 a.m.

ADDRESSES: The meetings will be held at the Coos Bay District Office, 1300 Airport Lane, North Bend, Oregon 97459. The point of contact is Megan Harper, 541-751-4353.

FOR FURTHER INFORMATION CONTACT: Stephen Baker, Bureau of Land Management, Oregon/Washington, Oregon State Office, P.O. Box 2965, Portland, Oregon 97208, (503) 808-6306; sabaker@blm.gov.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Secure Rural Schools and Community Self Determination Act was extended to provide stability for local counties by compensating them, in part, for the decrease in funds formerly derived from the harvest of timber on Federal lands. Pursuant to the Act, the five Committees serve western Oregon BLM districts that contain Oregon and California grant lands and Coos Bay Wagon Road grant lands. Committees consist of 15 local citizens representing a wide array of interests. The RACs provide a mechanism for local community collaboration with Federal land managers as they select projects to be conducted on Federal lands or that will benefit resources on Federal lands using funds under Title II of the Act.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided above. The Resource Advisory Committees will be based on the following BLM District boundaries:

Coos Bay District Resource Advisory Committee advises Federal officials on projects associated with Federal lands within the Coos Bay District which includes lands in Coos, Curry, Douglas, and Lane Counties.

Eugene District Resource Advisory Committee advises Federal officials on projects associated with Federal lands within the Eugene District boundary which includes lands in Benton, Douglas, Lane, and Linn Counties.

Medford District Resource Advisory Committee advises Federal officials on projects associated with Federal lands within the Medford District and Klamath Falls Resource Area in the Lakeview District which includes lands in Coos, Curry, Douglas, Jackson, and Josephine Counties and small portions of west Klamath County.

Roseburg District Resource Advisory Committee advises Federal officials on projects associated with Federal lands within the Roseburg District boundary which includes lands in Douglas, Lane, and Jackson Counties.

Salem District Resource Advisory Committee advises Federal officials on projects associated with Federal lands within the Salem District boundary which includes lands in Benton, Clackamas, Clatsop, Columbia, Lane,

Lincoln, Linn, Marion, Multnomah, Polk, Tillamook, Washington, and Yamhill Counties.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: Title VI, Section 205 of Pub. L. 110-343.

Jody L. Weil,

Deputy State Director, Office of Communications, Oregon/Washington.

[FR Doc. 2014-02528 Filed 2-5-14; 8:45 am]

BILLING CODE 4310-33-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAN10000.L18200000.XZ0000]

Notice of Intent To Establish and Call for Nominations for the Northern California District Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The BLM is publishing this notice in accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act (FACA). The Bureau of Land Management (BLM) gives notice that the Secretary of the Interior is establishing the Northern California District Resource Advisory Council (RAC) to represent the district covering the northern portion of the state. This notice is also to solicit public nominations for the council. The RAC provides advice and recommendations on land use planning and management of public lands within its geographic area.

DATES: All nominations must be received by March 24, 2014.

ADDRESSES: Nominations should be submitted to Bureau of Land Management, 2950 Riverside Dr., Susanville, CA 96130, Attention: RAC Nominations.

FOR FURTHER INFORMATION CONTACT: Nancy Haug, BLM Northern California District Manager, 530-224-2160; or Joseph J. Fontana, BLM Public Affairs Officer, 530-252-5332.

SUPPLEMENTARY INFORMATION: FLPMA (43 U.S.C. 1739) directs the Secretary of the Interior to involve the public in planning and issues related to management of lands administered by the BLM. Section 309 of FLPMA directs the Secretary to establish 10- to 15-member citizen-based advisory councils that are consistent with FACA. The rules governing RACs are found at 43 CFR subpart 1784. As required by FACA, RAC membership must be balanced and representative of the various interests concerned with the management of the public lands. These include three categories:

Category One—Holders of Federal grazing permits and representatives of organizations associated with energy and mineral development, timber industry, transportation or rights of way, developed outdoor recreation, off-highway vehicle use, and commercial recreation;

Category Two—Representatives of nationally or regionally recognized environmental organizations; archaeological and historic organizations, dispersed recreation activities, and wild horse and burro organizations; and

Category Three—Representatives of State, county or local elected office; representatives and employees of a State agency responsible for managing natural resources; representatives of Indian tribes adjacent to or within the area for which the council is organized; representatives of academia who are employed in natural sciences; and the public at large.

Individuals may nominate themselves or others. Nominees must be residents of the district in which the RAC has jurisdiction. The BLM will evaluate nominees based on their education, training, experience, and knowledge of the geographic area of the RAC. Nominees should demonstrate a commitment to collaborative resource decision-making. The Obama Administration prohibits individuals who are currently federally registered lobbyists to serve on all FACA and non-FACA boards, committees or councils. The following must accompany all nominations:

- Letters of reference from represented interests or organizations;
- A completed background information nomination form; and
- Any other information that addresses the nominee's qualifications.

Simultaneous with this notice, the BLM Northern California District Office will issue a press release providing additional information for submitting nominations, with the specifics about

the number and categories of member positions available.

Certification Statement: I certify that the BLM Northern California District Resource Advisory Council is necessary and in the public interest in connection with the Secretary's responsibilities to manage the lands, resources and facilities administered by the BLM.

(Authority: 43 CFR 1784.4–1)

Dated: January 24, 2014.

Sally Jewell,

Secretary of the Interior.

[FR Doc. 2014–02544 Filed 2–5–14; 8:45 am]

BILLING CODE 4310–\$40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORW00000L10200000.ML0000241A.0000–HAG14–0027]

Notice of Intent To Establish and Call for Nominations for the San Juan Islands National Monument Advisory Committee, Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) is publishing this notice in accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act (FACA). The BLM gives notice that the Secretary of the Interior is establishing the San Juan Islands National Monument Advisory Committee. This notice also solicits nominations for members of the public to sit on the Committee. The Committee will provide information and advice regarding the development of the National Monument's management plan as stated in the Presidential Proclamation establishing the Monument.

DATES: All nominations must be received by March 24, 2014.

ADDRESSES: Nominations should be submitted to Daniel Picard, BLM Spokane District Manager, 1103 N. Fancher Road, Spokane, WA 99212, Attention: RAC Nominations.

FOR FURTHER INFORMATION CONTACT: Daniel Picard, BLM Spokane District Manager, 509–536–1200.

SUPPLEMENTARY INFORMATION: The FLPMA (43 U.S.C. 1739) directs the Secretary of the Interior to involve the public in planning and issues related to management of lands administered by the BLM. Section 309 of FLPMA directs the Secretary to establish 10-to-15-

member citizen-based advisory councils that are consistent with FACA. The rules governing RACs are found at 43 CFR subpart 1784. As required by FACA, Resource Advisory Committee (RAC) membership must be balanced and representative of the various interests concerned with the management of the public lands. The San Juan Islands National Monument Advisory Committee will be composed of 12 members: 2 members representing recreation and tourism interests, 2 members representing wildlife and ecological interests, 2 members representing cultural and heritage interests, 2 public-at-large members, 1 member representing tribal interests, 1 member representing local government, 1 member representing education and interpretation interests, and 1 member representing private landowners. Individuals may nominate themselves or others. Nominees must be residents of the district in which the RAC has jurisdiction. The BLM will evaluate nominees based on their education, training, experience, and knowledge of the geographic area of the RAC. Nominees should demonstrate a commitment to collaborative resource decision-making. The Obama Administration prohibits individuals who are currently federally registered lobbyists to serve on all FACA and non-FACA boards, committees or councils. The following must accompany all nominations.

- Letters of reference from represented interests or organizations;
- A completed background information nomination form; and
- Any other information that addresses the nominee's qualifications.

Simultaneous with this notice, the BLM Spokane District Office will issue a press release providing additional information for submitting nominations, with the specifics about the number and categories of member positions available.

Certification Statement: I certify that the BLM San Juan Islands National Monument Advisory Committee is necessary and in the public interest in connection with the Secretary's responsibilities to manage the lands, resources and facilities administered by the BLM.

(Authority: 43 CFR 1784.4–1).

Dated: January 24, 2014.

Sally Jewell,

Secretary of the Interior.

[FR Doc. 2014–02536 Filed 2–5–14; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR**Bureau of Ocean Energy Management****[Docket No. BOEM–2013–0083]****Notice of Determination of No Competitive Interest for the WindFloat Pacific Project Offshore Oregon; MMAA104000****AGENCY:** Bureau of Ocean Energy Management (BOEM), Interior.**ACTION:** Notice.

SUMMARY: This notice provides BOEM's determination that there is no competitive interest in the area requested by Principle Power, Incorporated (PPI) to acquire an Outer Continental Shelf (OCS) commercial wind lease as described in the *Potential Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore Oregon, Request for Interest (RFI)* that BOEM published on September 30, 2013 (78 FR 59968). The RFI described the WindFloat Pacific Project proposal submitted to BOEM by PPI to acquire a commercial wind lease on the OCS offshore Oregon, and provided an opportunity for the public to submit comments about the proposal.

DATES: Effective February 6, 2014.

FOR FURTHER INFORMATION CONTACT: Ms. Jean Thurston, Renewable Energy Program Specialist, BOEM, Pacific Region Office of Strategic Resources, 770 Paseo Camarillo, Second Floor, Camarillo, California 93010, Phone: (805) 384–7585.

SUPPLEMENTARY INFORMATION:**Authority**

This Determination of No Competitive Interest (DNCI) is published pursuant to subsection 8(p)(3) of the OCS Lands Act (43 U.S.C. 1337(p)(3)), and the implementing regulations at 30 CFR Part 585. Subsection 8(p)(3) of the OCS Lands Act requires that OCS renewable energy leases, easements, and rights-of-way be issued “on a competitive basis unless the Secretary [of the Interior] determines after public notice of a proposed lease, easement, or right-of-way (ROW) that there is no competitive interest.” The Secretary delegated the authority to make such determinations to BOEM.

Determination and Next Steps

This DNCI provides notice to the public that BOEM has determined there is no competitive interest in the proposed lease area, as no indications of competitive interest were submitted in response to the RFI.

In the RFI, BOEM also solicited public input regarding the area described in the

notice, the potential environmental consequences of wind energy development in the area, and multiple uses of the area. In response to the RFI, BOEM received public comment submissions from 18 entities. BOEM will use the comments it received to inform its subsequent decisions. After publication of this DNCI, BOEM will proceed with the noncompetitive lease issuance process outlined at 30 CFR 585.231.

Map of the Area

A map of the area proposed for a commercial lease can be found at the following Web site: <http://www.boem.gov/Oregon/>.

Dated: January 17, 2014.

Tommy P. Beaudreau,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2014–02549 Filed 2–5–14; 8:45 am]

BILLING CODE 4310–MR–P**INTERNATIONAL TRADE COMMISSION****[Investigation Nos. 701–TA–512 and 731–TA–1248 (Preliminary)]****Carbon and Certain Alloy Steel Wire Rod From China; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations****AGENCY:** United States International Trade Commission.**ACTION:** Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701–TA–512 and 731–TA–1248 (Preliminary) under sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from China of carbon and certain alloy steel wire rod, provided for in subheadings 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, 7227.90.6030, and 7227.90.6035 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of China

and are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to sections 702(c)(1)(B) or 732(c)(1)(B) of the Act (19 U.S.C. 1671a(c)(1)(B) or 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by Monday, March 17, 2014. The Commission's views must be transmitted to Commerce within five business days thereafter, or by Monday, March 24, 2014.

For further information concerning the conduct of these investigations 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 and B (19 CFR Part 207).

DATES: Effective Date: Friday, January 31, 2014.**FOR FURTHER INFORMATION CONTACT:**

Amy Sherman (202–205–3289), 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 this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted in response to a petition filed on Friday, January 31, 2014, by ArcelorMittal USA LLC, Chicago, IL; Charter Steel, Saukville, WI; Evraz Rocky Mountain Steel, Pueblo, CO; Gerdau Ameristeel U.S. Inc., Tampa, FL; Keystone Consolidated Industries, Inc., Dallas, TX; and Nucor Corporation, Charlotte, NC.

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations

have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with these investigations for 9:30 a.m. on Friday, February 21, 2014, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the conference should be emailed to William.bishop@usitc.gov and Sharon.bellamy@usitc.gov (DO NOT FILE ON EDIS) on or before Wednesday, February 19, 2014. Parties in support of the imposition of countervailing and antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before Wednesday, February 26, 2014, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please consult the Commission's rules, as amended, 76 FR

61937 (Oct. 6, 2011) and the Commission's Handbook on Filing Procedures, 76 FR 62092 (Oct. 6, 2011), available on the Commission's Web site at <http://edis.usitc.gov>.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: January 31, 2014.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2014-02494 Filed 2-5-14; 8:45 am]

BILLING CODE 7020-02-P

NUCLEAR WASTE TECHNICAL REVIEW BOARD

Meeting

Board meeting: March 19, 2014—The U.S. Nuclear Waste Technical Review Board will meet to discuss DOE R&D activities related to salt as a geologic medium for disposal of SNF and HLW.

Pursuant to its authority under section 5051 of Public Law 100-203, Nuclear Waste Policy Amendments Act of 1987, the U.S. Nuclear Waste Technical Review Board will hold a public meeting in Albuquerque, NM, on Wednesday, March 19, 2014. The main topic of the meeting is the Department of Energy (DOE) research and development (R&D) activities related to salt as a geologic medium for the disposal of spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Speakers from the DOE Office of Nuclear Energy will present work on a range of studies, including performance assessment modeling of a generic salt disposal system for SNF and HLW, coupled models for thermal-hydrological-chemical and thermal-hydrological-mechanical processes in a salt repository, and brine migration experimental studies for salt repositories. The Board also will hear a presentation on DOE activities related to resumption of NRC work on the Yucca Mountain License Application. In addition, a speaker from the DOE Office of Environmental Management will describe lessons learned from managing

remote-handled radioactive wastes at the Waste Isolation Pilot Plant in Carlsbad, NM.

The meeting will begin at 8:00 a.m. and will be held at the Marriott Hotel, 2101 Louisiana Blvd. NE., Albuquerque, New Mexico; Tel. 505-881-6800, Fax 505-888-2982. A block of rooms has been reserved at the hotel for meeting attendees. Reservations can be made by calling 800 228-9290 or through the online reservations link on the Board's Web site calendar page (<http://www.nwtrb.gov/calendar/calendar.html>). Reservations must be made by Sunday, March 2, 2014, to ensure receiving the meeting rate.

A detailed agenda will be available on the Board's Web site at www.nwtrb.gov approximately one week before the meeting. The meeting will be open to the public, and opportunities for public comment will be provided at the end of the day. Those wanting to speak are encouraged to sign the "Public Comment Register" at the check-in table. A time limit may need to be set for individual remarks, but written comments of any length may be submitted for the record. Transcripts of the meeting will be available on the Board's Web site after April 21, 2014.

The Board was established in the 1987 amendments to the Nuclear Waste Policy (NWP) as an independent agency in the Executive branch to perform an ongoing objective evaluation of the technical validity of activities undertaken by the U.S. Department of Energy related to implementing the NWP. Board members are experts in their fields and are appointed by the President from a list of candidates submitted by the National Academy of Sciences. The Board is required to report its findings, conclusions, and recommendations to Congress and the Secretary of Energy. Board reports, correspondence, congressional testimony, and meeting transcripts and materials are posted on the Board's Web site.

For information on the meeting, contact Karyn Severson at severson@nwtrb.gov or Roberto Pabalan at pabalan@nwtrb.gov. For information on lodging or logistics, contact Linda Coultry at coultry@nwtrb.gov. They all can be reached by phone at 703-235-4473.

Dated: January 31, 2014.

Nigel Mote,

Executive Director, U.S. Nuclear Waste Technical Review Board.

[FR Doc. 2014-02432 Filed 2-5-14; 8:45 am]

BILLING CODE 6820-AM-M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review, Request for Comments

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) is forwarding 4 Information Collection Requests (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Our ICR describes the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collections of information to determine (1) the practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to the RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if the RRB and OIRA receive them within 30 days of the publication date.

1. *Title and purpose of information collection:* Placement Service; OMB 3220-0057.

Section 12(i) of the Railroad Unemployment Insurance Act (RUIA), authorizes the Railroad Retirement Board (RRB) to establish, maintain, and operate free employment offices to

provide claimants for unemployment benefits with job placement opportunities. Section 704(d) of the Regional Railroad Reorganization Act of 1973, as amended, and as extended by the consolidated Omnibus Budget Reconciliation Act of 1985, required the RRB to maintain and distribute a list of railroad job vacancies, by class and craft, based on information furnished by rail carriers to the RRB. Although the requirement under the law expired effective August 13, 1987, the RRB has continued to obtain this information in keeping with its employment service responsibilities under Section 12(k) of the RUIA. Application procedures for the job placement program are prescribed in 20 CFR part 325. The procedures pertaining to the RRB's obtaining and distributing job vacancy reports furnished by rail carriers are described in 20 CFR 346.1.

The RRB currently utilizes four forms to obtain information needed to carry out its job placement responsibilities. Form ES-2, Supplemental Information for Central Register, is used by the RRB to obtain information needed to update a computerized central register of separated and furloughed railroad employees available for employment in the railroad industry. Form ES-21, Referral to State Employment Service, and ES-21c, Report of State Employment Service Office, are used by the RRB to provide placement assistance for unemployed railroad employees through arrangements with State Employment Service offices. Form UI-35, Field Office Record of Claimant Interview, is used primarily by RRB

field office staff to conduct in-person interviews of claimants for unemployment benefits. Completion of these forms is required to obtain or maintain a benefit. In addition, the RRB also collects Railroad Job Vacancies information received voluntarily from railroad employers.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (78 FR 66786 on November 6, 2013) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Placement Service.

OMB Control Number: 3220-0057.

Form(s) submitted: ES-2, ES-21, ES-21c, UI-35 and Job Vacancies Report.

Type of request: Extension without change of a currently approved collection.

Affected public: Private Sector; Businesses or other for-profits.

Abstract: Under the RUIA, the Railroad Retirement Board provides job placement assistance for unemployed railroad workers. The collection obtains information from job applicants, railroad employers, and State Employment Service offices for use in placement, for providing referrals for job openings, reports of referral results and for verifying and monitoring claimant eligibility.

Changes proposed: The RRB proposes no revisions to the forms in the collection.

The Burden Estimate for the ICR is as Follows:

Form No.	Annual responses	Time (minutes)	Burden (hours)
ES-2	7,500	0.25	31
ES-21	3,500	0.68	40
ES-21c	1,250	1.50	31
UI-35 (in-person)	9,000	7.00	1,050
UI-35 (by mail)	1,000	10.50	175
Railroad Job Vacancies Report	750	10.00	125
TOTAL	23,000	.....	1,452

2. *Title and Purpose of information collection:* Withholding Certificate for Railroad Retirement Monthly Annuity Payments; OMB 3220-0149.

The Internal Revenue Code requires that all payers of tax liable private pensions to U.S. citizens or residents: (1) Notify each recipient at least concurrent with initial withholding that the payer is, in fact, withholding benefits for tax liability and that the recipient has the option of electing not to have the payer withhold, or to

withhold at a specific rate; (2) withhold benefits for tax purposes (in the absence of the recipient's election not to withhold benefits); and (3) notify all beneficiaries, at least annually, that they have the option to change their withholding status or elect not to have benefits withheld.

The RRB provides Form RRB-W4P, Withholding Certificate for Railroad Retirement Payments, to its annuitants to exercise their withholding options. Completion of the form is required to

obtain or retain a benefit. One response is requested of each respondent.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (78 FR 66787 on November 6, 2013) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Withholding Certificate for Railroad Retirement Monthly Annuity Payments.

OMB Control Number: 3220–0149.
Form(s) submitted: RRB W–4P.
Type of request: Extension without change of a currently approved collection.

Affected public: Individuals or Households.

Abstract: Under Public Law 98–76, railroad retirement beneficiaries’ Tier II, dual vested and supplemental benefits are subject to income tax under private pension rules. Under Public Law 99–514, the non-social security equivalent benefit portion of Tier I is also taxable under private pension rules. The collection obtains the information needed by the Railroad Retirement Board to implement the income tax withholding provisions.

Changes proposed: The RRB proposes no changes to Form RRB W–4P.

The burden estimate for the ICR is as follows:

Estimated annual number of respondents: 25,000.

Total annual responses: 25,000.

Total annual reporting hours: 1.

3. Title and Purpose of information collection: Investigation of Claim for Possible Days of Employment; OMB 3220–0196.

Under Section 1(k) of the Railroad Unemployment Insurance Act (RUIA), unemployment and sickness benefits are not payable for any day remuneration is payable or accrues to the claimant. Also Section 4(a–1) of the RUIA provides that unemployment or sickness benefits are not payable for any day the claimant receives the same benefits under any law other than the RUIA. Under the Railroad Retirement Board (RRB)

regulation 20 CFR 322.4(a), a claimant’s certification or statement on an RRB-provided claim form that he or she did not work on any day claimed and did not receive income such as vacation pay or pay for time lost for any day claimed is sufficient evidence unless there is conflicting evidence. Further, under 20 CFR 322.4(b), when there is a question raised as to whether or not remuneration is payable or has accrued to a claimant with respect to a claimed day or days, investigation shall be made with a view to obtaining information sufficient for a finding.

Form ID–5S (SUP), Report of Cases for Which All Days Were Claimed During a Month Credited Per an Adjustment Report, collects information about compensation credited to an employee during a period when the employee claimed either unemployment or sickness benefits from a railroad employer. The request is generated as a result of a computer match that compares data which is maintained in the RRB’s RUIA Benefit Payment file with data maintained in the RRB’s records of service. The ID–5S (SUP) is generated annually when the computer match indicates that an employee of the railroad employer was paid unemployment or sickness benefits for every day in one or more months for which creditable compensation was adjusted at the request of their railroad employer on RRB Form BA–4 (OMB Approved 3220–0008).

The computer-generated Form ID–5S (SUP) includes pertinent identifying information, the BA–4 adjustment process date, and the claimed months in

question. Space is provided on the report for the employer’s use in supplying the information requested in the computer-generated transmittal letter, Form ID–5S, Railroad Compensation Adjustment Discrepancy Report, which accompanies the report. Completion is voluntary. One response is requested of each respondent.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (78 FR 66787 on November 6, 2013) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Investigation of Claim for Possible Days of Employment.

OMB Control Number: 3220–0196.

Form(s) submitted: ID–5S (SUP).

Type of request: Extension without change of a currently approved collection.

Affected public: Private Sector; Businesses or other for profits

Abstract: Under the Railroad Unemployment Insurance Act, unemployment or sickness benefits are not payable for any day in which remuneration is payable or accrues to the claimant. The collection obtains information about compensation credited to an employee during a period when the employee claimed unemployment or sickness benefits from their railroad employer.

Changes proposed: The RRB proposes no revisions to Form ID–5S (SUP).

The burden estimate for the ICR is as follows:

Form number	Annual responses	Time (minutes)	Burden (hours)
ID–5S (SUP)	55	10	9

4. Title and Purpose of information collection: Designation of Contact Officials; 3220–0200.

Coordination between railroad employers and the RRB is essential to properly administer the payment of benefits under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). In order to enhance timely coordination activity, the RRB utilizes Form G–117A, Designation of Contact Officials. Form G–117A is used by railroad employers to designate employees who are to act as point of contact with the RRB on a

variety of RRA and RUIA-related matters. Completion is voluntary. One response is requested from each respondent.

Previous Requests for Comments: The RRB has already published the initial 60-day notice (78 FR 66787 on November 6, 2013) required by 44 U.S.C. 3506(c)(2). That request elicited no comments.

Information Collection Request (ICR)

Title: Designation of Contact Officials.

OMB Control Number: 3220–0200.

Form(s) submitted: G–117A.

Type of request: Extension without change of a currently approved collection.

Affected public: Private Sector; Businesses or other for profits.

Abstract: The Railroad Retirement Board (RRB) requests that railroad employers designate employees to act as liaison with the RRB on a variety of Railroad Retirement Act and Railroad Unemployment Insurance Act matters.

Changes proposed: The RRB proposes no revisions to Form G–117A.

The burden estimate for the ICR is as follows:

Form number	Annual responses	Time (minutes)	Burden (hours)
G-117A	100	15	25

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Dana Hickman at (312) 751-4981 or Dana.Hickman@RRB.GOV.

Comments regarding the information collection should be addressed to Charles Mierzwa, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611-2092 or Charles.Mierzwa@RRB.GOV and to the OMB Desk Officer for the RRB, Fax: 202-395-6974, Email address: OIRA_Submission@omb.eop.gov.

Charles Mierzwa,

Chief of Information Resources Management.

[FR Doc. 2014-02558 Filed 2-5-14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-30899]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

January 31, 2014.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of January 2014. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 25, 2014, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

FOR FURTHER INFORMATION CONTACT:

Diane L. Titus at (202) 551-6810, SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE., Washington, DC 20549-8010.

Brandywine Fund Inc. [File No. 811-4447]

Brandywine Blue Fund Inc. [File No. 811-6221]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to series of Managers Trust I, and on October 1, 2013, made distributions to their shareholders based on net asset value. Expenses of approximately \$790,000 incurred in connection with each reorganization were paid by Friess Associates, LLC, applicants' investment adviser, and Managers Investment Group LLC, investment adviser to the surviving fund.

Filing Date: The applications were filed on December 30, 2013.

Applicant's Address: P.O. Box 4166, Greenville, DE 19807.

Oracle Family of Funds [File No. 811-22423]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On August 31, 2013, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of \$7,610 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on November 21, 2013, and amended on January 2, 2014.

Applicant's Address: 182 Island Blvd. FL, Fox Island, WA 98333.

HighMark Funds [File No. 811-5059]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant's series either liquidated or transferred their assets to corresponding series of California Daily Tax Free Income Fund, Inc., Daily Income Fund, and Nationwide Mutual Funds, and on September 16, 2013, made a final distribution to shareholders based on net asset value. Expenses of \$2,724,000 incurred in connection with the reorganization were paid by HighMark Capital Management, Inc., applicant's investment adviser, Reich & Tang Asset Management, LLC, investment adviser to certain acquiring funds, and

Nationwide Fund Advisors, investment adviser to certain other acquiring funds.

Filing Dates: The application was filed on November 8, 2013, and amended on December 20, 2013.

Applicant's Address: 350 California St., Suite 1600, San Francisco, CA 94104.

Dreyfus BASIC U.S. Mortgage Securities Fund [File No. 811-5074]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 5, 2013, applicant made a final liquidating distribution to its shareholders based on net asset value. Expenses of \$1,897 incurred in connection with the reorganization were paid by The Dreyfus Corporation, applicant's investment adviser.

Filing Date: The application was filed on January 15, 2014.

Applicant's Address: c/o The Dreyfus Corporation, 200 Park Ave., New York, NY 10166.

BlackRock Senior High Income Fund, Inc. [File No. 811-7456]

BlackRock Strategic Bond Trust [File No. 811-10635]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to BlackRock Debt Strategies Fund, Inc., and on December 9, 2013, made final distributions to their shareholders based on net asset value. Expenses of \$414,580 incurred in connection with BlackRock Senior High Income Fund, Inc.'s reorganization were paid by BlackRock Advisors, LLC, applicant's investment adviser. Expenses of \$332,180 incurred in connection with BlackRock Strategic Bond Trust's reorganization were paid by applicant.

Filing Date: The applications were filed on December 17, 2013.

Applicant's Address: 100 Bellevue Pkwy., Wilmington, DE 19809.

BlackRock Alternatives Allocation Master Portfolio LLC [File No. 811-22672]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant is not presently making an offering of its securities and does not propose to make any offering of its securities. The fund

only has five beneficial owners and will continue to operate as a private investment fund in reliance on section 3(c)(1) of the Act until its remaining assets are liquidated.

Filing Date: The application was filed on December 12, 2013.

Applicant's Address: 100 Bellevue Pkwy., Wilmington, DE 19809.

Nuveen Tax-Advantaged Floating Rate Fund [File No. 811-21705]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On June 27, 2012, applicant made a liquidating distribution to its shareholders, based on net asset value. Applicant incurred no expenses in connection with the liquidation.

Filing Date: The application was filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Global Income & Currency Fund Inc. [File No. 811-21791]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant transferred its assets to Nuveen Diversified Currency Opportunities Fund, and on December 10, 2012, made a distribution to its shareholders based on net asset value. Expenses of \$332,009 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

MLP & Strategic Equity Fund Inc. [File No. 811-22040]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant transferred its assets to Nuveen Energy MLP Total Return Fund, and on August 27, 2012, made a distribution to its shareholders based on net asset value. Expenses of \$542,215 incurred in connection with the reorganization were paid by applicant and the acquiring fund.

Filing Date: The application was filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

RiverSource International Managers Series, Inc. [File No. 811-10427]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant transferred its assets to series of

Columbia Acorn Trust, and on August 9, 2011, made a distribution to shareholders based on net asset value. Expenses of \$74,370 incurred in connection with the reorganization were paid by Columbia Management Investment Advisers, LLC, applicant's investment adviser and its affiliates.

Filing Date: The application was filed on December 5, 2013.

Applicant's Address: 901 Marquette Ave. South, Suite 2810, Minneapolis, MN 55402-3268.

Selected Capital Preservation Trust [File No. 811-5240]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant transferred its asset to Davis Government Money Market Fund, a series of Davis Series, Inc., and on December 16, 2013, made a distribution to its shareholders based on net asset value. Expenses of approximately \$28,432 incurred in connection with the reorganization were paid by applicant and its investment adviser, Davis Selected Advisers, L.P.

Filing Date: The application was filed on December 19, 2013.

Applicant's Address: 2949 East El Vira Rd., Suite 101, Tucson, AZ 85756.

RiverSource Investment Series, Inc. [File No. 811-54]

RiverSource Special Tax-Exempt Series Trust [File No. 811-4647]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to series of Columbia Funds Series Trust I, and on April 5, 2011, and May 31, 2011, respectively, made distributions to their shareholders based on net asset value. Expenses of \$241,116 and approximately \$44,944, respectively, incurred in connection with the reorganization were paid by Columbia Management Investment Advisers, LLC, investment adviser to each applicant, and its affiliates.

Filing Date: The applications were filed on December 5, 2013.

Applicant's Address: 901 Marquette Ave. South, Suite 2810, Minneapolis, MN 55402-3268.

RiverSource Income Series, Inc. [File No. 811-499]

RiverSource Global Series, Inc. [File No. 811-5696]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to series of Columbia Funds Series Trust II, and on

April 5, 2011, and May 31, 2011, respectively, made distributions to their shareholders based on net asset value. Expenses of \$148,184 and \$48,194, respectively, incurred in connection with the reorganizations were paid by applicants and Columbia Management Investment Advisers, LLC, investment adviser to each applicant.

Filing Date: The applications were filed on December 5, 2013.

Applicant's Address: 901 Marquette Ave. South, Suite 2810, Minneapolis, MN 55402-3268.

RiverSource Tax-Exempt Income Series, Inc. [File No. 811-2901]

RiverSource Strategic Allocation Series, Inc. [File No. 811-4133]

RiverSource Managers Series, Inc. [File No. 811-10321]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to series of Columbia Funds Series Trust I, and on May 31, 2011, May 31, 2011, and April 5, 2011, respectively, made final distributions to their shareholders based on net asset value. Expenses of \$274,452, \$101,298 and \$216,962, respectively, incurred in connection with the reorganizations were paid by applicants and Columbia Management Investment Advisers, LLC, investment adviser to each applicant.

Filing Date: The applications were filed on December 5, 2013.

Applicant's Address: 901 Marquette Ave. South, Suite 2810, Minneapolis, MN 55402-3268.

Nuveen Georgia Premium Income Municipal Fund [File No. 811-7614]

Nuveen Georgia Dividend Advantage Municipal Fund [File No. 811-10351]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Each applicant transferred its assets to Nuveen Georgia Dividend Advantage Municipal Fund 2, and on July 9, 2012, made distributions to its shareholders based on net asset value. Aggregate expenses of \$461,941 incurred in connection with the reorganizations were allocated among applicants and the acquiring fund.

Filing Date: The applications were filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Nuveen Virginia Dividend Advantage Municipal Fund [File No. 811-9469]**Nuveen Virginia Dividend Advantage Municipal Fund 2 [File No. 811-10523]**

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Each applicant transferred its assets to Nuveen Virginia Premium Income Municipal Fund, and on August 6, 2012, made distributions to its shareholders based on net asset value. Aggregate expenses of \$385,970 incurred in connection with the reorganizations were allocated among applicants and the acquiring fund.

Filing Date: The applications were filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Nuveen Insured California Premium Income Municipal Fund Inc. [File No. 811-6620]**Nuveen Insured California Premium Income Municipal Fund 2 Inc. [File No. 811-7492]****Nuveen Insured California Dividend Advantage Municipal Fund [File No. 811-9449]**

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Each applicant transferred its assets to Nuveen California AMT-Free Municipal Income Fund, and on May 4, 2012, applicants made distributions to their shareholders based on net asset value. Aggregate expenses of \$1,076,339 incurred in connection with the reorganizations were allocated among applicants and the acquiring fund.

Filing Date: The applications were filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Nuveen Connecticut Dividend Advantage Municipal Fund [File No. 811-9465]**Nuveen Connecticut Dividend Advantage Municipal Fund 2 [File No. 811-21033]****Nuveen Connecticut Dividend Advantage Municipal Fund 3 [File No. 811-21154]**

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to Nuveen Connecticut Premium Income Municipal Fund, and on July 9, 2012, made distributions to their shareholders based on net asset value. Aggregate

expenses of \$520,574 incurred in connection with the reorganizations were allocated among applicants and the acquiring fund.

Filing Date: The applications were filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Nuveen Maryland Dividend Advantage Municipal Fund [File No. 811-9471]**Nuveen Maryland Dividend Advantage Municipal Fund 2 [File No. 811-10349]****Nuveen Maryland Dividend Advantage Municipal Fund 3 [File No. 811-21153]**

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to Nuveen Maryland Premium Income Municipal Fund, and on August 6, 2012, made distributions to their shareholders based on net asset value. Aggregate expenses of \$455,433 incurred in connection with the reorganizations were allocated among applicants and the acquiring fund.

Filing Date: The applications were filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Nuveen North Carolina Dividend Advantage Municipal Fund [File No. 811-9461]**Nuveen North Carolina Dividend Advantage Municipal Fund 2 [File No. 811-10525]****Nuveen North Carolina Dividend Advantage Municipal Fund 3 [File No. 811-21158]**

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants transferred their assets to Nuveen North Carolina Premium Income Municipal Fund, and on July 9, 2012, applicants made distributions to their shareholders based on net asset value. Aggregate expenses of \$559,890 incurred in connection with the reorganizations were allocated among applicants and the acquiring fund.

Filing Date: The applications were filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

Nuveen New York Dividend Advantage Municipal Fund 3 [File No. 811-10447]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never had any shareholders and does

not propose to engage in business of any kind other than as necessary to wind up its affairs.

Filing Date: The application was filed on December 20, 2013.

Applicant's Address: 333 West Wacker Dr., Chicago, IL 60606.

JPMorgan Value Opportunities Fund Inc. [File No. 811-4321]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant transferred its assets to JPMorgan Large Cap Value Fund, a series of JP Morgan Trust II, and on October 18, 2013, made a distribution to its shareholders based on net asset value. Expenses of approximately \$288,593 incurred in connection with the reorganization were reimbursed by JP Morgan Investment Management, Inc., investment adviser to applicant.

Filing Date: The application was filed on January 15, 2014.

Applicant's Address: 270 Park Ave., New York, NY 10017.

RiverSource Sector Series, Inc. [File No. 811-5522]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant transferred its assets to Columbia Real Estate Equity Fund, a series of Columbia Funds Series Trust I, and on March 24, 2011, made a distribution to its shareholders based on net asset value. Expenses of \$77,516 incurred in connection with the reorganization were paid by applicant and Columbia Investment Advisers, LLC, applicant's investment adviser.

Filing Dates: The application was filed on December 5, 2013.

Applicant's Address: 901 Marquette Ave. South, Suite 2810, Minneapolis, MN 55402-3268.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2014-02572 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30901; File No. 812-14224]

T. Rowe Price Global Allocation Fund, Inc. et al.; Notice of Application

January 31, 2014.

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 subadvisory agreements with Wholly-Owned Sub-Advisors (as defined below) and non-affiliated sub-advisors without shareholder approval and would grant relief from certain disclosure requirements.

APPLICANTS: T. Rowe Price Global Allocation Fund, Inc. (the “Company”) and T. Rowe Price Associates, Inc. (“T. Rowe Price”).

DATES: *Filing Dates:* The application was filed on October 17, 2013 and amended on January 21, 2014.

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 February 25, 2014, 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, Darrell Braman, Esq., T. Rowe Price Associates, Inc., 100 East Pratt Street, Baltimore, Maryland 21202.

FOR FURTHER INFORMATION CONTACT: Jason M. Williams, Senior Counsel, at (202) 551-6821, or Daniele Marchesani, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel’s 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 Company is organized as a Maryland corporation and is registered under the Act as an open-end management investment company. The Company may offer one or more series of shares (each, a “Series”) with its own distinct investment objectives, policies and restrictions.¹ Each Series has, or will have, as its investment adviser, T. Rowe Price, or another investment adviser controlling, controlled by or under common control with T. Rowe Price or its successors (each, an “Advisor”).² T. Rowe Price is a Maryland corporation.³

2. An Advisor will serve as the investment adviser to each Series pursuant to an investment management agreement with the Company (“Investment Management Agreement”). The Investment Management Agreement will be approved by the board of directors of the Company (“Board”),⁴ 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 Series or the Advisor (“Independent Board Members”) 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 these Investment Management Agreements will comply with section 15(a) of the Act.

3. Under the terms of each Investment Management Agreement, the Advisor, subject to the supervision of the Board, will provide continuous investment management of the assets of each Series. The Advisor will periodically review a

¹ The Company currently consists of a single Series, the T. Rowe Price Global Allocation Fund.

² Each Advisor is, or will be, registered as an investment adviser under the Investment Advisers Act of 1940 (“Advisers Act”). 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.

³ 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 intends to rely on the requested order in the future and that is advised by an Advisor, uses the multi-manager structure described in the application, and complies with the terms and conditions of the application (“Subadvised 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. If the name of any Subadvised Series contains the name of a Sub-Advisor (as defined below), the name of the Advisor that serves as the primary adviser to the Subadvised Series, or a trademark or trade name that is owned by or publicly used to identify that Advisor, will precede the name of the Sub-Advisor.

⁴ The term “Board” also includes the board of trustees or directors of a future Subadvised Series.

Series’ investment policies and strategies, and based on the need of a particular Series may recommend changes to the investment policies and strategies of the Series for consideration by the Board. For its services to each Series under the applicable Investment Management Agreement, the Advisor will receive an investment management fee from that Series based on either the average net assets of that Series or that Series’ investment performance over a particular period compared to a benchmark. Each Investment Management Agreement will provide that the Advisor may, subject to the approval of the Board, including a majority of the Independent Board Members, and the shareholders of the applicable Subadvised Series (if required), delegate portfolio management responsibilities of all or a portion of the assets of a Subadvised Series to one or more Sub-Advisors.⁵

4. Applicants request an order to permit the Advisor, subject to the approval of the Board, including a majority of the Independent Board Members, to, without obtaining shareholder approval: (i) Select Sub-Advisors to manage all or a portion of the assets of a Series and enter into Sub-Advisory Agreements (as defined below) with the Sub-Advisors, and (ii) materially amend Sub-Advisory Agreements with the Sub-Advisors.⁶ The requested relief will not extend to any sub-advisor, other than a Wholly-Owned Sub-Advisor, who is an affiliated person, as defined in section 2(a)(3) of the Act, of the Subadvised Series or of the Advisor, other than by reason of serving as a sub-advisor to one or more of the Subadvised Series (“Affiliated Sub-Advisor”).

5. Pursuant to each Investment Management Agreement, the Advisor

⁵ A “Sub-Advisor” is (a) an indirect or direct “wholly-owned subsidiary” (as such term is defined in the Act) of the Advisor for that Series; (b) a sister company of the Advisor for that Series that is an indirect or direct “wholly-owned subsidiary” (as such term is defined in the Act) of the same company that, indirectly or directly, wholly owns the Advisor (each of (a) and (b), a “Wholly-Owned Sub-Advisor” and collectively, the “Wholly-Owned Sub-Advisors”), or (c) an investment sub-advisor for that Series that is not an “affiliated person” (as such term is defined in section 2(a)(3) of the Act) of the Series or the Advisor, except to the extent that an affiliation arises solely because the sub-advisor serves as a sub-advisor to a Series (each, a “Non-Affiliated Sub-Advisor”).

⁶ Shareholder approval will continue to be required for any other sub-advisor change (not otherwise permitted by applicable law or rule) and material amendments to an existing sub-advisory agreement with any sub-advisor other than a Non-Affiliated Sub-Advisor or a Wholly-Owned Sub-Advisor (all such changes referred to as “Ineligible Sub-Advisor Changes”).

will have overall responsibility for the management and investment of the assets of each Subadvised Series. These responsibilities will include recommending the removal or replacement of Sub-Advisors, determining the portion of that Subadvised Series' assets to be managed by any given Sub-Advisor and reallocating those assets as necessary from time to time.

6. The Advisor may enter into sub-advisory agreements with various Sub-Advisors ("Sub-Advisory Agreements") to provide investment management services to the Subadvised Series. The terms of each Sub-Advisory Agreement will comply fully with the requirements of section 15(a) of the Act and will be approved by the Board, including a majority of the Independent Board Members. The Sub-Advisors, subject to the supervision of the Advisor and oversight of the Board, will determine the securities and other investments to be purchased or sold by a Subadvised Series and place orders with brokers or dealers that they select. The Advisor will compensate each Sub-Advisor out of the fee paid to the Advisor under the relevant Investment Management Agreement.

7. Subadvised Series will inform shareholders of the hiring of a new Sub-Advisor pursuant to the following procedures ("Modified Notice and Access Procedures"): (a) Within 90 days after a new Sub-Advisor is hired for any Subadvised Series, that Subadvised Series will send its shareholders either a Multi-manager Notice or a Multi-manager Notice and Multi-manager Information Statement;⁷ and (b) the Subadvised Series will make the Multi-manager Information Statement available on the Web site identified in

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-Advisor (except as modified to permit Aggregate Fee Disclosure (as defined below)); (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 Subadvised 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. Multi-manager Information Statements will be filed with the Commission via the EDGAR system.

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. In the circumstances described in the application, a proxy solicitation to approve the appointment of new Sub-Advisors 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 Sub-Advisory Agreements.

8. Applicants also request an order exempting the Subadvised Series from certain disclosure obligations that may require each Subadvised Series to disclose fees paid by the Advisor to each Sub-Advisor. Applicants seek relief to permit each Subadvised Series to disclose (as a dollar amount and a percentage of the Subadvised Series' net assets): (a) The aggregate fees paid to the Advisor and any Wholly-Owned Sub-Advisors; (b) the aggregate fees paid to Non-Affiliated Sub-Advisors; and (c) the fee paid to each Affiliated Sub-Advisor (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 Advisor, subject to the review and approval of the Board, to select the Sub-Advisors who are in the best position to achieve the Subadvised Series' investment objective. Applicants assert that, from the perspective of the shareholder, the role of the Sub-Advisors is substantially equivalent to the role of the individual portfolio managers employed by an investment adviser to a traditional investment company. Applicants believe that permitting the Advisor to perform the duties for which the shareholders of the Subadvised Series are paying the Advisor—the selection, supervision and evaluation of the Sub-Advisors—without incurring unnecessary delays or expenses is appropriate in the interest of the Subadvised Series' shareholders and will allow such Subadvised Series to operate more efficiently. Applicants state that each Investment Management 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 Board Members, 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 Management Agreements.

7. Applicants assert that disclosure of the individual fees that the Advisor would pay to the Sub-Advisors of Subadvised Series that operate under the multi-manager structure described in the application would not serve any meaningful purpose. Applicants contend that the primary reasons for requiring disclosure of individual fees paid to Sub-Advisors are to inform shareholders of expenses to be charged by a particular Subadvised 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 Advisor will be fully disclosed and, therefore, shareholders will know what the Subadvised Series' fees and expenses are and will be able to compare the advisory fees a Subadvised Series is charged to those of other investment companies. Applicants assert that the requested disclosure relief would benefit shareholders of the Subadvised Series because it would improve the Advisor's ability to negotiate the fees paid to Sub-Advisors. Applicants state that the Advisor may be able to negotiate rates that are below a Sub-Advisor's "posted" amounts if the Advisor is not required to disclose the Sub-Advisors' fees to the public. Applicants submit that the relief requested to use Aggregate Fee Disclosure will encourage Sub-Advisors to negotiate lower subadvisory fees with the Advisor 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 Subadvised Series in the manner described in the application must be approved by shareholders of a Subadvised Series before that Subadvised 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-Advisors, and provide that shareholders are informed when new Sub-Advisors are hired. Applicants assert that conditions 6, 7, 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 Advisor, including Wholly-Owned Sub-Advisors. 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 Subadvised Series may rely on the order requested in the application, the operation of the Subadvised Series in the manner described in the application, including the hiring of Wholly-Owned Sub-Advisors, will be, or has been, approved by a majority of the Subadvised Series' outstanding voting securities as defined in the Act, or, in the case of a new Subadvised Series whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder before offering the Subadvised Series' shares to the public.

2. The prospectus for each Subadvised Series will disclose the existence, substance, and effect of any order granted pursuant to the application. Each Subadvised Series will hold itself out to the public as employing the multi-manager structure described in the application. Each prospectus will prominently disclose that the Advisor has the ultimate responsibility, subject to oversight by the Board, to oversee the Sub-Advisors and recommend their hiring, termination and replacement.

3. The Advisor will provide general management services to a Subadvised Series, including overall supervisory responsibility for the general management and investment of the Subadvised Series' assets. Subject to review and approval of the Board, the Advisor will (a) set a Subadvised Series' overall investment strategies, (b) evaluate, select, and recommend Sub-Advisors to manage all or a portion of a Subadvised Series' assets, and (c) implement procedures reasonably designed to ensure that Sub-Advisors comply with a Subadvised Series' investment objective, policies and restrictions. Subject to review by the Board, the Advisor will (a) when appropriate, allocate and reallocate a Subadvised Series' assets among multiple Sub-Advisors; and (b) monitor

and evaluate the performance of Sub-Advisors.

4. A Subadvised Series will not make any Ineligible Sub-Advisor Changes without the approval of the shareholders of the applicable Subadvised Series.

5. Subadvised Series will inform shareholders of the hiring of a new Sub-Advisor within 90 days after the hiring of the new Sub-Advisor pursuant to the Modified Notice and Access Procedures.

6. At all times, at least a majority of the Board will be Independent Board Members, and the selection and nomination of new or additional Independent Board Members will be placed within the discretion of the then-existing Independent Board Members.

7. Independent Legal Counsel, as defined in rule 0-1(a)(6) under the Act, will be engaged to represent the Independent Board Members. The selection of such counsel will be within the discretion of the then-existing Independent Board Members.

8. The Advisor will provide the Board, no less frequently than quarterly, with information about the profitability of the Advisor on a per Subadvised Series basis. The information will reflect the impact on profitability of the hiring or termination of any sub-advisor during the applicable quarter.

9. Whenever a sub-advisor is hired or terminated, the Advisor will provide the Board with information showing the expected impact on the profitability of the Advisor.

10. Whenever a sub-advisor change is proposed for a Subadvised Series with an Affiliated Sub-Advisor or a Wholly-Owned Sub-Advisor, the Board, including a majority of the Independent Board Members, will make a separate finding, reflected in the Board minutes, that such change is in the best interests of the Subadvised Series and its shareholders, and does not involve a conflict of interest from which the Advisor or the Affiliated Sub-Advisor or Wholly-Owned Sub-Advisor derives an inappropriate advantage.

11. No Board member or officer of a Subadvised Series, or director, manager, or officer of the Advisor, will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in a sub-advisor, except for (a) ownership of interests in the Advisor or any entity that controls, is controlled by, or is under common control with the Advisor; 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-Advisor or an entity that controls, is

controlled by, or is under common control with a Sub-Advisor.

12. Each Subadvised 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 requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014-02507 Filed 2-5-14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-30900; File No. 812-14161]

NF Investment Corp., et al.; Notice of Application

January 31, 2014.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application for an order under sections 17(d), 57(a)(4), and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d), 57(a)(4), and 57(i) of the Act and rule 17d-1 under the Act.

SUMMARY: *Summary of Application:*

Applicants request an order to permit business development companies ("BDCs") and certain closed-end management investment companies to co-invest in portfolio companies with each other and with affiliated investment funds.

APPLICANTS: NF Investment Corporation ("NFIC"); Carlyle GMS Finance, Inc. ("CGMSF," and together with NFIC, the "Regulated Funds"); NFIC SPV LLC ("NFIC Sub"); Carlyle GMS Finance SPV LLC ("CGMSF Sub" and together with NFIC Sub, the "SPV Subs"); and Carlyle GMS Investment Management L.L.C. ("CGMSIM") on behalf of itself and its successors.¹

DATES: *Filing Dates:* The application was filed on May 29, 2013, and amended on August 9, 2013, December 12, 2013, and January 22, 2014.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will

¹ The term "successor" means an entity that results from a reorganization into another jurisdiction or change in the type of business organization.

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 February 25, 2014, 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 St. NE., Washington, DC 20549-1090. Applicants: c/o Ian J. Sandler, Carlyle GMS Finance, Inc., 520 Madison Avenue, 38th Floor, New York, NY 10022.

FOR FURTHER INFORMATION CONTACT: Jean E. Minarick, Senior Counsel, at (202) 551-6811 or Daniele Marchesani, Branch Chief, at (202) 551-6821 (Chief Counsel's Office, Division of Investment Management).

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. CGMSF and NFIC are both Maryland corporations organized as non-diversified, closed-end management investment companies that have elected to be regulated as BDCs under Section 54(a) of the Act.² The Objectives and Strategies³ of both CGMSF and NFIC are to generate current income and capital appreciation primarily through debt investments in U.S. middle market companies. CGMSF and NFIC invest primarily in first lien

² Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

³ "Objectives and Strategies" means a Regulated Fund's investment objectives and strategies, as described in the Regulated Fund's registration statement on Form 10 under the Securities Exchange Act of 1934 ("Exchange Act"), other filings made with the Commission by the Regulated Fund under the Exchange Act or under the Securities Act of 1933 ("Securities Act"), and the Regulated Fund's reports to shareholders.

senior secured and unitranche loans to private U.S. middle market companies that are, in many cases, controlled by private equity investment firms. A majority of the directors of the board of directors ("Board") of CGMSF and NFIC are persons who are not "interested persons" as defined in section 2(a)(19) of the Act of CGMSF, NFIC, respectively ("Non-Interested Directors").

2. CGMSIM is registered as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act") and serves as the investment adviser to CGMSF and NFIC. CGSIM is a Delaware corporation and a wholly owned subsidiary of The Carlyle Group L.P.

3. Applicants seek an order ("Order") to permit one or more Regulated Funds⁴ and/or one or more Private Funds⁵ (collectively, "Co-Investment Affiliates") to participate in the same investment opportunities through a proposed co-investment program where such participation would otherwise be prohibited under sections 17(d) and 57(a)(4) of the Act and rules under the Act ("Co-Investment Program") by (a) co-investing with each other in securities issued by issuers in private placement transactions⁶ or loans made to issuers in which an Investment Adviser negotiates terms in addition to price and (b) making additional investments in securities or loans of such issuers, including through the exercise of warrants, conversion privileges, and other rights to purchase securities of the issuers ("Follow-On Investments"). For purposes of the application, "Co-Investment Transaction" means any transaction in which any of the Regulated Funds (or any SPV Sub, as defined below) participated together with one or more Co-Investment Affiliates in reliance on the Order. "Potential Co-Investment Transaction" means any investment opportunity in which any of the Regulated Funds (or any SPV Sub, as

⁴ "Regulated Fund" means CGMSF, NFIC, and any future closed-end management investment company that (a) elects to be regulated as a BDC or is registered under the Act; (b) is advised by an Investment Adviser; and (c) intends to participate in the Co-Investment Program (as defined below). The term "Investment Adviser" means (a) CGMSIM and (b) any future investment adviser controlling, controlled by, or under common control with CGMSIM.

⁵ "Private Fund" means any entity (a) whose investment adviser is an Investment Adviser; (b) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act; and (c) that intends to participate in the Co-Investment Program.

⁶ The term "private placement transactions" means transactions in which the offer and sale of securities by the issuer are exempt from registration under the Securities Act.

defined below) could not participate together with one or more Co-Investment Affiliates without obtaining and relying on the Order.⁷

4. Applicants state that a Regulated Fund may, from time to time, form one or more SPV Subs.⁸ Such a subsidiary would be prohibited from investing in a Co-Investment Transaction with any Co-Investment Affiliate because it would be a company controlled by its parent Regulated Fund for purposes of sections 17(d) and 57(a)(4) and rule 17d-1. Applicants request that each SPV Sub be permitted to participate in Co-Investment Transactions in lieu of its parent Regulated Fund and that the SPV Sub's participation in any such transaction be treated, for purposes of the requested Order, as though the parent Regulated Fund were participating directly. Applicants represent that this treatment is justified because a SPV Sub would have no purpose other than serving as a holding vehicle for the Regulated Fund's investments and, therefore, no conflicts of interest could arise between the Regulated Fund and the SPV Sub. The Regulated Fund's Board would make all relevant determinations under the conditions with regard to a SPV Sub's participation in a Co-Investment Transaction, and the Regulated Fund's Board would be informed of, and take into consideration, any proposed use of a SPV in the Regulated Fund's place. If the Regulated Fund proposes to participate in the same Co-Investment Transaction with any of its SPV Subs, the Regulated Fund's Board will also be informed of, and take into consideration, the relative participation of the Regulated Fund and the SPV Sub. CGMSF Sub and NFIC Sub are SPV Subs of CGMSF or NFIC, respectively, and formed specifically for the purpose

⁷ All existing entities that currently intend to rely on the Order have been named as applicants. Any other existing or future entity that relies on the Order in the future will comply with the terms and conditions of the application.

⁸ "SPV Sub" means an entity that (a) is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (b) whose sole business purpose is to hold one or more investments on behalf of the Regulated Fund (and, in the case of an SBIC Subsidiary (as defined below), maintain a license under the SBA Act (as defined below) and issue debentures guaranteed by the SBA (as defined below)); (c) with respect to which the Regulated Fund's Board has the sole authority to make all determinations with respect to the SPV Sub's participation under the conditions of the application; and (d) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act. "SBIC Subsidiary" means an SPV Sub that is licensed by the Small Business Administration (the "SBA") to operate under the Small Business Investment Act of 1958 (the "SBA Act") as a small business investment company (an "SBIC").

of procuring financing or otherwise holding investments.

5. When considering Potential Co-Investment Transactions for any Regulated Fund, the applicable Investment Adviser will consider the Objectives and Strategies, investment policies, investment positions, capital available for investment ("Available Capital"),⁹ and other factors relevant to such Regulated Fund. Opportunities for Potential Co-Investment Transactions may arise when an investment adviser considers for a Co-Investment Affiliate investment opportunities that may be appropriate for a Regulated Fund. Upon issuance of the Order, the Investment Advisers will refer to the Investment Advisers of the Regulated Funds all Potential Co-Investment Transactions within a Regulated Fund's Objectives and Strategies that are considered for a Co-Investment Affiliate, and such investment opportunities may result in a Co-Investment Transaction.

6. Other than pro rata dispositions and Follow-On Investments as provided in conditions 7 and 8, and upon making the determinations required in conditions 1 and 2(a), the applicable Investment Adviser will present each Potential Co-Investment Transaction and the proposed allocation to the directors or trustees, as applicable, eligible to vote under section 57(o) of the Act ("Eligible Directors") and the "required majority," as defined in section 57(o) of the Act ("Required Majority"),¹⁰ will approve each Co-Investment Transaction prior to any investment by a Fund.

7. With respect to the pro rata dispositions and Follow-On Investments as provided in conditions 7 and 8, a Regulated Fund may participate in a pro rata disposition or Follow-On Investment without obtaining prior approval of the Required Majority if, among other things: (i) The proposed participation of each Co-Investment Affiliate in such disposition or Follow-On Investment is proportionate to its outstanding investments in the issuer immediately preceding the disposition or Follow-On Investment, as the case may be; and (ii) the Board of the Regulated Fund has approved that Regulated Fund's participation in pro

⁹ "Available Capital" consists solely of liquid assets not held for permanent investment, including cash, amounts that can currently be drawn down from lines of credit, and marketable securities held for short-term purposes. In addition, Available Capital would include bona fide uncalled capital commitments that can be called by the settlement date of the Co-Investment Transaction.

¹⁰ With respect to Regulated Funds that are not BDCs, the defined terms Eligible Directors and Required Majority apply as if each Regulated Fund were a BDC subject to section 57(o) of the Act.

rata dispositions and Follow-On Investments as being in the best interests of the Regulated Fund. If the Board does not so approve, any such disposition or Follow-On Investment will be submitted to the Regulated Fund's Eligible Directors. The Board of any Regulated Fund may at any time rescind, suspend or qualify its approval of pro rata dispositions and Follow-On Investments with the result that all dispositions and/or Follow-On Investments must be submitted to the Eligible Directors.

8. No Non-Interested Director of a Regulated Fund will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d-1 under the Act prohibit affiliated persons of a registered investment company from participating in joint transactions with the company or a company controlled by such registered investment company unless the Commission has granted an order permitting such transactions. Section 57(a)(4) of the Act prohibits certain affiliated persons of a BDC from participating in joint transactions with the BDC (or a company controlled by such BDC) in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to BDCs. Because the Commission has not adopted any rules under section 57(a)(4), rule 17d-1 applies.

2. Applicants submit that the Investment Advisers and the entities that they advise would be deemed to be a person related to a Regulated Fund in a manner described by sections 17(d) or 57(b) and therefore prohibited by sections 17(d) or 57(a)(4) and rule 17d-1 from participating in the Co-Investment Transactions. Further, because the SPV Subs are controlled by the Regulated Funds, the SPV Subs are subject to sections 17(d) or 57(a)(4) and would be prohibited by rule 17d-1 from participating in the Co-Investment Transactions without the Order.

3. Rule 17d-1 under the Act generally prohibits participation by a registered investment company, or a company controlled by such registered investment company, and an affiliated person (as defined in section 2(a)(3) of the Act) or principal underwriter for

that investment company, or an affiliated person of such affiliated person or principal underwriter, in any joint enterprise or other joint arrangement or profit sharing plan, as defined in the rule, absent an order by the Commission. Similarly, rule 17d-1, as made applicable to BDCs by section 57(i), prohibits any person who is related to a BDC in a manner described in section 57(b), acting as principal, from participating in, or effecting any transaction in connection with, any joint enterprise or other joint arrangement or profit-sharing plan in which the BDC (or a company controlled by such BDC) is a participant, absent an order from the Commission. In passing upon applications under rule 17d-1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

4. Applicants state that in the absence of the requested relief, the Regulated Funds would be, in some circumstances, limited in their ability to participate in attractive and appropriate investment opportunities. Applicants believe that the proposed terms and conditions will ensure that the Co-Investment Transactions are consistent with the protection of each Regulated Fund's shareholders and with the purposes intended by the policies and provisions of the Act. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions will be consistent with the provisions, policies and purposes of the Act and on a basis that is not different from or less advantageous than that of other participants.

Applicants' Conditions

Applicants agree that any Order granting the requested relief will be subject to the following conditions:

1. Each time an investment adviser to any Co-Investment Affiliate considers a Potential Co-Investment Transaction for a Co-Investment Affiliate that falls within a Regulated Fund's then-current Objectives and Strategies, the Regulated Fund's Investment Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of such Regulated Fund's then-current circumstances.

2. (a) If the Investment Adviser deems the Regulated Fund's participation in any such Potential Co-Investment Transaction is appropriate for the Regulated Fund, it will then determine

an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by an Investment Adviser to be invested by the Regulated Fund in the Potential Co-Investment Transaction together with the amount proposed to be invested by the other Co-Investment Affiliates, collectively, in the same transaction, exceeds the amount of the investment opportunity, the amount proposed to be invested by each such party will be allocated among them pro rata based on each participant's Available Capital available for investment in the asset class being allocated, up to the amount proposed to be invested by each. The Investment Advisers will provide the Eligible Directors of each participating Regulated Fund with information concerning each participating Co-Investment Affiliate's Available Capital to assist the Eligible Directors with their review of the Regulated Fund's investments for compliance with these allocation procedures.

(c) After making the determinations required in conditions 1 and 2(a), the Investment Adviser will distribute written information concerning the Potential Co-Investment Transaction, including the amount proposed to be invested by each Co-Investment Affiliate, to the Eligible Directors of each participating Regulated Fund for their consideration. A Regulated Fund will co-invest with Co-Investment Affiliates only if, prior to such Regulated Fund's and any Co-Investment Affiliates' participation in the Potential Co-Investment Transaction, a Required Majority of such Regulated Fund concludes that:

(i) The terms of the Potential Co-Investment Transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its shareholders and do not involve overreaching of such Regulated Fund or its shareholders on the part of any person concerned;

(ii) the Potential Co-Investment Transaction is consistent with:

(A) The interests of the shareholders of such Regulated Fund; and

(B) such Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by the Co-Investment Affiliates would not disadvantage such Regulated Fund, and participation by such Regulated Fund is not on a basis different from or less advantageous than that of any Co-Investment Affiliate; provided, that if a Co-Investment Affiliate, other than such Regulated Fund, gains the right to nominate a director for election to a portfolio company's board of directors

or the right to have a board observer or any similar right to participate in the governance or management of the portfolio company, such event shall not be interpreted to prohibit the Required Majority from reaching the conclusions required by this condition (2)(c)(iii), if:

(A) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any;

(B) the Investment Advisers agree to, and do, provide, periodic reports to such Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and

(C) any fees or other compensation that any Co-Investment Affiliate or any affiliated person of a Co-Investment Affiliate receives in connection with the right of the Co-Investment Affiliate to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among the participating Co-Investment Affiliates (the Co-Investment Affiliates (other than the Regulated Funds) may, in turn, share their portion with their affiliated persons) and the applicable Regulated Fund in accordance with the amount of each party's investment; and

(iv) the proposed investment by such Regulated Fund will not benefit the Investment Advisers or the Co-Investment Affiliates or any affiliated person of either of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by condition 13, (B) to the extent permitted by sections 17(e) and 57(k) of the Act, as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in condition 2(c)(iii)(C).

3. Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. The applicable Investment Adviser will present to the Board of the Regulated Fund, on a quarterly basis, a record of all investments made by the Co-Investment Affiliates in Potential Co-Investment Transactions during the preceding quarter that fell within such Regulated Fund's then-current Objectives and Strategies that were not made available to the Regulated Fund, and an explanation of why the investment opportunities were not

offered to the Regulated Fund. All information presented to the Board of such Regulated Fund pursuant to this condition will be kept for the life of such Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

5. Except for Follow-On Investments made in accordance with condition 8, below, a Regulated Fund will not invest in reliance on the Order in any issuer in which any Co-Investment Affiliate or any affiliated person of a Co-Investment Affiliate is an existing investor.

6. A Regulated Fund will not participate in any Potential Co-Investment Transaction unless the terms, conditions, price, class of securities to be purchased, settlement date, and registration rights will be the same for such Regulated Fund as for the Co-Investment Affiliates. The grant to a Co-Investment Affiliate, but not such Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this condition 6, if conditions 2(c)(iii)(A), (B) and (C) are met.

7. (a) If any Co-Investment Affiliate elects to sell, exchange or otherwise dispose of an interest in a security that was acquired in a Co-Investment Transaction, the applicable Investment Adviser will:

(i) notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed disposition at the earliest practical time; and

(ii) formulate a recommendation as to participation by each Regulated Fund in the disposition.

(b) Each Regulated Fund will have the right to participate in such disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to other Co-Investment Affiliates.

(c) A Regulated Fund may participate in such disposition without obtaining prior approval of the Required Majority if: (i) The proposed participation of each Co-Investment Affiliate in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition; (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such dispositions on a pro rata basis (as described in greater detail in the application); and (iii) the Board of each Regulated Fund is provided on a quarterly basis with a list of all

dispositions made in accordance with this condition. In all other cases, the applicable Investment Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

(d) Each Co-Investment Affiliate will bear its own expenses in connection with any such disposition.

8. (a) If any Co-Investment Affiliate desires to make a Follow-On Investment in a portfolio company whose securities were acquired in a Co-Investment Transaction, the Investment Adviser will:

(i) Notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed transaction at the earliest practical time; and

(ii) formulate a recommendation as to the proposed participation, including the amount of the proposed Follow-On Investment, by each Regulated Fund.

(b) A Regulated Fund may participate in such Follow-On Investment without obtaining prior approval of the Required Majority if: (i) The proposed participation of each Co-Investment Affiliate in such investment is proportionate to its outstanding investments in the issuer immediately preceding the Follow-On Investment; and (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application). In all other cases, the applicable Investment Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

(c) If, with respect to any Follow-On Investment:

(i) The amount of the opportunity is not based on the Co-Investment Affiliate's outstanding investments immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the applicable Investment Adviser to be invested by such Regulated Fund in the Follow-On Investment, together with the amount proposed to be invested by the other Co-Investment Affiliates in the same transaction, exceeds the amount of the opportunity, then the amount invested by each such party will be allocated among them pro rata based on each

participant's Available Capital available for investment in the asset class being allocated, up to the amount proposed to be invested by each.

(d) The acquisition of Follow-On Investments as permitted by this condition will be considered a Co-Investment Transaction for all purposes and subject to the other conditions set forth in the application.

9. The Non-Interested Directors of each Regulated Fund will be provided quarterly for review all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by any Co-Investment Affiliate that the applicable Regulated Fund considered but declined to participate in, so that the Non-Interested Directors may determine whether all investments made during the preceding quarter, including those investments which such Regulated Fund considered but declined to participate in, comply with the conditions of the Order. In addition, the Non-Interested Directors will consider at least annually the continued appropriateness for the applicable Regulated Fund of participating in new and existing Co-Investment Transactions. All information presented to such Regulated Fund's Board pursuant to this condition will be kept for the life of such Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

10. Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and as if each of the investments permitted under these conditions were approved by the Required Majority under section 57(f).

11. No Non-Interested Director of a Regulated Fund also will be a director, general partner, managing member or principal, or otherwise an "affiliated person" (as defined in the 1940 Act) of any of the Co-Investment Affiliates (other than any other Fund).

12. The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the applicable Investment Adviser under its respective investment advisory agreement with the applicable Regulated Fund or other Co-Investment Affiliate, be shared by such Regulated Fund and each Co-Investment Affiliate in proportion to the relative amounts of the securities held or to be acquired or disposed of, as the case may be.

13. Any transaction fee (including break-up or commitment fees but excluding broker's fees contemplated by section 17(e) or 57(k) of the Act, as applicable) received in connection with a Co-Investment Transaction will be distributed to the participating applicable Regulated Fund and the Co-Investment Affiliates on a pro rata basis based on the amount they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by the Investment Advisers of a Co-Investment Affiliate pending consummation of the transaction, the fee will be deposited into an account maintained by the Investment Advisers of Co-Investment Affiliates at a bank or banks having the qualifications prescribed in section 26(a)(1) of the Act, and the account will earn a competitive rate of interest that will also be divided pro rata between such Fund and the Co-Investment Affiliates based on the amounts they invest in such Co-Investment Transaction. None of the Co-Investment Affiliates, their investment advisers, nor any affiliated person (as defined in the Act) of the Regulated Funds will receive additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction (other than (a) in the case of Co-Investment Affiliates, the pro rata transaction fees described above and fees or other compensation described in condition 2(c)(iii)(C) and (b) in the case of the Investment Advisers, investment advisory fees paid in accordance with the agreements between such Investment Advisers and the Co-Investment Affiliates).

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2014-02506 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71466]

Draft 2014-2018 Strategic Plan for Securities and Exchange Commission

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Securities and Exchange Commission (SEC) is providing notice that it is seeking comments on its draft 2014-2018 Strategic Plan. The draft Strategic Plan includes a draft of the

SEC's mission, vision, values, strategic goals, planned initiatives, and performance goals.

DATES: Comments should be received on or before March 10, 2014.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

Send an email to
PerformancePlanning@sec.gov.

Paper Comments

Send paper comments to Vikash Mohan, Program Analyst, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-2521.

FOR FURTHER INFORMATION CONTACT: Vikash Mohan, Program Analyst, Office of Financial Management, at (202) 551-8522, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-2521.

SUPPLEMENTARY INFORMATION: The draft strategic plan is available at the Commission's Web site at <http://www.sec.gov/about/secstratplan1418.htm> or by contacting

Vikash Mohan, Program Analyst, Office of Financial Management, at (202) 551-8522, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-2521.

By the Commission.

Dated: February 3, 2014.

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2014-02518 Filed 2-5-14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71458; File No. SR-CBOE-2014-003]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change To List and Trade CBOE Short-Term Volatility Index Options

January 31, 2014.

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 January 27, 2014, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") 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

CBOE proposes to amend certain of its rules to provide for the listing and trading of options that overlie the CBOE Short-Term Volatility Index ("VXST"). VXST options would be cash-settled contracts with European-style exercise that expire every week. The text of the proposed rule change is available on the Exchange's Web site <http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>, at the Exchange's Office of the Secretary, and at the Commission.

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 purpose of this proposed rule change is to permit the Exchange to list and trade options that overlie the CBOE Short-Term Volatility Index ("VXST"). VXST options would be cash-settled contracts with European-style exercise that expire every week.

The Exchange created the VXST index in response to market demand for an option contract on a short-term volatility index that expires each week. The VXST index is designed to measure investors' consensus view of future (nine day) expected stock market volatility. The proposed new VXST options would trade alongside existing CBOE Volatility Index ("VIX") options (which expire on a monthly basis and measure a 30 day period of implied volatility) and on one Wednesday each month, the Exchange plans to calculate two exercise settlement values based on different S&P 500 index options (one

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

expiring in 30 days and one expiring in nine days) to settle expiring VIX and VXST options.³

Index Design and Calculation

The calculation of VXST is based on the VIX methodology applied to option series on the S&P 500 index that expire on every Friday, including standard S&P 500 index option series (*i.e.*, third Friday expirations).⁴ Similar to VIX and VIX options, the cash (spot) VXST value is calculated using premium quotations and the exercise settlement value for

VXST options will be calculated using the actual opening premium prices of the constituent S&P 500 index options on the expiration day of the respective VXST option. The VXST index was introduced by CBOE on October 1, 2013 and has been disseminated at least once a day on every trading day since that time.

The VXST index measures a nine day period of expected (implied) volatility and is calculated based on real-time prices of options on the S&P 500 index

that expire in nine days. Specifically, the constituent S&P 500 index options that expire on a Friday (*i.e.*, nine days from the VXST expiration date, which is typically a Wednesday in the preceding week) may include the following types of options on the S&P 500 index: Standard monthly options, End-of-Week ("EOW") expirations⁵ and Quarterly Index ("QIX") expirations.⁶ The chart below illustrates the different types of S&P 500 index options that would be used to calculate the VXST index:

August 2016/September 2016						
S	M	T	W	T	F	S
28	29	30	31	1	2	3
			VXST expiration			
4	5	6	7	8	9	10
			VXST expiration		P.M.-settled EOW	
11	12	13	14	15	16	17
			VXST expiration		A.M.-settled standard	
18	19	20	21	22	23	24
			VXST expiration		P.M.-settled EOW	
25	26	27	28	29	30	
					P.M.-settled QIX	

Because some of the constituent options used to calculate the VXST index are A.M.-settled and some are P.M.-settled, the amount of time covered by a specific contract will vary slightly depending on the type of series used for any given A.M.-settled VXST option. For a VXST option contract calculated using A.M.-settled standard S&P 500 index options, the period of implied volatility covered by the contract will be exactly nine days. For a VXST option contract calculated using P.M.-settled EOW or QIX on the S&P 500 index, the period of implied volatility covered by the contract will be nine days, plus 390 minutes.⁷

The VXST calculation generally uses nearby and second nearby option expirations with at least 1 day left to expiration and then weights them to yield a constant, nine-day measure of

the expected volatility of the S&P 500 index. The quantity of S&P 500 index option series used to calculate the VXST at any given time will range from an average of 60 series at settlement to 120 or more series at other times.

For each VXST contract expiration, CBOE will determine the at-the-money strike price. The Exchange will then select the at-the-money and out-of-the-money series with non-zero bid prices and determine the midpoint of the bid-ask quote for each of these series. The midpoint quote of each series is then weighted so that the further away that series is from the at-the-money strike, the less weight that is accorded to the quote. Then, to compute the index level, CBOE will calculate a volatility measure for the nearby options and then for the second nearby options. This is done using the weighted mid-point of the

prevailing bid-ask quotes for all included option series with the same expiration date. These volatility measures are then interpolated to arrive at a single, constant nine-day measure of volatility.

CBOE will compute values for VXST underlying option series on a real-time basis throughout each trading day, from approximately 8:30 a.m. (Chicago time) until approximately 3:15 p.m. (Chicago time). VXST levels will be calculated by CBOE and generally disseminated at 15-second intervals to major market data vendors.⁸

Options Trading

VXST options would be quoted in index points and fractions and one point will equal \$100. The minimum tick size for series trading below \$3 would be 0.05 (\$5.00) and above \$3 will

³ CBOE Futures Exchange, LLC ("CFE") plans to launch trading VXST futures during the first quarter in 2014 and prior to launching VXST options on CBOE.

⁴ The VXST index is calculated in the same manner as other volatility indexes, *e.g.*, VIX, upon which options have been based and previously approved by the SEC. A more detailed explanation of the method used to calculate VIX may be found on the CBOE's Web site at: <http://www.cboe.com/micro/vix/vixwhite.pdf>.

⁵ Listed under Rule 24.9(e).

⁶ Listed under Rule 24.9(c).

⁷ P.M.-settled, expiring EOWs and QIX stop trading at 3:00 p.m. (Chicago time) on their last day of trading. See Rules 24.9(e)(4) and 24.6.01. The additional 390 minutes reflects that the constituent options trade for six and a half hours on their expiration date until 3:00 p.m. (Chicago time).

⁸ When VIX options and VXST options expire on the same day, as the calculator of volatility indexes, CBOE would not begin disseminating the spot (cash) values for any volatility index that CBOE calculates until the S&P 500 index option (SPX)

series that CBOE will use to calculate the exercise settlement value for VIX options have opened. On all other VXST option expiration days, as the calculator of volatility indexes, CBOE would not begin disseminating the spot (cash) values for any volatility index that CBOE calculates until the S&P 500 index option series that CBOE will use to calculate the exercise settlement value for VXST options have opened. See CBOE Information Circular IC13-068, which CBOE will revise prior to the launch of trading VXST futures and VXST options.

be 0.10 (\$10.00). The Exchange would be permitted to list up to 12 near-term VXST option expiration weeks and new series would be permitted to be added up to and including on the last day of trading for an expiring VXST option contract.⁹ The trading hours for VXST options would be from 8:30 a.m. to 3:15 p.m. (Chicago time). Exhibit 3 presents contract specifications for VXST options.

The Exchange is proposing to establish a strike price setting regime for VXST options similar to what is permitted for VIX options and, in part, what is permitted for short term option series (or weekly options) on volatility based-exchange traded products.¹⁰ Specifically, the Exchange proposes to permit \$0.50 strike price (or greater) intervals for VXST options where the strike price is less than \$75 because the Exchange believes that more granular strike price intervals will provide investors with greater flexibility by allowing them to establish positions that are better tailored to meet their investment objectives. Fifty cent strike price (or greater) intervals are currently permitted for VIX (and other volatility index) options where the strike price is less than \$75.¹¹ In addition, \$0.50 strike price (or greater) intervals are permitted for short term options series (or weekly options) on volatility based exchange-traded products.¹² Next, the Exchange

⁹ See proposed amendments to Rule 24.9(a)(2) and 24.9.01(c). The Exchange is proposing to permit new VXST series to be added up to and on the last day of trading for expiring contracts. This is similar to the series setting schedule for short-term (weekly) options, which may be added up to and including on their expiration date. See Rules 5.5(d)(4) and 24.9(a)(2)(A)(iv).

¹⁰ See proposed Interpretation and Policy .01(i) to Rule 24.9 permitting the described strike price interval setting regime.

¹¹ VIX options are used to calculate the CBOE VVIX index (aka "VIX of VIX" index). Because VIX options are used to calculate a volatility index, \$0.50 strike price intervals are permitted for VIX options where the strike price is less than \$75. See Rule 24.9.12.

¹² The strike price interval for standard options on exchange-traded products ("ETPs"), such as exchange-traded funds and exchange-traded notes, is \$1 or greater where the strike price is \$200 or less. See Rules 5.5.08 and 5.5.09. The strike price interval for ETP options that are in the short-term option series program (or weekly program) may be \$0.50 or greater where the strike price is less than \$75. See Rule 5.5(d)(5). For example, \$0.50 strike price intervals are permitted for weekly options on the iPath S&P 500 VIX Short-Term Futures ETN ("VXX"). The Exchange is not proposing to harmonize the strike price setting parameters for VXST options with weekly options, but instead is proposing to adopt a strike price setting regime similar to VIX options. The Exchange believes that market participants will expect the strikes price intervals for VXST options to be the same as permitted for VIX options. In addition, the Exchange believes that [sic] is desirable to have harmonized strike price interval rules for all of its volatility index options.

proposes to permit \$1 strike price (or greater) intervals for VXST options where the strike price is \$200 or less. The Exchange notes that \$1 strike price (or greater) intervals where the strike price is \$200 or less are permitted for VIX options pursuant to Rule 24.9.01(l). Finally, the Exchange proposes to permit \$5 strike price (or greater) intervals for VXST options whether [sic] the strike price is greater than \$200. The Exchange notes that \$5 strike price (or greater) intervals where the strike price is more than \$200 are permitted for VIX options pursuant to Rule 24.9.01(l).

The Exchange is proposing to set forth the above described strike interval setting regime for VXST options in new Interpretation and Policy .01(i) to Rule 24.9. The Exchange is also proposing to add new Interpretation and Policy .23 to Rule 5.5, *Series of Option Contracts Open for Trading*, which would be an internal cross reference stating that the intervals between strike prices for VXST option series will be determined in accordance with proposed new Interpretation and Policy .01(i) to Rule 24.9.

The Exchange is proposing to make a technical change to Rule 24.9.12, which permits \$0.50 and \$1 strike price intervals for index options used to calculate volatility indexes. Specifically, the Exchange is proposing to add "and \$150" to the rule text as those two words were inadvertently omitted from the proposed rule text changes to Rule 24.9.12 contained in original rule filing, but were described in detail in the purpose section.¹³

Exercise Settlement Value, Expiration Date and Last Trading Day

The Exchange proposes to set forth in new subparagraph (a)(6) to Rule 24.9 that the exercise settlement value for the proposed VXST options would be calculated on the specific date (usually a Wednesday) identified in the option symbol for the series.¹⁴ If that Wednesday or the Friday in the business week following that Wednesday (*i.e.*, nine days away) is an Exchange holiday, the exercise settlement value would be calculated on

¹³ See Securities Exchange Act Release 64189 (April 5, 2011), 76 FR 20066 (April 11, 2011) (order granting approval of proposed rule change to permit the listing of series within [sic] \$0.50 and \$1 strike price increments on certain options used to calculate volatility indexes) (SR-CBOE-2011-008).

¹⁴ Options symbols are made up of 17 to 21 characters, depending on the length of the symbol representing the underlying security. Symbols are constructed as follows: Symbol + Expiration Date (Year, Month, Day) + Call or Put + Strike Price (in dollars to three decimal places).

the business day immediately preceding the Wednesday.

On the day the exercise settlement value is calculated for VXST options, modified Hybrid Opening System ("HOSS") opening procedures would be used to calculate the exercise settlement value for VXST options.¹⁵ The Exchange recently amended Rule 6.2B.08 to establish modified HOSS opening procedures for all Hybrid classes and series used to calculate volatility indexes.¹⁶ The Exchange notes that Rule 6.2B.01 sets forth similar procedures for Hybrid 3.0 classes that are used to calculate volatility indexes. As explained in more detail in SR-CBOE-2013-102, the different types of options on the S&P 500 index that will be used to calculate the VXST trade on different platforms, *e.g.*, standard S&P 500 index options are Hybrid 3.0 series and EOW on the S&P 500 index are Hybrid series. As a result, Rules 6.2B.01 and 6.2B.08 would apply to the constituent option series in the VXST, as relevant. Accordingly, CBOE is proposing to amend each of those rules to reflect this fact.

The exercise settlement value of a VXST option would be calculated by the Exchange as a Special Opening Quotation ("SOQ") of VXST using the sequence of opening prices of the options that comprise the VXST index. The opening price for any series in which there is no trade would be the average of that option's bid price and ask price as determined at the opening of trading. The "time to expiration" used to calculate the SOQ shall account for the actual number of days and minutes until expiration for the constituent option series. For example, if the Exchange announces that the opening of trading in the constituent option series is delayed, the amount of time until expiration for the constituent option series used to calculate the exercise settlement value would be reduced to reflect the actual opening time of the constituent option series. Another example would be when the Exchange is closed on a Wednesday due to an Exchange holiday, the amount of time until expiration for the constituent option series used to calculate the exercise settlement value would be increased to reflect the extra day of trading in the constituent option series.

¹⁵ The main feature of the modified HOSS opening procedures is the strategy order cut-off time for the constituent option series that will be used to calculate the exercise settlement value of a volatility index.

¹⁶ Securities Exchange Act Release No. 71073 (December 13, 2013), 78 FR 76664 (December 18, 2013) (order approving SR-CBOE-2013-102).

The expiration date of a VXST option would be on the same day that the exercise settlement value of the VXST option is calculated. The last trading day for a VXST option would be the business day immediately preceding the expiration date of the VXST option (typically a Tuesday). For example, the Dec 10 14 VXST option would expire on Wednesday, December 10, 2014 and trading in that expiring contract would cease at 3:15 p.m. (Chicago time) on Tuesday, December 9, 2014. When the last trading day is moved because of an Exchange holiday, the last trading day for an expiring VXST option contract would be the day immediately preceding the last regularly scheduled trading day.

Exercise would result in delivery of cash on the business day following expiration. VXST options would be A.M.-settled.¹⁷ The exercise-settlement amount would be equal to the difference between the exercise-settlement value and the exercise price of the option, multiplied by \$100.

Position and Exercise Limits

The Exchange is not proposing to establish any position and exercise limits for VXST options.¹⁸ Because the VXST is calculated using options on the S&P 500 Index (for which there are no position and exercise limits) the Exchange believes that VXST options should similarly have not [sic] position and exercise limits. In addition, the Exchange notes that VIX options also do not have position and exercise limits. Exercise limits for VXST options would be the equivalent to the proposed position limits. VXST options will be subject to the same reporting requirements triggered for other options dealt in on the Exchange.¹⁹

Margin

The Exchange proposes that VXST options be margined as “broad-based index” options, and under CBOE rules, especially, Rule 12.3(c)(5)(A), the margin requirement for a short put or call shall be 100% of the current market value of the contract plus up to 15% of the “product of the current index group

value and the applicable index multiplier.” Additional margin may be required pursuant to Rules 12.3(h) and 12.10, *Margin Required is Minimum*.

Exchange Rules Applicable

Except as modified herein, the rules in Chapters I through XIX and Chapter XXIV would equally apply to VXST options.

Capacity

CBOE has analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority (“OPRA”) have the necessary systems capacity to handle the additional traffic associated with the listing of new series that would result from the introduction of VXST options. The Exchange notes that VXST options would expire weekly and the Exchange is proposing to permit the listing of up to 12 expirations at one time. In comparison, over 300 classes participate in the industry wide weekly option series program and the Exchange and OPRA have been able to handle and absorb the traffic associated with that program (which continues to expand and increase). Because the proposal is limited to a single class and a maximum number of expirations that may be listed at one time, the Exchange believes that the additional traffic that would be generated from VXST options will be manageable.

Surveillance

The Exchange would use the same surveillance procedures currently utilized for each of the Exchange’s other index options to monitor trading in VXST options. The Exchange would also utilize enhanced surveillance procedures at expiration, several of which would be automated. The Exchange further represents that these surveillance procedures shall be adequate to monitor trading in VXST options. For surveillance purposes, the Exchange would have complete access to information regarding trading activity in the pertinent underlying securities.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.²⁰ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²¹ requirements that the rules of an exchange be designed to promote just

and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that there is an unmet market demand for options that expire each week that measure a short-term volatility period. As described above, VXST options are designed to respond to that unmet market demand and CBOE believes that VXST options will provide an opportunity for investors to hedge or speculate on the market risk associated with change in implied volatility that measure a nine day period.

The success of CBOE’s VIX options that measure a 30 day period illustrate the prominence that volatility products have taken over the past several years. CBOE seeks to enlarge its suite of volatility products by introducing a new volatility index option that will provide investors with a contract that expires every week that measures a shorter volatility duration than existing VIX options. CBOE believes that VXST options will provide investors with additional opportunities to manage volatility risk that ranges over different time periods.

CBOE has many years of history and experience in conducting surveillance for volatility index options trading to draw from in order to detect manipulative trading in the proposed VXST options. Additionally, the Exchange represents that it has the necessary systems capacity to support the introduction of VXST options.

The Exchange believes that the proposed strike interval setting regime is designed to promote just and equitable principles of trade and is consistent with the strike interval setting regimes for other volatility index options and, in part, for other weekly products. In fact, the Exchange believes that the establishment of the proposed ability to list \$.50 (or greater) strike price intervals where the strike price is less than \$75 is needed for competitive reasons because it will allow the Exchange to list strike price intervals for VXST options at the same level of granularity permitted for competitor products, such as weekly VXX options. Additionally, the Exchange believes that it [sic] desirable to have strike price setting regimes that are harmonized for all volatility index options.

B. Self-Regulatory Organization’s Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any

¹⁷ See proposed amendment to Rule 24.9(a)(4) (adding VXST to the list of A.M.-settled index options approved for trading on the Exchange). The Exchange is also proposing to make a technical change to this rule to distinguish existing 30-day volatility period contracts from VXST options.

¹⁸ See proposed amendment to Rules 24.4, *Position Limits for Broad-Based Index Options*, and 24.5, *Exercise Limits* (adding VXST to the list of products for which there are no position limits and no exercise limits, respectively).

¹⁹ See proposed amendments to Interpretations and Policies .03, *Reporting Requirement*, and .04, *Margin and Clearing Firm Requirements*, to Rule 24.4 (adding VXST to each of these provisions).

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(5).

burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, CBOE believes that the introduction of a new volatility index option product will enhance competition among market participants and will provide a new type of weekly expiration that can compete with products such as VXX weekly options to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CBOE-2014-003 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2014-003. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's

Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2014-003 and should be submitted on or before February 27, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2014-02504 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71460; File No. SR-BX-2014-006]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify the Language Describing a Newly Adopted Credit Tier Under Rule 7018

January 31, 2014.

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 January 22, 2014, NASDAQ OMX BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to clarify the language describing a newly adopted credit tier under Rule 7018. The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqomxbx.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The 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

In SR-BX-2014-065 [sic] (filed December 30, 2013), BX adopted a new tier with respect to the rebates it pays for orders that access liquidity in securities priced at \$1 or more. The new tier applies to members that are active in both the NASDAQ OMX BX Equities System (the "BX Equities System") and BX Options. Under the tier, a member will receive a credit of \$0.0013 per share executed when accessing liquidity if the member (i) has a daily average volume of liquidity accessed in all securities during the month of 6 million or more shares through one or more of its BX Equities System market participant identifiers ("MPIDs"), and (ii) adds and/or removes liquidity of 40,000 or more contracts per day during the month through BX Options.

In SR-BX-2013-065, BX explained that, as with other rebate tiers, the proposed tier does not apply to an order that executes against a midpoint pegged order, because the accessing order receives price improvement in that case. Accordingly, BX believes that the payment of a rebate is not also warranted. The fee schedule makes it clear that the rebate paid with respect to

²² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

an “order that executes against a midpoint pegged order” is \$0. However, the language that describes other rebate tiers in the fee schedule includes parenthetical language to further emphasize that specific rebate tiers do not apply to an order that executes against a midpoint pegged order. This parenthetical language was inadvertently omitted from the rule language describing the new tier. In order to maintain consistent language throughout the fee schedule, BX is proposing to add the parenthetical language to the description of the new tier. The change does not alter the meaning or effect of the fee schedule, but is rather intended only to enhance its clarity and consistency.

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,³ in general, and with Section 6(b)(5) of the Act⁴ in particular, in that the proposal 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, BX believes that the change will promote these goals by enhancing the clarity and consistency of BX fee schedule.

B. Self-Regulatory Organization's Statement on Burden on Competition

BX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, the change does not alter the meaning or effect of BX's fee schedule, and therefore does not affect competition in any respect.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁵ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁶

A proposed rule change filed under Rule 19b-4(f)(6)⁷ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),⁸ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal simply would maintain consistent language throughout the fee schedule that specific rebate tiers do not apply to an order that executes against a midpoint pegged order and thus would provide clarity to members, market participants, and investors. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.⁹

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

⁵ 15 U.S.C. 78s(b)(3)(a)(ii).

⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁷ 17 CFR 240.19b-4(f)(6).

⁸ 17 CFR 240.19b-4(f)(6)(iii).

⁹ 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).

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-BX-2014-006 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-BX-2014-006. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-BX-2014-006 and should be submitted on or before February 27, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014-02505 Filed 2-5-14; 8:45 am]

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¹⁰ 17 CFR 200.30-3(a)(12).

³ 15 U.S.C. 78f.

⁴ 15 U.S.C. 78f(b)(5).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71457; File No. SR-FINRA-2013-052]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving the Proposed Rule Change Relating to Alternative Display Facility New Entrant

January 31, 2014.

I. Introduction

On December 2, 2013, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b-4 thereunder, ² a proposed rule change to add a new entrant to the Alternative Display Facility (the “Proposal”). The Proposal was published for comment in the **Federal Register** on December 17, 2013. ³ The Commission received no comments on the Proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Alternative Display Facility (“ADF”) is a quotation collection and trade reporting facility that provides ADF Market Participants (*i.e.*, ADF-registered market makers or electronic communications networks (“ECNs”)) ⁴ the ability to post quotations, display orders and report transactions in NMS stocks ⁵ for submission to the Securities Information Processors for consolidation and dissemination to vendors and other market participants. ⁶ The ADF is also designed to deliver real-time data to FINRA for regulatory purposes, including enforcement of requirements imposed by Regulation NMS. ⁷

In particular, Rule 610 of Regulation NMS ⁸ requires that a trading center displaying quotations in an NMS stock through a self-regulatory organization (“SRO”) display-only facility (such as the ADF) “provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by

SRO trading facilities in that stock.” ⁹ Rule 610 also requires that a trading center displaying quotations in an NMS stock through an SRO display-only facility not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations through a member, subscriber, or customer of the trading center. ¹⁰ In articulating this standard, the Commission noted that the level and cost of access would “encompass both (1) the policies, procedures, and standards that govern access to quotations of the trading center, and (2) the connectivity through which market participants can obtain access and the cost of such connectivity.” ¹¹ The nature and cost of connections for market participants seeking to access the ADF participant’s quotations would need to be substantially equivalent to the nature and cost of connections to SRO trading facilities. ¹²

In determining whether ADF participants have satisfied the access standards under Rule 610, Regulation NMS also requires FINRA to submit a proposed rule change under Section 19(b) of the Act in order to add a new ADF participant. ¹³ Accordingly, FINRA is proposing to add LavaFlow (“FLOW”) as a new ADF Market Participant. ¹⁴ FLOW provided FINRA with a summary of its policies and procedures regarding access to its quotations in an NMS stock displayed on the ADF, and a summary of its proposed fees for such access. ¹⁵ According to FINRA, FLOW has proposed policies and procedures that are designed to ensure that the level of access to its quotations is substantially equivalent to the level of access to quotations displayed by SRO trading facilities, and to ensure that FLOW does not impose unfairly discriminatory terms that prevent or inhibit any person from obtaining efficient access to such quotations. ¹⁶

In particular, FINRA states that FLOW allows firms to access its liquidity in a variety of ways. ¹⁷ FLOW also allows a subscriber to determine its level of

connectivity, and does not have any tiers or rules regarding execution of orders based upon Market Participant Identification. ¹⁸ Additionally, the FLOW matching engine does not give priority to any participant and is blind to a participant’s identity, with the exception of orders using the anti-internalization feature. ¹⁹ FLOW also maintains policies and procedures that require FLOW to respond to orders by non-subscribers as promptly as it responds to orders by subscribers, and allow for non-subscribers to be able to automatically execute against quotations displayed by the system. ²⁰

In addition, FINRA states that FLOW has established, and regularly maintains, policies and procedures designed to maintain a linkage with at least one SRO trading facility, or SRO display-only facility (together, “SRO Facility”). ²¹ FLOW also maintains policies and procedures to transmit to such SRO Facility for display either the best priced order of those orders entered by OTC market makers and exchange market makers for those securities in which they make markets (or act as specialists) or the best priced orders entered by all ECN subscribers. ²² Moreover, FLOW has represented to FINRA that it has policies and procedures to provide, to any broker or dealer, access to such orders that is functionally equivalent to the access that is generally available for quotes displayed by an SRO Facility, at a level and cost of access that is substantially similar to the level and cost of access to quotations displayed by SRO trading facilities in that stock. ²³ FLOW also has policies and procedures to conduct continuous monitoring of its connections with SRO Facilities and regular periodic system capacity reviews and tests to ensure future capacity and system integrity. ²⁴

Furthermore, FINRA states that FLOW has policies and procedures designed to ensure that the cost of access to its quotations is substantially equivalent to the cost of access to quotations displayed by SRO trading facilities, and that FLOW will not charge a fee for accessing its quotations that exceeds the maximum fee permitted by Rule 610 of Regulation NMS. ²⁵ Specifically, the cost of accessing the quotations of a trading center may involve several distinct

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 71042 (December 11, 2013), 78 FR 76341 (“Notice”).

⁴ See FINRA Rule 6220(a)(3).

⁵ See 17 CFR 242.600.

⁶ See Notice, 78 FR at 76341.

⁷ See 17 CFR 242.600.

⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“NMS Adopting Release”).

⁹ 17 CFR 242.610(b)(1).

¹⁰ 17 CFR 242.610(b)(2).

¹¹ NMS Adopting Release, 70 FR at 37549.

¹² *Id.*

¹³ See Notice, 78 FR at 76342.

¹⁴ According to FINRA, there have been no ADF Market Participants since the second quarter of 2010. See *id.*

¹⁵ See Notice, 78 FR at 76341.

¹⁶ See Notice, 78 FR at 76342.

¹⁷ Firms that are FLOW subscribers may connect to FLOW via the FLOW Smart Order Router, or through the FLOW Gateway. Non-FLOW subscribers may connect via a third party vendor or connectivity provider, or through an exchange or a third-party broker-dealer subscriber. See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

costs, such as port fees,²⁶ market data fees,²⁷ general connectivity fees,²⁸ and transaction fees,²⁹ and FLOW proposes to assess costs in these respects that are substantially equivalent to the costs assessed by SRO trading facilities.³⁰

FINRA also notes that the FLOW fee structure is currently a maker-taker model where FLOW pays a rebate for added executed liquidity and charges a fee for removed liquidity.³¹ FLOW charges a standard rate of \$0.0030 to remove liquidity.³² Pricing is subject to change with advance notice provided to subscribers, and for non-subscribers, notice of a price change is published on the FLOW Web site in advance of such price change.³³ In addition, FLOW charges subscribers and non-subscribers the same fees for utilizing its system, and monitors the average fee charged to non-subscribers and compares it to the average fee paid by subscribers in order to ensure the prices are the same.³⁴

Finally, FINRA states that all members in good standing of an SRO are

²⁶ FLOW charges port fees to subscribers based upon the number of ports requested. Fee-eligible port connections may be charged \$400 per connection, per month. In comparison, exchange port fees on average range from \$100 to \$1,000 per port, per month. *See id.*

²⁷ According to FINRA, FLOW has represented that it does not have any plans to charge its subscribers or non-subscribers for access to FLOW's market data. In comparison, market data fees vary by exchange, with some exchanges charging fees that range from under \$100 per month to \$750 to \$2,500, and some exchanges charging \$5,000 for external distribution. *See Notice*, 78 FR at 76342–43.

²⁸ According to FINRA, FLOW is connected in its production environment to most outbound routers via intranets, cross connects and other direct connections. FLOW has also represented to FINRA that the cost to establish connections to FLOW for users of these services and for individual firms not using these services should be substantially the same as the costs to connect to an exchange. Both FLOW subscribers and non-subscribers are responsible for paying for their own external telecommunications costs to connect to FLOW. FLOW has represented to FINRA that such fees would be equivalent to the costs to connect to other trading center. *See Notice*, 78 FR at 76342.

²⁹ Exchanges currently charge a range of other fees, including but not limited to membership fees, trading rights fees, risk gateway fees and other miscellaneous fees. According to FINRA, FLOW has represented that it does not assess similar charges. *See Notice*, 78 FR at 76343.

³⁰ *See Notice*, 78 FR at 76342.

³¹ *See Notice*, 78 FR at 76343.

³² FLOW also pays a current base rebate of \$0.0024 per share for added executed visible liquidity and \$0.0010 per share of added executed non-visible liquidity. There are increased rebate incentives for FLOW subscribers that maintain higher volumes on a daily basis. *See Notice*, 78 FR at 76343, n. 20.

³³ *See Notice*, 78 FR at 76343.

³⁴ FINRA states that in the event that FLOW makes a material change to its policies and procedures governing access to FLOW, including a change to its fees, FLOW will submit to FINRA, and FINRA will post on its Web site, an amended description of FLOW's policies, procedures and fees governing access. *See Notice*, 78 FR at 76343, n. 21.

eligible to become FLOW subscribers, and will be subject to credit limits set by FLOW.³⁵

III. Discussion and Commission Findings

After carefully considering the Proposal, the Commission finds that the Proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.³⁶ In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,³⁷ which requires, in part, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

Specifically, the Commission believes that the Proposal is consistent with Section 15A(b)(6) of the Act because the fees and the policies and procedures governing access to protected quotations displayed on the ADF by FLOW as described above should provide market participants with fair and efficient access, and are not unfairly discriminatory such that they would prevent a market participant from obtaining efficient access to such quotations. All members in good standing of an SRO are eligible to become FLOW subscribers, and both subscribers and non-subscribers may access FLOW liquidity. FLOW offers both subscribers and non-subscribers multiple options to access FLOW liquidity. In addition, FLOW also has policies and procedures that require FLOW to respond to orders by non-subscribers as promptly as it responds to orders by subscribers, and allow for non-subscribers to be able to automatically execute against quotations displayed by the system. Finally, the Commission notes FINRA's representation that the proposed level and cost of access is, in relative terms, substantially equivalent to the level and cost of access provided by SRO trading facilities.³⁸

For these reasons, the Commission believes that the proposed rule change is consistent with the Act.

³⁵ *See Notice*, 78 FR at 76343.

³⁶ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

³⁷ 15 U.S.C. 78o–3(b)(6).

³⁸ *See Notice* at 78 FR at 76343 for a more detailed comparison of FLOW fees against those of other SROs.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³⁹ that the proposed rule change (SR–FINRA–2013–052), is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–02503 Filed 2–5–14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71454; File No. SR–NYSE–2014–06]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List To (i) Increase the Credit for Agency Cross Trades; (ii) Increase the Fee for Certain Executions at the Close; (iii) Increase the “Tier 1 Adding Credit;” (iv) Increase the Fee for Certain Floor Broker Discretionary e-Quotes; (v) Increase the Credit for Certain Floor Broker Executions That Add Liquidity; (vi) Increase the Credit for Certain Supplemental Liquidity Provider Executions; and (vii) Increase the Fee for Executions in Crossing Session II

January 31, 2014.

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 January 23, 2014, New York Stock Exchange LLC (“NYSE” or the “Exchange”) 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 Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to (i) increase the credit for agency cross trades; (ii) increase the fee for certain executions at the close; (iii) increase the “Tier 1 Adding Credit;” (iv) increase the fee for certain Floor broker

³⁹ 15 U.S.C. 78s(b)(2).

⁴⁰ 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.

discretionary e-Quotes (“d-Quotes”); (v) increase the credit for certain Floor broker executions that add liquidity; (vi) increase the credit for certain Supplemental Liquidity Provider (“SLP”) executions; and (vii) increase the fee for executions in Crossing Session II. The Exchange proposes to implement the fee change effective February 1, 2014. The text of the proposed rule change is available on the Exchange’s Web site at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to (i) increase the credit for agency cross trades; (ii) increase the fee for certain executions at the close; (iii) increase the “Tier 1 Adding Credit;” (iv) increase the fee for certain d-Quotes; (v) increase the credit for certain Floor broker executions that add liquidity; (vi) increase the credit for certain SLP executions; and (vii) increase the fee for executions in Crossing Session II. The Exchange proposes to implement the fee change effective February 1, 2014.⁴ The proposed change would have no impact

⁴ The Exchange notes that it has previously filed with the Securities and Exchange Commission a proposed rule change to amend the Price List (File No. SR-NYSE-2014-05). Exhibit 5 to SR-NYSE-2014-05 specified an effective date for the revised Price List of January 27, 2014 (changed from December 18, 2013). Exhibit 5 to the instant proposed rule change specifies an effective date of February 1, 2014 (changed from December 18, 2013). On January 27, 2014, subject to effectiveness of SR-NYSE-2014-05, the Exchange will update the Price List to reflect the fee change reflected in SR-NYSE-2014-05, with an effective date of January 27, 2014. On February 1, 2014, the Exchange will further update the Price List to reflect the changes set forth in the instant proposed rule change, with an effective date of February 1, 2014.

on pricing for transactions in securities priced below \$1.00.

Agency Cross Trades

A credit of \$0.0003 per share is currently provided for an agency cross trade, which is a trade where a member organization has customer orders to buy and sell an equivalent amount of the same security. The Exchange proposes to increase this credit to \$0.0006 per share.

Executions at the Close

A fee of \$0.0001 per share currently applies to executions at the close (except for market at-the-close (“MOC”) and limit at-the-close (“LOC”) orders) and Floor broker executions swept into the close if a member organization executes an average daily volume (“ADV”) on the Exchange during the billing month of at least 1,000,000 shares in such orders. The Exchange proposes to increase the fee to \$0.0002 per share. Such executions would continue to be free of charge if the member organization does not reach the 1,000,000-share threshold.

Tier 1 Adding Credit

The Tier 1 Adding Credit currently provides for a credit of \$0.0018 per share (or \$0.0010 for a Non-Displayed Reserve Order or \$0.0015 for a Midpoint Passive Liquidity (“MPL”) Order).⁵ The Exchange proposes to increase this credit to \$0.0020 per share.⁶

⁵ A member organization qualifies for the Tier 1 Adding Credit when adding liquidity to the Exchange if (i) the member organization has ADV that adds liquidity to the Exchange during the billing month (“Adding ADV,” which excludes any liquidity added by a Designated Market Maker (“DMM”) that is at least 1.5% of consolidated ADV (“CADV”) in NYSE-listed securities during the billing month, excluding odd lots through January 31, 2014 (“NYSE CADV”), and executes MOC and LOC orders of at least 0.375% of NYSE CADV, (ii) the member organization has Adding ADV that is at least 0.8% of NYSE CADV, executes MOC and LOC orders of at least 0.12% of NYSE CADV, and adds liquidity to the NYSE as an SLP for all assigned SLP securities in the aggregate (including shares of both an SLP proprietary trading unit (“SLP-Prop”) and an SLP market maker (“SLMM”) of the same member organization) of more than 0.15% of NYSE CADV, or (iii) the member organization has ADV that adds liquidity in customer electronic orders to the NYSE (“Customer Electronic Adding ADV,” which shall exclude any liquidity added by a Floor broker, DMM, or SLP) during the billing month that is at least 0.5% of NYSE CADV, executes MOC and LOC orders of at least 0.12% of NYSE CADV, and has Customer Electronic Adding ADV during the billing month that, taken as a percentage of NYSE CADV, is at least equal to the member organization’s Customer Electronic Adding ADV during September 2012 as a percentage of CADV in NYSE-listed securities during September 2012 plus 15%.

⁶ The applicable credit of \$0.0010 for a Non-Displayed Reserve Order or \$0.0015 for an MPL Order would not change as a result of this proposal.

d-Quotes

A fee of \$0.0010 per share currently applies to d-Quotes of a Floor broker that executes an ADV of at least 500,000 shares of d-Quotes that remove liquidity from the Exchange during the month. The Exchange proposes to increase this fee to \$0.0015. Such executions would continue to be charged a fee of \$0.0005 per share if the member organization does not reach the 500,000-share threshold.

Floor Broker Executions That Add Liquidity

A credit of \$0.0019 per share (or \$0.0015 for an MPL Order) currently applies to executions of orders sent to a Floor broker for representation on the Exchange when adding liquidity to the Exchange. The Exchange proposes that the applicable credit for a Floor broker that is part of a member organization that qualifies for the Tier 1 Adding Credit would be the same rate that applies to the Tier 1 Adding Credit.⁷ This would be the \$0.0020 per share credit proposed above. For Floor brokers that are not part of a member organization that qualifies for the Tier 1 Adding Credit, the current \$0.0019 rate would continue to apply.

SLP Credits

A credit of \$0.0025 per share (or \$0.0020 for a Non-Displayed Reserve Order or \$0.0015 for an MPL Order) currently applies to SLP transactions in securities with a per share price of \$1.00 or more that add liquidity on the Exchange if the SLP (i) meets the 10% average or more quoting requirement in an assigned security pursuant to NYSE Rule 107B (quotes of an SLP-Prop and an SLMM of the same member organization are not aggregated), (ii) adds liquidity for all assigned SLP securities in the aggregate (including shares of both an SLP-Prop and an SLMM of the same member organization) of an ADV of more than 0.22% of NYSE CADV, (iii) adds liquidity for all assigned SLP securities in the aggregate (including shares of both an SLP-Prop and an SLMM of the same member organization) of an ADV during the billing month that is at least equal to the SLP’s September 2012 Adding ADV (“SLP Baseline ADV”) plus 0.18% of NYSE CADV, and (iv) has a minimum provide [sic] ADV for all assigned SLP securities of 12 million shares. The Exchange proposes to increase this credit to \$0.0027 per share

⁷ The applicable credit of \$0.0015 for an MPL Order would not change as a result of this proposal.

or \$0.0022 per share if a Non-Displayed Reserve Order.⁸

Crossing Session II

A fee of \$0.0002 per share currently applies to executions in Crossing Session II. The Exchange proposes to increase the fee to \$0.0004. Fees for executions in Crossing Session II would continue to be capped at \$100,000 per month per member organization.

The proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that member organizations 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,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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 increase in the credit for agency cross trades is reasonable because such trades are typically large block orders, and providing a higher credit would encourage their submission to a public exchange, thereby promoting price discovery and transparency. The Exchange believes that the proposed increase is equitable and not unfairly discriminatory because all member organizations that engage in agency trading would be eligible to receive the higher credit, and all market participants would benefit from the price discovery and transparency provided by large block orders.

The Exchange believes that it is reasonable to increase the fee for executions at the close (other than MOC and LOC orders) and Floor broker executions swept into the close if a member organization executes an ADV of at least 1,000,000 of such executions on a combined basis. Specifically, the Exchange's closing auction is a recognized industry benchmark,¹¹ and member organizations receive a substantial benefit from the Exchange in obtaining an ADV of 1,000,000 or more of such executions at the Exchange's

closing price on a daily basis. In that respect, this fee increase is designed in part to offset the reduced fees that the Exchange collects from executions of MOC and LOC orders, which were lowered effective August 1, 2013.¹² The Exchange also believes that the proposed fee is equitable and not unfairly discriminatory. Specifically, while member organizations that reach the threshold of an ADV of at least 1,000,000 combined executions are generally larger member organizations that are deriving a substantial benefit from this high volume of executions, the Exchange must nonetheless encourage liquidity from multiple sources. Allowing member organizations with lower execution volumes to continue to obtain executions at the close at no charge would encourage them to continue to send orders to the Exchange for the closing auction. The Exchange believes that the threshold it has selected would continue to incent order flow from multiple sources and help maintain the quality of the Exchange's closing auctions, which benefits all market participants.

The Exchange believes that the proposed increase in the Tier 1 Adding Credit is reasonable because it would further contribute to incenting member organizations to provide additional amounts of liquidity on the Exchange. The Exchange believes that the proposed increase is equitable and not unfairly discriminatory because all member organizations would benefit from such increased levels of liquidity and because the Tier 1 Adding Credit would continue to provide a higher credit to member organizations that is reasonably related to the value to the Exchange's market quality associated with higher volumes of liquidity. As is currently the case, member organizations would continue to have three distinct methods of qualifying for the Tier 1 Adding Credit.¹³

The Exchange believes that the proposed increase in the d-Quote rate for Floor brokers executing an ADV of at least 500,000 d-Quotes that remove liquidity from the Exchange is reasonable because a substantial benefit is derived from obtaining executions for such a high volume of d-Quotes. The Exchange also believes that the proposed rate is equitable and not unfairly discriminatory. Specifically, while Floor brokers that reach the threshold of an ADV of at least 500,000 combined executions are generally

larger member organizations that are deriving a substantial benefit from this high volume of executions, the Exchange must nonetheless encourage liquidity from multiple sources. Allowing Floor brokers with lower execution volumes to continue to use d-Quotes to remove liquidity, but at the lower fee of \$0.0005, would further incent order flow from multiple sources and help maintain the quality of order execution on the Exchange, which benefits all market participants. The Exchange further believes that it is reasonable to continue to maintain d-Quote take rates that are lower than the take rate that applies to Floor broker transactions not otherwise specified on the Price List (i.e., the \$0.0022 and \$0.0020 per share rates) because d-Quotes, in particular, encourage additional liquidity during the trading day and incent Floor brokers to provide additional intra-quote price improved trading, which contribute to the overall quality of the Exchange's market.

The Exchange believes that the proposed increase in the credit for Floor brokers that are part of a member organization that qualifies for the Tier 1 Adding Credit is reasonable. Without this proposed change, and due to the proposed increase in the Tier 1 Adding Credit from \$0.0018 to \$0.0020, a Floor broker's transactions that add liquidity would receive a credit that would be inferior to that of the non-Floor broker transactions of the same member organization. The Exchange believes that this result would disincentivize member organizations from sending orders to a Floor broker and could therefore decrease the amount of liquidity-adding volume available on the Exchange's Floor. The Exchange believes that the proposed change is equitable and not unfairly discriminatory because a Floor broker would only receive the Tier 1 Adding Credit rate if it is part of a member organization that qualifies for the Tier 1 Adding Credit and because Floor broker volume is counted when determining whether a member organization has reached the applicable Tier 1 Adding Credit thresholds.

The Exchange believes that the proposed increase in the credit for SLPs that add liquidity to the Exchange with a per share price of \$1.00 or more if the SLP meets certain requirements is reasonable because it would create added incentive for SLPs to provide liquidity in assigned securities. This is further reasonable because the added incentive created by the availability of the increased credit is reasonably related to an SLP's liquidity obligations on the Exchange. The corresponding

⁸ The applicable credit of \$0.0015 for an MPL Order would not change as a result of this proposal.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

¹¹ For example, the pricing and valuation of certain indices, funds, and derivative products require primary market prints.

¹² See Securities Exchange Act Release No. 70193 (August 14, 2013), 78 FR 51251 (August 20, 2013) (SR-NYSE-2013-56).

¹³ See *supra* note 6.

increase in the credit applicable to Non-Displayed Reserve Orders is also reasonable because it would maintain the existing \$0.0005 difference between these order types and all other order types (excluding MPL Orders).¹⁴ The Exchange believes that the proposed increase in the credit is equitable and not unfairly discriminatory because, as is currently the case under the existing rate, the credit is available to all qualifying SLPs on an equal basis and because the credit is reasonably related to the value to the Exchange's market quality associated with higher volumes.

The Exchange believes that the proposed increase in the fee for Crossing Session II transactions is reasonable because it would more closely align the rate with the other rates within the Price List. The Exchange also believes that the proposed increase in the fee for Crossing Session II transactions is equitable and not unfairly discriminatory because such fees would apply to executions of all member organizations in Crossing Session II and because such fees would continue to be capped at \$100,000 per member organization per month.

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,¹⁵ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Specifically, the Exchange believes that the proposed increase in the credit for agency cross trades would further encourage the submission of what are typically large block orders to a public exchange and thereby allow the Exchange to more effectively compete with alternative trade reporting facilities for market share.

The proposed increased fee for executions at the close and Floor broker executions swept into the close would continue to apply only to member organizations that obtain high volumes of executions at the close on a daily basis. The Exchange believes that this small fee would not result in a burden on competition for these member

organizations in light of the substantial benefit that they obtain from these executions. Participation in the closing by member organizations with relatively lower closing activity is also important to the quality of the closing, and the Exchange therefore believes that continuing to not charge member organizations with executions below the 1,000,000-share monthly ADV threshold would not result in a burden on competition.

The proposed increase in the Tier 1 Adding Credit would not burden competition, but rather would encourage member organizations to submit additional amounts of liquidity on the Exchange. In addition, the method of qualifying for the Tier 1 Adding Credit would continue to not burden competition, in that the qualification parameters encourage multiple sources of liquidity, including from those member organizations without an SLP or Floor broker unit.

The Exchange believes that Floor brokers that are removing higher volumes of liquidity via d-Quotes from the Exchange would not be burdened by paying a higher fee for such executions, especially because a substantial benefit is derived from obtaining executions for such a high volume of d-Quotes. The Exchange also believes that continuing to charge Floor brokers below the 500,000-share monthly ADV threshold a lower rate of \$0.0005 per share would continue to not result in a burden on competition, because such rate would continue to incent order flow from multiple sources and help maintain the quality of order execution on the Exchange, which benefits all market participants.

The Exchange believes that applying the Tier 1 Adding Credit rate to Floor broker executions that add liquidity if the Floor broker is part of a qualifying member organization would not burden competition. Rather, the Exchange believes that the proposed change would eliminate a potential disincentive to sending orders to Floor brokers and would therefore prevent decreased levels of available liquidity on the Floor of the Exchange.

The increase in the credit for certain SLP executions would not burden competition because all SLPs would have the opportunity to qualify for the credit. The increased credit would create an added incentive for SLPs to provide liquidity on the Exchange, thereby also contributing to the Exchange's competitiveness with other markets.

The increase in the fee for executions in Crossing Session II would not burden competition because it would apply to

all member organizations and because fees for member organizations that are particularly active in Crossing Session II would continue to be capped at \$100,000 per member organization per month.

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 or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee 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 changes will impair the ability of member organizations 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)¹⁶ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁷ 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

¹⁴ MPL Order fees and credits apply equally to all market participants and MPL Orders are not eligible for any tiered or additional credits or reduced fees. See SR-NYSE-2014-05.

¹⁵ 15 U.S.C. 78f(b)(8).

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(2).

under Section 19(b)(2)(B)¹⁸ 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-NYSE-2014-06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2014-06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 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 will also be available for Web site viewing and printing at the NYSE's principal office and on its Internet Web site at www.nyse.com. 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-NYSE-

2014-06 and should be submitted on or before February 27, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014-02500 Filed 2-5-14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71450; File No. SR-ICEEU-2014-03]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Clearinghouse Recovery and Wind-Down Rules for Its Futures and Options and Foreign Exchange Product Categories

January 31, 2014.

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 January 28, 2014, ICE Clear Europe Limited ("ICE Clear Europe") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change described in Items I and II below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act,³ and Rules 19b-4(f)(4)(i) and (ii) thereunder,⁴ so that the proposal was effective upon filing with the Commission. 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 principal purpose of the proposed changes is to amend the ICE Clear Europe Clearing Rules in order to adopt new procedures for clearinghouse recovery and wind-down in the event of exhaustion or potential exhaustion of clearinghouse resources following a clearing member default, as well as make other improvements to the default management process. As discussed below, the proposed amendments apply to the F&O and FX product categories, but, except for certain conforming and

clarifying changes described below, do not apply to the CDS product category.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe 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

1. Purpose

ICE Clear Europe submits proposed amendments to its Rules in order to adopt new provisions relating to clearinghouse recovery and wind-down following the exhaustion or potential exhaustion of available resources after a clearing member default or series of clearing member defaults. The amendments would, among other matters, (i) establish a "cooling-off period" in cases of certain clearing member defaults that result in assessments, in which case the liability of clearing members for additional guaranty fund assessments would be capped for all defaults that trigger the period or occur during the period; (ii) establish new procedures under which a clearing member may terminate its clearing membership, both in the ordinary course of business and during a cooling-off period, and related procedures for unwinding all positions of such a clearing member and capping its continuing liability to the clearing house, (iii) provide for "haircutting" of mark-to-market margin gains by the clearing house in situations where the clearing house determines, following a clearing member default, that it is unlikely to have sufficient resources to make all such payments; (iv) revise procedures for the termination of clearing and wind-up of outstanding contracts of a particular product category in the event of exhaustion of clearing house resources available to support those contracts; (v) adopt a new set of procedures for default auctions and modify the order of allocation of guaranty funds of non-defaulting clearing members to strengthen incentives of clearing members to

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(4)(i) and (ii).

¹⁸ 15 U.S.C. 78s(b)(2)(B).

actively participate in default auctions; and (vi) in general limit the effect of losses in the covered product categories (F&O or FX) on ongoing clearing for other product categories.

As described in the revised rules, and as described in a Circular to be published by the Clearing House with respect thereto, these proposed amendments would not apply to the CDS product category. Accordingly, ICE Clear Europe's existing rules will continue to apply to CDS contracts and to CDS Clearing Members (even if they are also F&O Clearing Members or FX Clearing Members), with certain conforming and clarifying changes described below.

Pursuant to amendments made to the recognition requirements for recognized clearing houses under English law, ICE Clear Europe is required to have default rules addressing the allocation of losses in excess of clearing house resources and recovery plans establishing the steps it will take to maintain continuity of services if such continuity is threatened. These requirements will go into effect on February 1, 2014. Recovery and wind-down plans are also an element of the CPSS-IOSCO Principles for Financial Market Infrastructures (the "PFMIs") and are therefore necessary for ICE Clear Europe to be treated as a qualified central counterparty ("QCCP") for purposes of the applicable Basel III bank capital requirements that apply to clearing members and other market participants.

The amendments are intended to enhance the clearing house's existing rules for the F&O and FX product categories by providing additional tools to assist the clearing house in addressing potential losses in excess of available clearing house resources. In each case, ICE Clear Europe, in consultation with its clearing members, has sought to balance a number of competing considerations in developing these additional tools. The clearing house needs to have sufficient resources to cover potential losses in extreme default situations and to have adequate flexibility in the management of defaults, consistent with the PFMIs and UK and U.S. regulatory requirements.⁵ At the same time, clearing members must be able to continue to manage appropriately their own risks from cleared transactions and their obligations to the clearing house, in light of the evolving regulatory and capital framework that applies to them. The amendments are designed to provide greater certainty (for both

clearing members and the clearing house) as to the maximum liability of clearing members to the clearing house and as to the particular steps the clearing house may take to manage a default (and the responsibilities of the clearing members for default management), and to reduce the incentives for non-defaulting clearing members to withdraw from the clearing house following a default. The amendments are also intended to give clearing members appropriate incentives to participate actively in default management and to provide the clearing house adequate time and opportunity to resolve a default, while limiting the incentive for non-defaulting clearing members to withdraw from clearing membership following a default. The following discussion is intended to highlight the purpose and expected effects of the principal features of the proposed amendments:

Cooling-Off Periods and Assessment Limits

- Under various provisions of its existing rules,⁶ there are limits on ICE Clear Europe's ability to call for assessments from clearing members as a result of potential losses exceeding guaranty fund resources. Following extensive consultation with clearing members, and consideration of the impact on clearing house resources in extreme loss scenarios, ICE Clear Europe proposes to revise the assessment limit framework as set forth herein. In each product category, ICE Clear Europe proposes to maintain both (i) a per default assessment limit (which is twice the required guaranty fund contribution for the F&O and FX product categories) and (ii) an aggregate assessment limit for any cooling-off period (which is three times the required guaranty fund contribution for each such product category).

- A cooling-off period will be triggered by a default or series of defaults that results in an assessment on clearing members or a sequential

guaranty fund depletion (i.e., a series of defaults requiring replenishment in the aggregate in excess of the required guaranty fund contribution). The cooling-off period will initially run for 30 business days, but if a subsequent trigger event occurs during the period, the period will be extended until the 30th business day following that subsequent trigger. Once the cooling-off period is triggered and for the duration of such period, the guaranty fund will not be recalculated or replenished. Each clearing member will remain liable for assessments during the period, up to the relevant maximum for the period. Clearing members will remain liable to post initial margin during the cooling-off period.⁷

- The combination of the assessment limit and the cooling-off period is designed to provide certainty to clearing members as to their maximum liability to the clearing house with respect to the guaranty fund. Well-defined liability for guaranty fund contributions is an expected aspect of QCCP status and facilitates the risk management needs of clearing members under their own capital requirements and policies.⁸ By fixing the maximum contribution for all clearing members, the cooling-off period is designed to reduce the risk of a "rush for the exit" following a significant default, since all clearing members (whether or not they choose to withdraw from membership) will bear the same assessment liability in proportion to their guaranty fund requirements. The cooling-off period also gives the clearing house time to arrange an orderly close-out of the defaulter's or defaulters' positions and provides the clearing house greater certainty as to the resources it will have during that period. ICE Clear Europe believes that even with the assessment caps, the clearing house has sufficient financial resources to support its operations even in extreme market conditions.⁹ In ICE Clear Europe's view,

⁷ The clearing house expects that it would rely on additional initial margin during the cooling-off period, if necessary, in order to satisfy ongoing regulatory financial resources requirements (i.e., the "cover 2" requirement).

⁸ ICE Clear Europe does not believe it is commercially feasible for an internationally active clearing house to require potentially unlimited guaranty fund contributions of its members. In this regard, we note that applicable bank capital guidelines under the Basel III capital framework contemplate that a qualified central counterparty, or QCCP, does not impose unlimited liability on its clearing members for contributions to the guaranty fund. See Regulatory Capital Rules, 78 FR 62018, 62099 (Oct. 11, 2013).

⁹ In this regard, we note that ICE Clear Europe satisfies its regulatory "cover 2" financial resources requirement through the funded component of its

⁵ See, e.g., 17 CFR 39.11, 39.16; 17 CFR 240.17Ad-22(b)(2)-(3), (d)(11).

⁶ In particular, existing Rule 1105(b) provides for a per default assessment limit equal to twice the required guaranty fund contribution for the F&O product category. The existing rules do not contemplate a cooling-off period assessment limit. Under the existing rules, a clearing member can only limit its liability for further assessments by withdrawing from clearing membership in accordance with Rule 1105(b) or (i). Similar provisions exist for the FX product category under Rule 1107. As discussed herein, ICE Clear Europe proposes the addition of the cooling-off period, with the related assessment cap for the period, to provide greater certainty as to the maximum liability of a clearing member during a series of defaults and to avoid providing an incentive for clearing members to withdraw from clearing membership to limit their liability.

the assessment limits and cooling-off period arrangements strike an appropriate balance between its needs for financial resources in the case of an extreme default while providing desired certainty and protection for non-defaulting clearing members in light of their own capital, liquidity, risk management and commercial considerations.

Procedures for Termination of Clearing Membership

- In connection with the adoption of the cooling-off period concept, ICE Clear Europe is proposing new procedures for withdrawal from clearing membership (other than for CDS Clearing Members). Under the revised rules, a withdrawing clearing member is required to close out all of its outstanding positions within a specified period. If it does so, it will not be responsible for losses from defaults occurring following the end of that period. In the case of a withdrawal during the cooling-off period, the revised rules provide for a specified cooling-off termination period during the beginning of the period. If notice is given within the cooling-off termination period, the clearing member generally has until the end of the cooling-off period to terminate its positions at the clearing house. If it does so, it will not be liable for further assessments beyond those owed during the cooling-off period, and will not have to replenish its guaranty fund at the end of the cooling-off period. The amendments are intended to provide clearing members, and the clearing house, greater certainty as to their respective rights and obligations in the case of withdrawal.

- The amendments are intended to benefit withdrawing clearing members by providing a clear procedure for withdrawal, and specifying the dates by which relevant actions must be taken in order for the clearing member to limit its liability for future defaults. For the clearing house, the amendments provide certainty as to those margin and guaranty fund contributions of a withdrawing clearing member that can be used for particular defaults, and also

guaranty funds, without consideration of assessment rights. Assessments provide additional financial resources in extreme scenarios beyond the cover 2 level, but the assessment caps will thus not impact the clearing house's ability to meet its regulatory financial resources requirements. Although ICE Clear Europe would not be permitted to call for replenishment of the guaranty fund during a cooling-off period, ICE Clear Europe retains the ability to call for initial margin (including additional initial margin) at all times during a cooling-off period in its discretion. ICE Clear Europe would expect to call for additional initial margin if necessary to satisfy regulatory financial resources requirements during such period.

provide a series of remedies for the clearing house in the event that a withdrawing clearing member does not satisfy its obligations in respect of its withdrawal. By providing an appropriate delay for withdrawal, the procedures protect the clearing house and remaining clearing members by permitting an orderly exit from positions, and continuing liability for the clearing member until it has closed out its positions. For customers of a withdrawing clearing member, the rules provide a mechanism for facilitating the transfer of positions to a new, remaining clearing member prior to withdrawal. This should mitigate the impact of withdrawal on customers and the cleared derivative market in general.

Mark-to-Market Margin Haircutting

- The proposed rules permit the clearing house, in limited circumstances specified in the proposed rules where, as a result of a clearing member default, the clearing house has insufficient resources to pay all outgoing mark-to-market margin payments, to "haircut" such outgoing payments by the amount of the shortfall in resources. This authority only applies to the F&O and FX product categories. This approach allows the clearing house to avoid default in such situations where available resources are insufficient. The proposed rules permit mark-to-market margin haircutting in several situations following a default where amounts owed or, in the clearing house's determination, expected to be owed by the clearinghouse (including to make outward mark-to-market margin payments and to pay the costs of transferring positions to non-defaulting clearing members as part of the default management process) exceed available financial resources. Thus, haircutting may be appropriate following default (i) where the clearing house does not believe that it would otherwise have sufficient resources to run a successful default auction for the defaulter's positions, and (ii) where the clearing house has encountered difficulty or delay in collection of amounts owed to it (including assessments on clearing members that have not been paid) as a result of which it is unable to pay all amounts then owed. In such situations, mark-to-market margin haircutting allows the clearing house to continue operations, despite the potential lack of available resources, in circumstances where it might otherwise be forced to terminate contracts or default. In particular, where there is uncertainty as to the ultimate resources of the clearing house or the ultimate cost of resolving a default, haircutting may permit the

clearing house to continue operations until such resources or costs are finally determined, following which the clearing house would expect to be able either to resume normal operations or proceed to termination of contracts as discussed below. In addition, mark-to-market margin haircutting can be conducted with respect to a particular product category (i.e., F&O or FX) that has been affected by a shortfall, allowing clearing in other product categories to continue unaffected. ICE Clear Europe anticipates that mark-to-market haircutting would only be imposed in extreme circumstances, as an alternative to clearinghouse default and a further preventive step to avoid or delay tear-up of relevant contracts.

- Haircutting will, of course, mean that clearing members and their customers that would otherwise have mark-to-market margin gains will not receive some or all of such gains. In ICE Clear Europe's view, this is an appropriate approach to loss allocation.¹⁰ In particular, haircutting is intended to mimic the way losses would be expected to be allocated in an actual insolvency, where parties with claims against an insolvent entity would share pro rata in available assets (and would thus have their claims "haircut" to the extent of any shortfall in assets). The haircutting rules are intended to achieve a similar result in an orderly, controlled manner without the need, expense or disruption of an insolvency proceeding. Although a tear-up of contracts is potentially an alternative (and is

¹⁰ As proposed, haircutting would be performed separately for the proprietary and each customer account, and within a customer account, haircutting would be done on a "gross" basis across each customer portfolio, to the extent possible (although positions would be netted for this purpose within each such portfolio). Although this approach will impose a burden on customers as well as clearing members, ICE Clear Europe believes that it most equitably distributes the loss, as it treats each non-defaulting market participant with mark-to-market gains in the same manner with the same percentage haircut. Alternative approaches, such as calculating the customer haircut on a net basis for this purpose, would make a customer's treatment depend on the positions of other customers of a particular clearing member, and would thus lead to different treatment for the same positions when held at different clearing members. Another alternative approach, position-by-position haircutting could adversely affect the ability of market participants to net exposures for accounting and other purposes. Furthermore, ICE Clear Europe does not believe it would be appropriate for the clearing house to try to shift more of the loss to clearing members as opposed to customers, such as by not haircutting the customer account or haircutting the proprietary account before the customer account. Such a preference for some market participants over others would divorce the haircutting treatment from the positions held, and would penalize clearing members (including self-clearing members) for the benefit of customers, even in circumstances where the customer is holding potentially riskier, more directional positions.

permitted under the rule amendments), ICE Clear Europe believes that haircutting would be a useful alternative in the situations mentioned above, where it is possible that the clearing house will, as a result of haircutting, be able to maintain the clearing house as a going concern and run a successful auction that would permit clearing to continue and be less disruptive to the market than tear-up. Similarly, where there is a delay in obtaining financial resources following a default, and the clearing house believes it has a reasonable prospect of obtaining amounts owed to it, haircutting that allows cleared contracts to remain outstanding may be preferable to tear-up for market participants.

Termination of Clearing

- As a final tool, the proposed rules would provide more detailed procedures under which ICE Clear Europe could terminate clearing in the F&O or FX product category. This would permit ICE Clear Europe to arrange an orderly wind-down of cleared contracts in that category in the event that there are insufficient financial resources to support continued clearing of that product and ICE Clear Europe determines that termination for that product category is appropriate under the circumstances. Upon termination, available resources for that product category (including the relevant guaranty fund) will be used, together with amounts owed to the clearing house, to pay amounts owed by the clearing house on the terminated contracts. To the extent such resources are insufficient, the shortfall will be shared among clearing members and their customers on a pro rata basis.

- Termination of contracts, particularly where resources are insufficient, will thus impose a loss on certain clearing members and their customers, similar to that imposed under mark-to-market margin haircutting. ICE Clear Europe believes that this approach is generally similar to the result that would obtain in an actual insolvency proceeding. Furthermore, ICE Clear Europe believes that this approach is an appropriate means of allocating the loss, consistent with the goals of avoiding unlimited liability for clearing members.

New Default Auction Procedures

- ICE Clear Europe has determined to adopt a new auction methodology for unwinding the F&O or FX positions of a defaulting clearing member. The terms of the auction methodology are set forth in default auction procedures established by ICE Clear Europe. Under

the auction methodology, the defaulting clearing member's open positions may be divided in to one or more lots, each of which will be auctioned separately. Each clearing member will be required to participate in each auction in a minimum bid amount based on the relative size of its guaranty fund contribution. (Clearing members will be permitted to submit bids on behalf of their customers as well, and in certain cases customers may be permitted to directly bid in the auction.)

- Based on the bids submitted, ICE Clear Europe will determine an auction clearing price for the relevant portfolio, subject to any maximum or minimum price established by the clearing house for that auction. The auction procedures use a "Dutch" auction methodology to establish an auction clearing price at which the defaulter's portfolio will be unwound. The Dutch auction methodology is similar to that used in determining auction settlement values under credit default swaps and in general is widely used in numerous other financial market contexts.

- In connection with the auction methodology, and to provide an incentive for active participation in the auction, the proposed rules also provide for a specific priority of use of guaranty fund contributions based on bids in the auction (sometimes referred to as "juniorization"). Under this approach, to the extent the guaranty funds of non-defaulting clearing members are to be used to pay the auction price,¹¹ ICE Clear Europe will begin with the guaranty fund contributions of any such clearing member that failed to participate in the auction. The guaranty fund contributions (and, if necessary, assessments) of other non-defaulting clearing members are split into a subordinate and a senior tranche based on the competitiveness of their respective bids. The subordinate tranche will be applied next to the auction costs, followed by the senior tranche (and followed by a subordinate tranche of assessments and senior tranche of assessments, if necessary). Within each tranche, guaranty fund contributions will be applied on a pro rata basis.

- Bidders whose bids were more competitive than a specified "senior threshold price" (determined based on a specified range from the auction clearing price) will have their guaranty fund contributions assigned to the senior tranche; bidders whose bids were

less competitive than a specified "subordinate threshold price" (determined based on a specified range from the auction clearing price) will have their guaranty fund contributions assigned to the subordinate tranche. Bidders whose bids were between the senior threshold price and subordinate threshold price will have their guaranty fund contributions split between the two tranches based on a formula. Where the defaulter's positions are divided into multiple lots, the above calculations will be performed for each lot, and an aggregate senior and subordinate tranche calculated based on the results of individual lots. (In such case, a bidder's guaranty fund contribution may be split between the aggregate senior and subordinate tranches depending on its bidding for each lot.)

- ICE Clear Europe believes that the new default auction methodology, together with the guaranty fund priority described above, will provide a strong incentive for clearing members to participate actively in the auction and will result in the allocation of the defaulter's positions at a fair, market-clearing price. Although clearing members that fail to participate, or that provide non-competitive bids, will be adversely affected as compared to an approach in which all clearing members are affected equally, ICE Clear Europe believes that this approach appropriately takes into account participation in the auction. The rules of the auction are established in advance, and all clearing members have an equal opportunity to participate. By giving clearing members an incentive to bid competitively, ICE Clear Europe believes that its default auctions will result in more competitive and accurate pricing for the defaulter's portfolios, which will benefit the clearing members as a whole and make it more likely that the clearing house will be able to manage a default successfully.

Separation of Product Categories

- The rule amendments are also designed to further the separation of the F&O and FX product categories cleared by ICE Clear Europe. Under its existing rules, ICE Clear Europe maintains separate guaranty funds for each product category, each of which is intended to support only that product category. The amendments will enhance this separation of products by allowing the clearing house to use the recovery tools separately for each of the F&O and FX product categories. As a result, an extreme loss in one such product category can be addressed by those tools, without adversely affecting clearing operations in another product

¹¹ Consistent with the existing default management waterfall, resources of the defaulting clearing member and certain resources provided by ICE Clear Europe itself would be used prior to the use of guaranty fund contributions of non-defaulting clearing members as described herein.

category. In an extreme situation, even if the clearing house has to implement mark-to-market margin haircutting or termination for one such product category, that will not in itself require termination of the other category. Although segregation of the different product categories in some sense may limit the aggregate resources that could be used to cover a default, it will protect the market, and market participants, in each category from events outside that market. ICE Clear Europe believes that preventing contagion of defaults in this way will further the operation of the clearing system more generally. Such separation is particularly important for market participants that may participate in one product category, but not others.

Use of Recovery Tools

- The recovery and wind-down tools set forth in the proposed rules are expected to be used only in extreme default scenarios where the clearing house has exhausted the margin and guaranty fund resources provided by the defaulter and has used guaranty fund contributions provided by non-defaulting clearing members (or might reasonably expect such contributions to be used). Default scenarios, especially such extreme default scenarios, vary, and as a result the proposed rules have been designed to provide the clearing house with flexibility as to how, whether and the extent to which the additional default tools are implemented in a particular case. However, where ICE Clear Europe has discretion as to implementing such measures, such as mark-to-market margin haircutting or termination, ICE Clear Europe expects that it would make such a decision in accordance with its default management procedures and governance process more generally. This would include, where practicable under the circumstances, consultation of clearing members through the relevant product risk committee.

As noted above, these new resolution and recovery tools will not apply to CDS contracts. The proposed Rule amendments are described in detail as follows.

In Part 1 of the Rules, various conforming changes have been made to definitions, including the definitions of “FX Default Amount”, “Termination Close-Out Deadline Date”, “Termination Close-Out Time”, “Termination Date” and “Termination Notice Time”. Rule 105(c) (“Termination”) has been revised to conform to new termination provisions in part 9 of the Rules and to clarify the use of the term “Termination Notice Time” in connection with a termination of clearing house services in

connection with F&O and FX products. A new subsection (f) has been added to Rule 110 which permits ICE Clear Europe to delay making outgoing mark-to-market margin payments for F&O and FX products on an intra-day basis in certain circumstances where a clearing member has failed to make a mark-to-market margin payment to the clearing house on such day.

In Rule 209 (“Termination of clearing membership”), certain provisions addressing the termination of clearing membership and a clearing house default and the consequences thereof have been moved to Rules 912 and Rule 918, as discussed below, with conforming changes being made to the remainder of Rule 209. (These amendments will not apply to CDS Clearing Members. Existing Rules 209 and 912 will continue to apply to CDS Clearing Members.)¹² In Rule 301(f) certain cross-references have been corrected. Various conforming and non-substantive changes are made in Part 4 of the Rules.

Part 9 of the Rules has been revised to incorporate the new recovery and wind-down provisions discussed above. In addition, several provisions that were previously in other parts of the Rules have been moved into Part 9 to consolidate the relevant provisions. Conforming and cross-reference changes have also been made throughout Part 9.

The former Rule 1103 (“Application of Assets upon Event of Default”) has been moved to Rule 908. As moved, relative to former Rule 1103, Rule 908 also contains various conforming changes, corrections to cross-references and non-substantive drafting improvements and clarifications to terms used, including to promote consistency across the rulebook, such as to change references to “any loss or shortfall” to “any shortfall, loss or liability” in relevant provisions.¹³ In Rule 908(e), which addresses the calculation of a separate default amount for each product category in the case of a defaulting clearing member that cleared in multiple product categories, a reference in clause (iv) to guaranty fund

contributions has been moved, and new clause (v) has been added, to clarify the allocation, for purposes of determining the default amounts, of the defaulter’s guaranty fund contributions across the product categories in which the defaulter acted, consistent with the other provisions of Rule 908. (A conforming change is also made in Rule 908(e)(vi) to clarify that the allocation of guaranty fund contributions, which is addressed in new clause (e)(v), is not addressed in clause (vi).) With respect to the F&O and FX product categories, Rule 908(g) also removes a timing limitation on the use of a defaulter’s guaranty fund contributions from one product category to cover its losses from another product category. In the proviso to clause (v) of Rule 908(g), conforming references to relevant defined terms have been added and a cross-reference in subclause (2) of the prior provision in former Rule 1103 has been corrected.¹⁴ In Rule 908(g)(vii), additional clarifying language has been included that states explicitly the extent to which assessment contributions in each product category may be used, consistent with the use of guaranty fund contributions under other clauses of Rule 908(g) and with the purposes for which (and amounts in which) assessments may be called under Rules 909–911. New Rule 908(i) provides that with respect to the F&O and FX product categories, if a non-defaulting clearing member fails to participate in a default auction or does not comply with its obligations under any such auction, its guaranty fund contributions will be applied prior to the guaranty fund contributions of other non-defaulting clearing members. Rule 908(i) also imposes the default auction priority for the use of guaranty fund contributions and any assessment contributions in the case of default auctions in the F&O and FX product categories, as discussed above.

Former Rules 1105 (“Powers of Assessment: Energy”), 1106 (“Powers of Assessment: CDS”) and 1107 (“Powers of Assessment: FX”) have been moved to new Rules 909, 910 and 911, respectively. In addition to certain conforming changes, new Rules 909 (for F&O) and 911 (for FX) have been revised (i) to provide that the clearing house may call for assessments where it determines that a shortfall in relevant resources either has arisen or is likely to arise, (ii) to clarify the existing per

¹² Pursuant to a telephone conversation among Geoffrey Goldman, Shearman & Sterling LLP; Gena Lai, Senior Special Counsel, SEC; and Justin Byrne, Attorney-Advisor, SEC on January 30, 2014, ICE Clear Europe notes that these Continuing CDS Rule Provisions, which continue to be in effect with respect to the CDS Contract Category, will be available on ICE Clear Europe’s Web site at <https://www.theice.com/Rulebook.shtml?clearEuropeRulebook=>.

¹³ Commission staff made clarifying edits to this sentence pursuant to a telephone conversation on January 30, 2014, among Geoffrey Goldman, Shearman & Sterling LLP; Gena Lai, Senior Special Counsel, SEC; and Justin Byrne, Attorney-Advisor, SEC.

¹⁴ Commission staff made clarifying edits to this sentence pursuant to a telephone conversation on January 30, 2014, among Geoffrey Goldman, Shearman & Sterling LLP; Gena Lai, Senior Special Counsel, SEC; and Justin Byrne, Attorney-Advisor, SEC.

default maximum assessment liability in each product category, as described above, and (iii) to provide that assessments called in excess of the amounts actually required will be treated as surplus collateral provided by the relevant clearing member until such time as such amount is required or the clearing house determines that it will not be required. In Rule 910, certain cross-references have been revised as a result of the movement of other provisions in the proposed rules. In addition, relative to former Rule 1106, Rule 910(a) contains certain non-substantive drafting improvements and clarifications to terms used across the rulebook, including to promote consistency across the rulebook, such as to change references to “any loss or shortfall” to “any shortfall, loss or liability” in relevant provisions.¹⁵ Rule 910(a) has also been revised to correct cross-references to new Rule 908(g) and remove certain unnecessary cross-references. Rule 910(b) removes certain text concerning the calculation of the CDS Assessment Amount that is unnecessary in light of the provisions of Rule 910(a) and further removes a superfluous reference to the Clearing House CDS Contribution.

Certain provisions addressing the termination of transactions in the event of an ICE Clear Europe insolvency or other default (formerly in Rule 209) have been moved to new Rule 912, with certain conforming changes and a clarification relating to a default that affects some but not all product categories. Such changes will not apply to CDS Clearing Members (regardless of whether they are also F&O Clearing Members or FX Clearing Members), and existing Rules 209 and 912 will continue to apply to CDS Clearing Members.¹⁶

New Rules 913 to 918 will not apply to the CDS product category.

New Rule 913 contains various new definitions used in the new recovery and wind-down provisions, including the haircutting provisions in Rule 914, the termination provisions of Rule 916, the cooling-off period provisions of Rule 917 and the clearing member withdrawal provisions of Rule 918.

New Rule 914 establishes the haircutting mechanism. The core of Rule 914 is the procedure for “haircutting” the mark-to-market margin and certain other contractual

payments owed by the clearing house to clearing members for a contract category, to the extent of a shortfall in available resources for that contract category, when ICE Clear Europe issues a “Haircutting Determination”. Such determination may be made, once certain conditions are satisfied:

(i) one or more clearing member defaults have occurred but ICE Clear Europe has not yet declared and either paid or submitted a claim in respect of all net sums due to or from the defaulter in respect of its proprietary account and all of its customer accounts; and (ii) ICE Clear Europe determines, based on one of several relevant tests, that its available resources are insufficient to pay all relevant outward mark-to-market margin and contractual payments and/or its available resources would be insufficient to cover the losses or shortfalls to the clearing house from close-out of the defaulter’s positions.

A Haircutting Determination will not be made if clearing in the relevant contracts is being terminated under Rule 916 or a clearing house insolvency or failure to pay has occurred. In the event of a Haircutting Determination, on day during the “loss distribution period” specified by the clearing house, the net amount owed on such day to each clearing member that is deemed to be a “cash gainer” in respect of an account class (i.e. a member that would otherwise be entitled to receive mark-to-market margin or other payments in respect of such account class) will be subject to a percentage haircut. Corresponding adjustments are also made for “cash losers” (i.e., those who owe the clearing house) to the extent amounts previously owed to them have been haircut.

New Rule 916 permits the clearing house to terminate a set of contracts where (i) its obligations to meet mark-to-market margin payments or the cost of auctioning off the positions of a defaulting clearing member will not be satisfied through the haircutting procedure in Rule 914, (ii) following the declaration of all net sums in respect of a particular default, the clearing house may be rendered insolvent, (iii) there has been a failed auction in a relevant contract category, or (iv) the clearing house determines that because of the termination of clearing members, there will be insufficient clearing members for clearing of the relevant contract category to remain viable. Rule 916 provides a procedure for determining the termination price for all contracts in a particular set. To the extent the termination value payable by the clearing house for the terminated contract set exceeds available resources for that contract set, the clearing house’s

obligations will be limited to the available resources. This will permit clearing activity to continue in other contract categories.

Rule 917 implements the “cooling-off period” concept discussed above. A cooling-off period is triggered by certain defaults that result in a guaranty fund assessment or a sequential guaranty fund depletion. During a cooling-off period, the assessment liability of a clearing member is capped with respect to all defaults occurring during the period. In addition, the guaranty fund is not recalculated or rebalanced during the cooling-off period, and replenishment of guaranty fund contributions for continuing clearing members is not required until the end of the cooling-off period.

Rule 918 implements the revised procedures discussed above for clearing members (other than CDS clearing members) that wish to terminate their clearing membership (including during a cooling-off period). Clearing members that have submitted a termination notice are required to close out their open contracts by a specified deadline. Rule 918 also provides for the calculation and payment of a net amount to or from the terminating clearing member for each of its accounts in respect of the close out of all of its positions. As discussed above, terminating clearing members are not responsible for additional guaranty fund contributions for defaults occurring after the effective termination date.

Various conforming changes are also made to the Rules, including in Part 11 of the Rules. Rule 1102(g), addressing the return of the guaranty fund, has been revised to provide for the return of F&O and FX guaranty fund contributions consistent with the new termination provisions in Rule 918. The amendments do not affect the return of CDS guaranty fund contributions, to which the existing rules continue to apply. Revised Rule 1102(i) also revises the timing of replenishment of guaranty fund contributions for the F&O and FX product categories, but not for the CDS product category. Certain conforming changes to cross-references in revised Rule 1102(i) are also made. Former Rule 1104, which addresses use of guaranty fund contributions, has been redesignated as Rule 1103, and various conforming changes to cross-references have been made. Rule 1204(j) has been revised to correct a cross-reference to Rule 1204(a). Other conforming changes have been made in parts 12 and 15 of the Rules. In part 17, Rule 1710 has been removed as it has been replaced by Rule 918.

¹⁵ Commission staff made clarifying edits to this sentence pursuant to a telephone conversation on January 30, 2014, among Geoffrey Goldman, Shearman & Sterling LLP; Gena Lai, Senior Special Counsel, SEC; and Justin Byrne, Attorney-Advisor, SEC.

¹⁶ See *supra* note 12.

2. Statutory Basis

ICE Clear Europe believes that the proposed rule changes are consistent with the requirements of Section 17A of the Act¹⁷ and the regulations thereunder applicable to it, including the standards under Rule 17Ad-22.¹⁸ Section 17A(b)(3)(F) of the Act¹⁹ 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. ICE Clear Europe believes that the proposed rule changes are consistent with the Act and the regulations thereunder applicable to ICE Clear Europe, in particular, Section 17(A)(b)(3)(F)²⁰, because ICE Clear Europe believes that the new recovery and wind-down rules will facilitate the prompt and accurate settlement of derivatives and contribute to the safeguarding of securities and funds associated with derivative transactions which are in the custody or control of ICE Clear Europe or for which it is responsible, as set forth herein. In addition, except for certain conforming and clarifying changes described above, the proposed amendments do not affect security-based swaps (i.e., the CDS product category), which will continue to be subject to the existing rules.²¹

ICE Clear Europe has developed the new recovery and wind-down rules in response to issues raised by the Bank of England as overseer of its payment arrangements and following extensive consultation with the Bank of England and clearing members. Recovery rules are required to be in place by February 2014 under recent amendments to the clearing house recognition requirements under applicable English law. Recovery and wind-down rules are also contemplated under the PFMI and accordingly are necessary to maintain QCCP status.

Consistent with these legal and regulatory requirements, the proposed rules are designed to address extreme loss scenarios following one or more clearing member defaults, and are not generally intended to affect the ordinary course operation of the clearing house or its existing protections for the securities and funds in its custody or

control or for which it is responsible. ICE Clear Europe believes that the proposed rule changes will enhance the stability of ICE Clear Europe following the default of one or more clearing members and reduce the risk of ICE Clear Europe failure or insolvency. The revisions will in particular facilitate the orderly wind-down or termination of contracts affected by a default. Further, ICE Clear Europe, as a clearing house for multiple products, also believes that the changes will permit the clearing house to address a default in one market while minimizing the effect on other categories of contracts, for which clearing should be able to continue. This will reduce the risk of a systemic problem in one cleared market causing contagion or creating risks for other cleared markets. The amendments also provide clearer limitations on the liability of clearing members for assessments following defaults, and a clearer procedure for termination of clearing member status. Taken together, the amendments will thus promote the prompt and accurate clearance and settlement of contracts cleared by ICE Clear Europe, consistent with the requirements of Section 17A(b)(3)(F).²²

As discussed above, most of the proposed amendments do not affect the clearing of security-based swaps (i.e., CDS). These changes, which principally include the implementation of new Rules 912-918, as well as revisions to Rules 209, 909, 911, 1102 and 1103 and related definitions and conforming changes, primarily affect ICE Clear Europe's clearing operations with respect to products that are not securities (specifically, the F&O and FX product categories) and do not significantly affect the securities clearing operations of ICE Clear Europe (i.e., the CDS product category) or the rights or obligations of ICE Clear Europe and its clearing members with respect to securities clearing activities.

Certain other rule changes discussed above (which are applicable to all product categories or specific to the CDS product category) involve the movement and/or reorganization of existing provisions, as well as conforming changes, clarifications and non-substantive drafting improvements. These include the changes described above that relate to the CDS product category in Rules 908 and 910, as well as certain other conforming changes in Part 11 of the Rules. These proposed amendments do not affect the substance of the existing requirements for the clearing of CDS or the rights and obligations of CDS Clearing Members

with respect to that product category. As a result, in ICE Clear Europe's view, they do not adversely affect the safeguarding of securities or funds relating to CDS in the custody or control of ICE Clear Europe or for which it is responsible, and do not significantly affect the rights or obligations of ICE Clear Europe or persons using its clearing service with respect to the CDS product category. As such, ICE Clear Europe believes the proposed rule changes are consistent with the requirements of Section 17(A)(b)(3)(F) of the Act²³ and the rules thereunder, as well as filing requirements under Section 19(b)(3)(A)(iii) of the Act²⁴ and Rules 19b-4(f)(4)(i) and (ii) thereunder.²⁵

B. Self-Regulatory Organization's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule changes would have any material impact, or impose any material burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule changes either (i) affect only the F&O and FX product categories or (ii) involve conforming or clarifying changes of general application (including the CDS product category) that will not significantly affect the rights or obligations of the Clearing House or clearing members.²⁶ Accordingly, in either case, the proposed amendments should not have any effect on the competition in the CDS market. Moreover, any effects on competition would not be on securities and therefore ICE Clear Europe does not believe that the proposed rule changes would have any material impact or impose any material burden on competition that is inappropriate in furtherance of the purposes of the Act.

As noted above, most of the proposed changes are intended to address extreme loss scenarios with respect to the FX and F&O product categories, and not affect the ordinary securities clearing operation of the clearing house. As such, ICE Clear Europe does not believe the changes will reduce access by CDS clearing members to the clearing house.

²³ 15 U.S.C. 78q-1(b)(3)(F).

²⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁵ 17 CFR 240.19b-4(f)(4)(i) and (ii). Commission staff made clarifying edits to this sentence pursuant to a telephone conversation on January 30, 2014, among Geoffrey Goldman, Shearman & Sterling LLP; Gena Lai, Senior Special Counsel, SEC; and Justin Byrne, Attorney-Advisor, SEC.

²⁶ Commission staff made clarifying edits to this sentence pursuant to a telephone conversation on January 30, 2014, among Geoffrey Goldman, Shearman & Sterling LLP; Gena Lai, Senior Special Counsel, SEC; and Justin Byrne, Attorney-Advisor, SEC.

¹⁷ 15 U.S.C. 78q-1.

¹⁸ 17 CFR 240.17Ad-22.

¹⁹ 15 U.S.C. 78q-1(b)(3)(F).

²⁰ 15 U.S.C. 78q-1(b)(3)(F).

²¹ Commission staff made clarifying edits to this sentence pursuant to a telephone conversation on January 30, 2014, among Geoffrey Goldman, Shearman & Sterling LLP; Gena Lai, Senior Special Counsel, SEC; and Justin Byrne, Attorney-Advisor, SEC.

²² 15 U.S.C. 78q-1(b)(3)(F).

ICE Clear Europe also does not believe the rule amendments will adversely affect the ability of market participants to continue to clear securities transactions or otherwise limit market participants' choices for clearing securities transactions. ICE Clear Europe expects that, in light of the PFMI and applicable regulatory requirements in the U.S. and EU, other clearing organizations will similarly need to develop recovery and wind-down plans. The rule amendments are intended to provide a stronger framework for the clearing house to deal with extreme loss events in the FX and F&O product categories. By helping segregate losses in one of these product categories from another, and from the CDS product category, the amendments are designed to keep unaffected CDS clearing services in operation despite losses in another area. This should generally enhance the ability of market participants to continue to clear CDS products, and reduce the risk of failure of the clearing house (which would generally be expected to have an adverse impact on competition). To the extent market participants have greater certainty as to how extreme loss events in the F&O and FX categories would be handled by the clearing house, they may have greater confidence in clearing generally (including for CDS), which will also tend to enhance the stability and strength of the market for cleared securities products, consistent with the goals of the Act.

With respect to those of the proposed amendments that do affect the CDS product category or CDS clearing members generally, such changes are in the nature of clarifying and conforming amendments that will not significantly affect the substantive rights or obligations of the Clearing House or clearing members in respect of CDS. As a result, ICE Clear Europe does not believe such changes would impose any burden on competition.

For the foregoing reasons, ICE Clear Europe does not believe that the proposed amendments will impose any burden on competition not necessary or appropriate in furtherance of the purpose of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, CDS Clearing Members or Others

Written comments relating to the rule changes have been solicited from clearing members through a public consultation and as part of the clearing house governance process. ICE Clear Europe received various comments

during this consultation and took such comments into account in making further modifications to the proposed rules. The rule changes also reflect discussions with the Bank of England. ICE Clear Europe will notify the Commission of any additional written comments received by ICE Clear Europe.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii)²⁷ of the Act, and Rules 19b-4(f)(4)(i) and (ii)²⁸ thereunder. 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.

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-ICEEU-2014-03 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-ICEEU-2014-03. 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 Europe and on ICE Clear Europe'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-ICEEU-2014-03 and should be submitted on or before February 27, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2014-02496 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71181A; File No. SR-Topaz-2013-19]

Self-Regulatory Organizations; Topaz Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To More Specifically Address the Number and Size of Contra-Parties to a Qualified Contingent Cross Order; Correction

December 24, 2013.

AGENCY: Securities and Exchange Commission.

ACTION: Notice; correction.

SUMMARY: The Securities and Exchange Commission published a document in the **Federal Register** of December 31, 2013 concerning a Notice of Filing and Immediate Effectiveness of Proposed Rule Change to More Specifically Address the Number and Size of Contra-parties to a Qualified Contingent Cross Order. The document was dated incorrectly.

FOR FURTHER INFORMATION CONTACT: Jennifer Colihan, Division of Trading and Markets, Securities and Exchange

²⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁸ 17 CFR 240.19b-4(f)(4)(i) and (ii).

²⁹ 17 CFR 200.30-3(a)(12).

Commission, 100 F Street NE.,
Washington, DC 20549, (202) 551-5779.

Correction

In the **Federal Register** of December 31, 2013, in FR Doc. 2013-31227, on page 79718, in the 49th line of the third column, the date is corrected to read as noted above.

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2014-02561 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71456; File No. SR-NYSEArca-2013-116]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Relating to Listing and Trading of Shares of AdvisorShares International Gold ETF, AdvisorShares Gartman Gold/Yen ETF, AdvisorShares Gartman Gold/British Pound ETF, and AdvisorShares Gartman Gold/Euro ETF Under NYSE Arca Equities Rule 8.600

January 31, 2014.

I. Introduction

On November 29, 2013, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the AdvisorShares International Gold ETF (“International Gold ETF”); AdvisorShares Gartman Gold/Yen ETF (“Gold/Yen ETF”); AdvisorShares Gartman Gold/British Pound ETF (“Gold/British Pound ETF”); and AdvisorShares Gartman Gold/Euro ETF (“Gold/Euro ETF,” and, together with the International Gold ETF, Gold/Yen ETF, and Gold/British Pound ETF, collectively, “Funds”)³ of the AdvisorShares Trust (“Trust”). The proposed rule change was published for comment in the **Federal Register** on December 19, 2013.⁴ The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Gold/Yen ETF, Gold/British Pound ETF, and Gold/Euro ETF are also referred to collectively herein as the “Gartman Funds.”

⁴ See Securities Exchange Act Release No. 71076 (Dec. 13, 2013), 78 FR 76867 (“Notice”).

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade Shares of the Funds under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares. The Shares will be offered by the Trust,⁵ a Delaware statutory trust that is registered with the Commission as an open-end management investment company. The investment adviser to the Funds will be AdvisorShares Investments, LLC (“Adviser”). Treesdale Partners, LLC (“Sub-Adviser”) will be the Funds’ sub-adviser. Foreside Fund Services, LLC will be the principal underwriter and distributor of the Funds’ Shares. The Bank of New York Mellon will serve as the administrator, custodian, transfer agent, and accounting agent for the Funds. The Exchange represents that neither the Adviser nor the Sub-Adviser is a broker-dealer or is affiliated with a broker-dealer.⁶

The Exchange has made the following representations and statements in describing the Funds and their respective investment strategies, including other permitted portfolio holdings and investment restrictions.⁷

International Gold ETF—Principal Investments

The International Gold ETF will be considered a fund of funds that, under normal circumstances,⁸ will seek to

⁵ The Trust is registered under the Investment Company Act of 1940 (“1940 Act”). On March 29, 2013, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 (“Securities Act”) and under the 1940 Act relating to the Fund (“Registration Statement”). In addition, the Exchange states that the Trust has obtained certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677).

⁶ See Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange represents that, in the event that (a) the Adviser or Sub-Adviser becomes a registered broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer, or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate, as the case may be, regarding access to information concerning the composition of, or changes to, a Fund’s portfolio and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding a Fund’s portfolio.

⁷ The Commission notes that additional information regarding the Trust, the Funds, and the Shares, including investment strategies, risks, net asset value (“NAV”) calculation, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. See Notice and Registration Statement, *supra* notes 4 and 5, respectively.

⁸ The term “under normal circumstances” includes, but is not limited to, the absence of

achieve its investment objective by primarily taking long positions in other exchange-traded funds (“ETFs”) that offer diversified exposure to the international gold market.⁹ The Sub-Adviser will seek, as appropriate, to maintain a balanced allocation of the International Gold ETF’s assets in ETFs in which it invests, which ETFs may be both affiliated and unaffiliated. The affiliated ETFs are the Gartman Funds. In addition, the Fund may seek to invest in long positions in exchange-traded notes (“ETNs”),¹⁰ closed-end funds,¹¹ and other exchange-traded products (“ETPs,” and, together with ETFs, ETNs, and closed-end funds, collectively, “Underlying ETPs”)¹² that offer diversified exposure to the international gold market. Under normal circumstances, the Fund will invest at least 80% of its total assets in those Underlying ETPs.

The Sub-Adviser’s gold investment strategy will be an active investment strategy that expresses a long position in gold, but diversifies the currencies in which the purchase is financed. The International Gold ETF will seek to provide an accessible method by which

adverse market, economic, political, or other conditions, including extreme volatility or trading halts in the equities markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

⁹ For purposes of this filing, ETFs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depository Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETFs in which a Fund will invest all will be listed and traded on national securities exchanges. The Funds will invest in the securities of ETFs registered under the 1940 Act consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation, or order of the Commission or interpretation thereof. The Funds will only make these investments in conformity with the requirements of Regulation M of the Internal Revenue Code of 1986, as amended (“Internal Revenue Code”).

¹⁰ ETNs are securities listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(6). ETNs are senior, unsecured unsubordinated debt securities issued by an underwriting bank that are designed to provide returns that are linked to a particular benchmark less investor fees. ETNs have a maturity date and, generally, are backed only by the creditworthiness of the issuer.

¹¹ A closed-end fund is a pooled investment vehicle that is registered under the 1940 Act and whose shares are listed and traded on U.S. national securities exchanges.

¹² For purposes of this filing, Underlying ETPs include Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); and Trust Units (as described in NYSE Arca Equities Rule 8.500).

an investor is able to express a view on the value of gold versus any one of a number of liquid currencies, including the U.S. dollar, the Japanese Yen, the European Euro, and the British Pound.

The Sub-Adviser, in determining the International Gold ETF's investment allocation, will follow a proprietary investment process to assess the relative value of gold versus each of the currencies represented in the Underlying ETPs. In general, if the Sub-Adviser determines that the price of gold versus a particular currency offers an expected return that exceeds that offered by gold versus other currencies, the Underlying ETP that offers that exposure, all things being equal, will receive a larger allocation of the International Gold ETF's assets for investment. While the Sub-Adviser will actively determine the allocation of the International Gold ETF's investments among Underlying ETPs, the value of these investments may change on any day due to market fluctuations and thus alter the allocation.

The Sub-Adviser will also consider the relative price volatility of gold versus each of the currencies represented within an Underlying ETP in making allocation decisions. In general, the higher the volatility of the price of gold versus a particular currency (defined as the standard deviation of historical daily returns), the lower the allocation of capital to that Underlying ETP.

In managing the International Gold ETF, the Sub-Adviser will consider the asset size of the International Gold ETF, as well as liquidity conditions in both the Gartman Funds and Underlying ETP markets, in an effort to ensure best execution and minimize potential market disruption.

Gold/Yen ETF—Principal Investments

The Gold/Yen ETF will seek to provide positive returns by utilizing the Japanese Yen to invest its assets in the gold market. In seeking to achieve the Gold/Yen ETF's investment objective, the Sub-Adviser will invest the Gold/Yen ETF's assets in instruments that provide exposure to the international gold market utilizing the Japanese Yen. This strategy will provide an investment vehicle for investors who believe that the value of the Gold/Yen ETF's investments in gold purchased in Japanese Yen will appreciate. Accordingly, in managing the Gold/Yen ETF, the Sub-Adviser will use the Japanese Yen, obtained synthetically through the sale of either exchange-traded currency futures or over-the-counter ("OTC") foreign exchange forward contracts, as the currency in

which purchases of gold are made. This "Gold Financed in Yen" investment strategy will enable the Sub-Adviser to provide an alternate gold investment vehicle that seeks to reduce U.S. dollar exposure.

The Gold/Yen ETF will seek to achieve its investment objective by investing directly (and not through the Gold/Yen ETF Subsidiary, as described below), under normal circumstances, at least 75% of its assets in cash and cash equivalents, plus "currency-linked derivatives" (consisting of exchange-traded Japanese Yen futures traded on the Chicago Mercantile Exchange ("CME"), Japanese Yen forward contracts, and currency (and not gold) swaps), with cash and cash equivalents comprising the majority of the Gold/Yen ETF's assets. Up to 25% of the Gold/Yen ETF's total assets will be invested in the Gold/Yen ETF Subsidiary, as described below. The distribution of the Gold/Yen ETF's investments in these currency-linked derivatives will be at the discretion of the Sub-Adviser. All of the Gold/Yen ETF's investments in these currency-linked derivatives will be backed by collateral of the Gold/Yen ETF's assets, as required, and will be diversified across multiple (generally more than 5) counterparties. In addition, these currency-linked derivatives will be subject to the limits on leverage imposed by the 1940 Act. Through its investment in a wholly-owned and controlled subsidiary organized outside the United States in the Cayman Islands ("Gold/Yen ETF Subsidiary"), the Gold/Yen ETF will obtain long exposure to the international gold market. Section 18(f) of the 1940 Act and related Commission guidance limit the amount of leverage an investment company, and, in this case, the Gold/Yen ETF Subsidiary, can obtain.

The Gold/Yen ETF may also invest in Underlying ETPs. The Sub-Adviser will rebalance its positions in the Gold/Yen ETF and in the Gold/Yen ETF Subsidiary periodically as the value of gold relative to the value of the Japanese Yen fluctuates in international markets.

The Gold/Yen ETF may invest directly and indirectly in foreign currencies. The Gold/Yen ETF may conduct foreign currency transactions on a spot (*i.e.*, cash) or forward basis (*i.e.*, by entering into forward contracts to purchase or sell foreign currencies). Currency transactions made on a spot basis are for cash at the spot rate prevailing in the currency exchange market for buying or selling currency. Forward contracts are customized transactions that require a specific amount of a currency to be delivered at a specific exchange rate on a specific

date or range of dates in the future and can have substantial price volatility. Forward contracts are generally traded in an interbank market directly between currency traders (usually large commercial banks) and their customers.

The Gold/Yen ETF, and certain Underlying ETPs in which the Gold/Yen ETF invests, may enter into swap agreements, including, but not limited to, total return swaps and index swaps. The Gold/Yen ETF may utilize swap agreements in an attempt to gain exposure to the asset in a market without actually purchasing the asset or to hedge a position. Any swaps used will be cash collateralized as required.¹³

On a daily basis, the Sub-Adviser will evaluate the gold market to determine whether the exchange-traded markets or the OTC markets provide the Gold/Yen ETF with optimal investment opportunities. As part of its daily evaluation, the Sub-Adviser will utilize information from The Gartman Letter, a daily commentary on the global capital markets, including political, economic, and technical trends from both long-term and short-term perspectives.¹⁴ The Sub-Adviser will carefully consider the liquidity of the investment, the cost of executing the purchase or sale, and the creditworthiness of the counterparty. Similarly, the Sub-Adviser will evaluate the market for the Japanese Yen to achieve the optimal duration at which

¹³ Each of the Gartman Funds will utilize cleared swaps if available and to the extent practicable and not enter into any swap agreement unless the Adviser believes that the other party to the transaction is creditworthy. The Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Sub-Adviser's credit analysts will evaluate each approved counterparty using various methods of analysis, including company visits, earnings updates, the broker-dealer's reputation, past experience with the broker-dealer, market levels for the counterparty's debt and equity, the counterparty's liquidity, and its share of market participation.

¹⁴ The Adviser has contracted with Gartman Capital Management, L.C. to provide the investment objectives of the Gartman Funds, to provide data to the Adviser and to permit the use of the Gartman name. Gartman Capital Management, L.C. is an affiliate of The Gartman Letter. The Gartman Letter is written by Dennis Gartman. For the services and license provided to the Gartman Funds, the Adviser will pay Gartman Capital Management, L.C. a fee from its legitimate profits and resources. Gartman Capital Management, L.C. and The Gartman Letter, L.C. will have no involvement in the day-to-day management of the Gartman Funds. Gartman Capital Management, L.C. is neither a broker-dealer nor affiliated with a broker-dealer. In the event Gartman Capital Management, L.C. becomes a broker-dealer, or becomes newly affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition or changes to the applicable portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the applicable portfolio.

to finance gold purchases for the Gold/Yen ETF. The Sub-Adviser will not participate in transactions in Japanese Yen where the maximum duration exceeds ninety days.

In managing the Gold/Yen ETF, the Sub-Adviser will consider the asset size of the Gold/Yen ETF, as well as liquidity conditions in both the gold and currency markets, in an effort to ensure best execution and minimize potential market disruption.

As discussed above, the Sub-Adviser will seek to gain additional exposure to gold through its investment in the Gold/Yen ETF Subsidiary. The Gold/Yen ETF's investment in the Gold/Yen ETF Subsidiary may not exceed 25% of the Gold/Yen ETF's total assets at each quarter end of the Gold/Yen ETF's fiscal year. The purpose of the Gold/Yen ETF's investment in the Gold/Yen ETF Subsidiary will be to provide the Gold/Yen ETF with additional exposure to commodity returns within the limits of the federal tax requirements applicable to investment companies, such as the Gold/Yen ETF. The Gold/Yen ETF Subsidiary's investments in "commodity-linked derivative instruments" (*i.e.*, futures, forwards, and swaps based on the price of gold) will be subject to limits on leverage imposed by the 1940 Act. Section 18(f) of the 1940 Act and related Commission guidance limit the amount of leverage an investment company, and in this case the Gold/Yen ETF Subsidiary, can obtain. Except as noted, references to the investment strategies and risks of the Gold/Yen ETF include the investment strategies and risks of the Gold/Yen ETF Subsidiary. The Gold/Yen ETF Subsidiary's shares will only be offered to the Gold/Yen ETF, and the Gold/Yen ETF will not sell any shares of the Gold/Yen ETF Subsidiary to any other investors.

Gold/British Pound ETF—Principal Investments

The Gold/British Pound ETF will seek to provide positive returns by utilizing the British Pound (GBP) to invest its assets in the gold market. In seeking to achieve the Gold/British Pound ETF's investment objective, the Sub-Adviser will invest the Gold/British Pound ETF's assets in instruments that provide exposure to the international gold market utilizing the British Pound. This strategy will provide an investment vehicle for investors who believe that the value of the Gold/British Pound ETF's investments in gold purchased in British Pounds will appreciate. Accordingly, in managing the Gold/British Pound ETF, the Sub-Adviser will use the British Pound, obtained

synthetically through the sale of either exchange-traded currency futures or OTC foreign exchange forward contracts, as the currency in which purchases of gold are made. This "Gold Financed in British Pounds" investment strategy will enable the Sub-Adviser to provide an alternate gold investment vehicle that seeks to reduce U.S. dollar exposure.

The Gold/British Pound ETF will seek to achieve its investment objective by investing directly (and not through the Gold/British Pound Subsidiary, as described below), under normal circumstances, at least 75% of its assets in cash and cash equivalents, plus currency-linked derivatives (consisting of exchange-traded British Pound futures principally traded on the CME, British Pound forward contracts, and currency (and not gold) swaps), with cash and cash equivalents comprising the majority of the Gold/British Pound ETF's assets. Up to 25% of the Gold/British Pound ETF's total assets will be invested in the Gold/British Pound ETF Subsidiary, as described below. The distribution of the Gold/British Pound ETF's investments in these currency-linked derivatives will be at the discretion of the Funds' Sub-Adviser. All of the Gold/British Pound ETF's investments in these currency-linked derivatives will be backed by collateral of the Gold/British Pound ETF's assets, as required, and will be diversified across multiple (generally more than 5) counterparties. In addition, these currency-linked derivatives will be subject to the limits on leverage imposed by the 1940 Act. Through its investment in a wholly-owned and controlled subsidiary organized outside the United States in the Cayman Islands ("Gold/British Pound ETF Subsidiary"), the Gold/British Pound ETF will obtain long exposure to the international gold market. Section 18(f) of the 1940 Act and related Commission guidance limit the amount of leverage an investment company, and in this case, the Gold/British Pound ETF Subsidiary, can obtain.

The Gold/British Pound ETF may also invest in Underlying ETPs. The Sub-Adviser will rebalance its positions in the Gold/British Pound ETF and in the Gold/British Pound ETF Subsidiary periodically as the value of gold relative to the value of the British Pound fluctuates in international markets.

The Gold/British Pound ETF may invest directly, or indirectly, in foreign currencies. The Gold/British Pound ETF may conduct foreign currency transactions on a spot (*i.e.*, cash) or forward basis (*i.e.*, by entering into forward contracts to purchase or sell

foreign currencies). Currency transactions made on a spot basis are for cash at the spot rate prevailing in the currency exchange market for buying or selling currency. Forward contracts are customized transactions that require a specific amount of a currency to be delivered at a specific exchange rate on a specific date or range of dates in the future and can have substantial price volatility. Forward contracts are generally traded in an interbank market directly between currency traders (usually large commercial banks) and their customers.

The Gold/British Pound ETF, and certain Underlying ETPs in which the Gold/British Pound ETF invests, may enter into swap agreements, including, but not limited to, total return and index swaps. The Gold/British Pound ETF may utilize swap agreements in an attempt to gain exposure to an asset in a market without actually purchasing the asset or to hedge a position. Any swaps used will be cash collateralized as required.¹⁵

On a daily basis, the Sub-Adviser will evaluate the gold market to determine whether the exchange-traded markets or the OTC markets provide the Gold/British Pound ETF with optimal investment opportunities. As part of its daily evaluation, the Sub-Adviser will utilize information from The Gartman Letter, as referenced above. The Sub-Adviser will carefully consider the liquidity of the investment, the cost of executing the purchase or sale, and the creditworthiness of the counterparty. Similarly, the Sub-Adviser will evaluate the market for the British Pound to achieve the optimal duration at which to finance gold purchases for the Gold/British Pound ETF. The Sub-Adviser will not participate in transactions in the British Pound where the maximum duration exceeds ninety days.

In managing the Gold/British Pound ETF, the Sub-Adviser will consider the asset size of the Gold/British Pound ETF, as well as liquidity conditions in both the gold and currency markets, in an effort to ensure best execution and minimize potential market disruption.

As discussed above, the Sub-Adviser will seek to gain additional exposure to gold through its investment in the Gold/British Pound ETF Subsidiary. The Gold/British Pound ETF's investment in the Gold/British Pound ETF Subsidiary may not exceed 25% of the Gold/British Pound ETF's total assets at each quarter end of the Gold/British Pound ETF's fiscal year. The purpose of the Gold/British Pound ETF's investment in the Gold/British Pound ETF Subsidiary will

¹⁵ See *supra* note 13.

be to provide the Gold/British Pound ETF with additional exposure to commodity returns within the limits of the federal tax requirements applicable to investment companies, such as the Gold/British Pound ETF. The Gold/British Pound ETF Subsidiary's investments in commodity-linked derivative instruments (*i.e.*, futures, forwards, and swaps based on the price of gold) will be subject to limits on leverage imposed by the 1940 Act. Section 18(f) of the 1940 Act and related Commission guidance limit the amount of leverage an investment company, and in this case the Gold/British Pound ETF Subsidiary, can obtain. Except as noted, references to the investment strategies and risks of the Gold/British Pound ETF include the investment strategies and risks of the Gold/British Pound ETF Subsidiary. The Gold/British Pound ETF Subsidiary's shares will only be offered to the Gold/British Pound ETF and the Gold/British Pound ETF will not sell any shares of the Gold/British Pound ETF Subsidiary to any other investors.

Gold/Euro ETF—Principal Investments

The Gold/Euro ETF will seek to provide positive returns by utilizing the Euro to invest its assets in the gold market. In seeking to achieve the Gold/Euro ETF's investment objective, the Sub-Adviser will invest the Gold/Euro ETF's assets in instruments that provide exposure to the international gold market utilizing the Euro. This strategy provides an investment vehicle for investors who believe that the value of the Gold/Euro ETF's investments in gold purchased in Euros will appreciate.

Accordingly, in managing the Gold/Euro ETF, the Sub-Adviser will use the Euro, obtained synthetically through the sale of either exchange-traded currency futures or OTC foreign exchange forward contracts, as the currency in which purchases of gold are made. This "Gold Financed in Euro" investment strategy will enable the Sub-Adviser to provide an alternate gold investment vehicle that will seek to reduce U.S. dollar exposure.

The Gold/Euro ETF will seek to achieve its investment objective by investing directly (and not through the Gold/Euro ETF Subsidiary, as described below), under normal circumstances, at least 75% of its assets in cash and cash equivalents, plus currency-linked derivatives (consisting of exchange-traded Euro futures traded on the CME, Euro forward contracts, and currency (and not gold) swaps), with cash and cash equivalents comprising the majority of the Gold/Euro ETF's assets. Up to 25% of the Gold/Euro ETF's

assets will be invested in the Gold/Euro ETF Subsidiary, as described below. The distribution of the Gold/Euro ETF's investments in these currency-linked derivatives will be at the discretion of the Fund's Sub-Adviser. All of the Gold/Euro ETF's investments in these currency-linked derivatives will be backed by collateral of the Gold/Euro ETF's assets, as required, and will be diversified across multiple (generally more than 5) counterparties. In addition, these currency-linked derivatives will be subject to the limits on leverage imposed by the 1940 Act. Through its investment in a wholly-owned and controlled subsidiary organized outside the United States in the Cayman Islands ("Gold/Euro ETF Subsidiary"), the Gold/Euro ETF will obtain long exposure to the international gold market. The Gold/Euro ETF may also invest in Underlying ETPs. The Sub-Adviser will rebalance its positions in the Gold/Euro ETF and in the Gold/Euro ETF Subsidiary periodically as the value of gold relative to the value of the Euro fluctuates in international markets.

The Gold/Euro ETF may invest directly and indirectly in foreign currencies. The Gold/Euro ETF may conduct foreign currency transactions on a spot (*i.e.*, cash) or forward basis (*i.e.*, by entering into forward contracts to purchase or sell foreign currencies). Currency transactions made on a spot basis are for cash at the spot rate prevailing in the currency exchange market for buying or selling currency. Forward contracts are customized transactions that require a specific amount of a currency to be delivered at a specific exchange rate on a specific date or range of dates in the future and can have substantial price volatility. Forward contracts are generally traded in an interbank market directly between currency traders (usually large commercial banks) and their customers.

The Gold/Euro ETF, and certain Underlying ETPs in which the Gold/Euro ETF invests, may enter into swap agreements, including, but not limited to, total return swaps and index swaps. The Gold/Euro ETF may utilize swap agreements in an attempt to gain exposure to an asset in a market without actually purchasing the asset or to hedge a position. Any swaps used will be cash collateralized as required.¹⁶

On a daily basis, the Sub-Adviser will evaluate the gold market to determine whether the exchange-traded markets or the OTC markets provide the Gold/Euro ETF with optimal investment opportunities. As part of its daily evaluation, the Sub-Adviser will utilize

information from The Gartman Letter, as referenced above. The Sub-Adviser will carefully consider the liquidity of the investment, the cost of executing the purchase or sale, and the creditworthiness of the counterparty. Similarly, the Sub-Adviser will evaluate the market for Euros to achieve the optimal duration at which to finance gold purchases for the Gold/Euro ETF. The Sub-Adviser will not participate in transactions in the Euro where the maximum duration exceeds ninety days.

In managing the Gold/Euro ETF, the Sub-Adviser will consider the asset size of the Gold/Euro ETF, as well as liquidity conditions in both the gold and currency markets, in an effort to ensure best execution and minimize potential market disruption.

As discussed above, the Sub-Adviser seeks to gain additional exposure to gold through its investment in the Gold/Euro ETF Subsidiary. The Gold/Euro ETF's investment in the Gold/Euro ETF Subsidiary may not exceed 25% of the Gold/Euro ETF's total assets at each quarter end of the Gold/Euro ETF's fiscal year. The purpose of the Gold/Euro ETF's investment in the Gold/Euro ETF Subsidiary will be to provide the Gold/Euro ETF with additional exposure to commodity returns within the limits of the federal tax requirements applicable to investment companies, such as the Gold/Euro ETF. The Gold/Euro ETF Subsidiary's investments in commodity-linked derivative instruments (*i.e.*, futures, forwards, and swaps based on the price of gold) will be subject to limits on leverage imposed by the 1940 Act. Section 18(f) of the 1940 Act and related Commission guidance limit the amount of leverage an investment company, and in this case the Gold/Euro ETF Subsidiary, can obtain. Except as noted, references to the investment strategies and risks of the Gold/Euro ETF include the investment strategies and risks of the Gold/Euro ETF Subsidiary. The Gold/Euro ETF Subsidiary's shares will only be offered to the Gold/Euro ETF and the Gold/Euro ETF will not sell any shares of the Gold/Euro ETF Subsidiary to any other investors.

Other Investments of the Funds

In the absence of normal circumstances,¹⁷ a Fund may have temporary defensive positions to respond to adverse market, economic, political, or other conditions. A Fund may invest 100% of its total assets, without limitation, either directly or indirectly through Underlying ETPs, in debt securities and money market

¹⁶ See *supra* note 13.

¹⁷ See *supra* note 8.

instruments, shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. government securities, repurchase agreements, or bonds that are rated BBB or higher by Standard & Poor's Ratings Group ("S&P"). A Fund may be invested in this manner for extended periods depending on the Sub-Adviser's assessment of market conditions.

While each Fund's principal investments, under normal circumstances, will be as described above, a Fund may invest up to 20% of its assets in other investments, as described below.

The International Gold ETF may invest directly and indirectly in foreign currencies. The International Gold ETF may invest in foreign currency transactions on a spot (*i.e.*, cash) or forward basis (*i.e.*, by entering into forward contracts to purchase or sell foreign currencies). Currency transactions made on a spot basis are for cash at the spot rate prevailing in the currency exchange market for buying or selling currency. Forward contracts are customized transactions that require a specific amount of a currency to be delivered at a specific exchange rate on a specific date, or range of dates, in the future and can have substantial price volatility. Forward contracts are generally traded in an interbank market directly between currency traders (usually large commercial banks) and their customers.

The International Gold ETF, and certain Underlying ETPs in which the International Gold ETF invests, may enter into swap agreements, including, but not limited to, total return and index swaps, which will be expected to only be tied to the price of gold. The International Gold ETF may utilize swap agreements in an attempt to gain exposure to an asset in a market without actually purchasing the asset (in this case, gold), or to hedge a position.¹⁸ The International Gold ETF will utilize cleared swaps if available and to the extent practicable, and will not enter into any swap agreement unless the Adviser believes that the other party to the transaction is creditworthy.¹⁹ Any swaps used will be cash collateralized as required.

The International Gold ETF may also invest a proportion of its assets in Underlying ETPs that do not offer diversified exposure to the international gold market.

Periodically, with respect to the International Gold ETF, the Sub-Adviser may decide to purchase downside

market protection to hedge against the risk of a large downward movement in the price of gold based on a proprietary assessment of the expected return from holding gold over a time horizon of generally no more than ninety days. The Sub-Adviser may implement this portion of its investment strategy by employing a number of option-based strategies using U.S.-listed equity options with maturities of no more than 90 days. The Sub-Adviser may pay a premium to buy a put option tied to the price of gold, which should rise in value when the price of gold declines, thus protecting the value of the International Gold ETF in the event of a large downward movement in the price of gold. The Sub-Adviser also may employ a strategy of buying a put option tied to the price of gold and simultaneously selling a call option tied to the price of gold, known as a "collar" hedging strategy. Both options should increase in value as the price of gold declines, while the combination of the put and call options is intended to reduce the premium cost of the hedge transaction. However, writing gold options may limit the potential profit the International Gold ETF would earn if the price of gold rises. Regardless of the option-based strategy employed, the Sub-Adviser will not utilize any strategy in which the value of the options sold exceeds the value of the International Gold ETF's portfolio investments, thereby limiting potential losses. The Sub-Adviser will utilize this option strategy only as a means to hedge its long position in gold.

The Gold/British Pound ETF, Gold/Yen ETF, and Gold/Euro ETF may invest in ETFs that are primarily index-based ETFs that hold substantially all of their assets in securities representing a specific index. The Gold/British Pound ETF, Gold/Yen ETF, and Gold/Euro ETF also may invest in ETFs that are actively managed and may invest in closed-end funds.

While the Funds do not anticipate doing so, they may borrow money for investment purposes, a form of leverage. A Fund may also borrow money to facilitate management of a Fund's portfolio by enabling a Fund to meet redemption requests when the liquidation of portfolio instruments would be inconvenient or disadvantageous. This borrowing will not be for investment purposes, will be repaid by a Fund promptly, and will be consistent with the requirements of the 1940 Act and the rules thereunder.

At the discretion of the Adviser, the Funds may, but are not obligated to, enter into forward currency exchange contracts for hedging purposes to help

reduce the risks and volatility caused by changes in foreign currency exchange rates.

While the Funds do not expect to engage in currency hedging, they may (and certain of the Underlying ETPs in which the Funds invest may) use currency transactions in order to hedge the value of portfolio holdings denominated in particular currencies against fluctuations in relative value, including forward currency contracts, exchange-listed currency futures and currency options, exchange-listed and OTC options²⁰ on currencies and currency swaps, and options on currency futures. The Funds may use futures contracts and related options for bona fide hedging; attempting to offset changes in the value of securities held or expected to be acquired or be disposed of; or other risk management purposes.²¹

A Fund's or an Underlying ETP's dealings in forward currency contracts

²⁰The Funds may trade put and call options on securities, securities indices, and currencies as the Sub-Adviser determines is appropriate in seeking a Fund's investment objective and except as restricted by a Fund's investment limitations. A Fund may buy or sell no more than 10% of its net assets in put and call options on foreign currencies either on exchanges or in the OTC market. A put option on a foreign currency gives the purchaser of the option the right to sell a foreign currency at the exercise price until the option expires. A call option on a foreign currency gives the purchaser of the option the right to purchase the currency at the exercise price until the option expires.

²¹The Exchange states that, to the extent a Fund invests in futures, options on futures, or other instruments subject to regulation by the Commodity Futures Trading Commission ("CFTC"), it will do so in compliance with CFTC regulations in effect from time to time and in accordance with the Fund's policies. To comply with recent changes to the CFTC regulations pertaining to registered investment companies that invest in derivatives regulated by the CFTC, such as futures contracts, the Funds expect to register with the CFTC as commodity pools, and the Adviser expects to register with the CFTC as a commodity pool operator prior to the Funds' commencement of operations. By registering with the CFTC, the Funds and the Adviser will be subject to regulation by the CFTC and the National Futures Association. The recent changes to CFTC regulations went into effect on December 31, 2012, but because the CFTC has not yet adopted regulations intended to "harmonize" the CFTC's regulation of newly registered investment companies with that of the Commission, the impact of registration on the Funds' operations is not yet known. Once the compliance obligations of the Funds under the CFTC's regulatory scheme are finalized, the Funds may consider modifying their principal investment strategies and structure by reducing substantially their investments in, or exposure to, derivative instruments subject to regulation by the CFTC in order to qualify for the exemption from CFTC regulation provided by CFTC Regulation 4.5. Alternatively, the Funds may determine to continue to be subject to CFTC regulation and comply with all applicable requirements, including registration and disclosure requirements governing commodity pools under the Commodity Exchange Act. Compliance with the CFTC's additional regulatory requirements may increase a Fund's operating expenses.

¹⁸ See *supra* note 13.

¹⁹ See *id.*

and other currency transactions such as futures, options on futures, options on currencies, and swaps will be limited to hedging involving either specific transactions ("Transaction Hedging")²² or portfolio positions ("Position Hedging").²³

The Funds, or certain Underlying ETPs in which the Funds invest, may also cross-hedge currencies by entering into transactions to purchase or sell one or more currencies that are expected to decline in value relative to other currencies to which the Funds, or certain Underlying ETPs in which the Funds invest, have or in which the Funds, or certain Underlying ETPs in which the Funds invest, expect to have portfolio exposure.

To reduce the effect of currency fluctuations on the value of existing or anticipated holdings of portfolio securities, a Fund, or certain of the Underlying ETPs in which a Fund invests, may also engage in proxy hedging. Proxy hedging is often used when the currency to which the portfolio of a Fund, or of an Underlying ETP in which a Fund invests, is exposed is difficult to hedge or to hedge against the dollar. Proxy hedging entails entering into a forward contract to sell a currency whose changes in value are generally considered to be linked to a currency or currencies in which some or all of a Fund's portfolio securities, or the portfolio securities of an Underlying ETP in which a Fund invests, are or are expected to be denominated, and to buy

²² Transaction Hedging is entering into a currency transaction with respect to specific assets or liabilities of a Fund, or certain Underlying ETPs in which a Fund invests, which will generally arise in connection with the purchase or sale of its portfolio securities or the receipt of income therefrom. A Fund, or certain Underlying ETPs in which a Fund invests, may enter into Transaction Hedging out of a desire to preserve the U.S. dollar price of a security when it enters into a contract for the purchase or sale of a security denominated in a foreign currency.

²³ Position Hedging is entering into a currency transaction with respect to portfolio security positions denominated or generally quoted in that currency. A Fund, or certain Underlying ETPs in which a Fund invests, may use Position Hedging when the Adviser believes that the currency of a particular foreign country may suffer a substantial decline against the U.S. dollar. A Fund, or certain Underlying ETPs in which a Fund invests, may enter into a forward foreign currency contract to sell, for a fixed amount of dollars, the amount of foreign currency approximating the value of some or all of its portfolio securities denominated in the foreign currency. A Fund, or certain Underlying ETPs in which a Fund invests, will not enter into a transaction to hedge currency exposure to an extent greater, after netting all transactions intended wholly or partially to offset other transactions, than the aggregate market value (at the time of entering into the transaction) of the securities held in its portfolio that are denominated or generally quoted in or currently convertible into the currency, other than with respect to proxy hedging as described below.

U.S. dollars. The amount of the contract would not exceed the value of a Fund's securities, or the securities and financial instruments held by the Underlying ETPs in which a Fund invests.

The Funds currently do not intend to enter into forward currency contracts with a term of more than one year, or to engage in Position Hedging with respect to the currency of a particular country to more than the aggregate market value (at the time the hedging transaction is entered into) of its portfolio securities denominated in (or quoted in or currently convertible into or directly related through the use of forward currency contracts in conjunction with money market instruments to) that particular currency.

The Funds may invest in performance indexed paper (PIPsSM), which is U.S. dollar-denominated commercial paper the yield of which is linked to certain foreign exchange rate movements. The yield to the investor on PIPs is established at maturity as a function of spot exchange rates between the U.S. dollar and a designated currency as of or about that time (generally, the index maturity is two days prior to maturity). The yield to the investor will be within a range stipulated at the time of purchase of the obligation, generally with a guaranteed minimum rate of return that is below, and a potential maximum rate of return that is above, market yields on U.S. dollar-denominated commercial paper, with both the minimum and maximum rates of return on the investment corresponding to the minimum and maximum values of the spot exchange rate two business days prior to maturity.

The Funds, and certain Underlying ETPs in which the Funds invest, may invest in commercial paper. Commercial paper is a short-term obligation with a maturity ranging from one to 270 days issued by banks, corporations, and other borrowers. These investments are unsecured and usually discounted. To the extent a Fund invests in commercial paper, a Fund will seek to invest in commercial paper rated A-1 or A-2 by S&P or Prime-1 or Prime-2 by Moody's Investors Service, Inc. ("Moody's").

The Funds, and certain of the Underlying ETPs in which the Funds invest, may invest in fixed income securities, as described below.

The Funds, and certain Underlying ETPs in which the Funds invest, may seek to invest in debt securities, which are securities consisting of a certificate or other evidence of a debt (secured or unsecured) on which the issuing company or governmental body promises to pay the holder thereof a fixed, variable, or floating rate of

interest for a specified length of time, and to repay the debt on the specified maturity date. Some debt securities, such as zero coupon bonds, do not make regular interest payments, but are issued at a discount to their principal or maturity value. Debt securities include a variety of fixed income obligations, including, but not limited to, corporate debt securities, government securities, municipal securities, convertible securities, and mortgage-backed securities. Debt securities include investment-grade securities, non-investment-grade securities, and unrated securities.

The Funds may invest in U.S. government securities. Securities issued or guaranteed by the U.S. government or its agencies or instrumentalities include U.S. Treasury securities, which are backed by the full faith and credit of the U.S. Treasury and which differ only in their interest rates, maturities, and times of issuance. U.S. Treasury bills have initial maturities of one year or less; U.S. Treasury notes have initial maturities of one to ten years; and U.S. Treasury bonds generally have initial maturities of greater than ten years.²⁴

The Funds, and certain Underlying ETPs in which the Funds invest, may invest in U.S. Treasury zero-coupon bonds. These securities are U.S. Treasury bonds which have been stripped of their unmatured interest coupons, the coupons themselves, and receipts or certificates representing interests in the stripped debt obligations and coupons. Interest is not paid in cash during the term of these securities, but is accrued and paid at maturity.

The Funds may invest in all grades of corporate debt securities including non-investment grade securities, as described below.

The Funds, and certain Underlying ETPs in which the Funds invest, to the extent a Fund invests in non-investment grade debt securities, will seek to invest no more than 10% of a Fund's net assets in these debt securities. Non-investment-grade debt securities, also

²⁴ Certain U.S. government securities are issued or guaranteed by agencies or instrumentalities of the U.S. government including, but not limited to, obligations of U.S. government agencies or instrumentalities such as the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the Small Business Administration, the Federal Farm Credit Administration, the Federal Home Loan Banks, Banks for Cooperatives (including the Central Bank for Cooperatives), the Federal Land Banks, the Federal Intermediate Credit Banks, the Tennessee Valley Authority, the Export-Import Bank of the United States, the Commodity Credit Corporation, the Federal Financing Bank, the National Credit Union Administration, and the Federal Agricultural Mortgage Corporation.

referred to as “high yield securities” or “junk bonds,” are debt securities that are rated lower than the four highest rating categories by a nationally recognized statistical rating organization (for example, lower than Baa3 by Moody’s or lower than BBB by S&P) or are determined to be of comparable quality by the Sub-Adviser.

The Funds, and certain Underlying ETPs in which the Funds invest, may seek to invest in unrated debt securities. The creditworthiness of the issuer, as well as any financial institution or other party responsible for payments on the security, will be analyzed to determine whether to purchase unrated bonds.

The Funds, and certain Underlying ETPs in which the Funds invest, will seek to invest no more than 10% of their net assets in asset-backed and mortgaged-backed securities.

The Funds, and certain of the Underlying ETPs in which the Funds invest, may invest in U.S. equity securities, including common stock, preferred stock, warrants, convertible securities, master limited partnerships, and rights traded in the U.S. or on other registered exchanges.

Each Fund may invest in issuers located outside the United States directly, or in financial instruments or Underlying ETPs that are indirectly linked to the performance of foreign issuers. These financial instruments may be one of the following: American Depositary Receipts (“ADRs”), Global Depositary Receipts (“GDRs”), European Depositary Receipts (“EDRs”), International Depositary Receipts (“IDRs”), ordinary shares, and New York shares issued and traded in the U.S. (collectively, “Equity Financial Instruments”).²⁵

²⁵ ADRs are U.S. dollar denominated receipts typically issued by U.S. banks and trust companies that evidence ownership of underlying securities issued by a foreign issuer. The underlying securities may not necessarily be denominated in the same currency as the securities into which they may be converted. The underlying securities are held in trust by a custodian bank or similar financial institution in the issuer’s home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services, including forwarding dividends and interest and corporate actions. Generally, ADRs in registered form are equity securities designed for use in domestic securities markets and are traded on exchanges or OTC in the U.S. GDRs, EDRs, and IDRs are similar to ADRs in that they are certificates evidencing ownership of shares of a foreign issuer; however, GDRs, EDRs, and IDRs may be issued in bearer form and denominated in other currencies, and are generally designed for use in specific or multiple securities markets outside the U.S. EDRs, for example, are designed for use in European securities markets, while GDRs are designed for use throughout the world. Ordinary shares are shares of foreign issuers that are traded abroad and on a U.S. exchange. New York shares are shares that a foreign

Fund, and certain Underlying ETPs in which a Fund invests, may invest in hybrid instruments. A hybrid instrument is a type of potentially high-risk derivative that combines a traditional stock, bond, or commodity with an option or forward contract. An example of a hybrid instrument could be a bond issued by an oil company that pays a small base level of interest with additional interest that accrues in correlation with the extent to which oil prices exceed a certain predetermined level. This hybrid instrument would be a combination of a bond and a call option on oil. Generally, the principal amount, amount payable upon maturity or redemption, or interest rate of a hybrid is tied (positively or negatively) to the price of some security, commodity, currency, securities index, or another interest rate or some other economic factor (each a “benchmark”). The interest rate or (unlike most fixed income securities) the principal amount payable at maturity of a hybrid security may be increased or decreased, depending on changes in the value of the benchmark.

Each Fund may invest in structured notes, which are debt obligations that also contain an embedded derivative component with characteristics that adjust the obligation’s risk/return profile. Generally, the performance of a structured note will track that of the underlying debt obligation and the derivative embedded within it. Each Fund has the right to receive periodic interest payments from the issuer of the structured notes at an agreed-upon interest rate and a return of the principal at the maturity date.²⁶

The Funds may invest in the securities of exchange-traded pooled vehicles that are not investment companies and, thus, not required to comply with the provisions of the 1940 Act.²⁷ The International Gold ETF may

issuer has allocated for trading in the U.S. ADRs, ordinary shares, and New York shares all may be purchased with and sold for U.S. dollars. ADRs may be sponsored or unsponsored, but unsponsored ADRs will not exceed 10% of a Fund’s net assets. With respect to its investments in equity securities (including Equity Financial Instruments), each Fund will invest at least 90% of its assets invested in these equity securities in securities that trade in markets that are members of the Intermarket Surveillance Group (“ISG”) or are parties to a comprehensive surveillance sharing agreement with the Exchange.

²⁶ In the case of structured notes on credit default swaps, a Fund, or the Underlying ETP in which a Fund invests, will also be subject to the credit risk of the corporate credits underlying the credit default swaps.

²⁷ These securities include Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule

principally invest in these securities through Underlying ETPs while the other Funds (Gold/British Pound ETF, Gold/Yen ETF, and Gold/Euro ETF) may, but are not expected to, invest in these securities as non-principal investments. As a result, as a shareholder of these pooled vehicles, a Fund will not have all of the investor protections afforded by the 1940 Act. These pooled vehicles may, however, be required to comply with the provisions of other federal securities laws, such as the Securities Act. These pooled vehicles typically hold currency or commodities, such as gold or oil, or other property that is itself not a security.

The Funds, and certain Underlying ETPs in which the Funds invest, may invest in exchange-traded shares of real estate investment trusts (“REITs”). REITs are pooled investment vehicles which invest primarily in real estate or real estate-related loans. REITs are generally classified as equity REITs, mortgage REITs, or a combination of equity and mortgage REITs.

The Funds, and certain Underlying ETPs in which the Funds invest, may enter into repurchase agreements with financial institutions, which may be deemed to be loans. The Funds will follow certain procedures designed to minimize the risks inherent in these agreements. These procedures will include effecting repurchase transactions only with large, well-capitalized and well-established financial institutions whose condition will be continually monitored by the Sub-Adviser. In addition, the value of the collateral underlying the repurchase agreement will always be at least equal to the repurchase price, including any accrued interest earned on the repurchase agreement.

The Funds, and certain Underlying ETPs in which the Funds invest, may enter into reverse repurchase agreements as part of a Fund’s investment strategy. However, the Funds do not expect to engage, under normal circumstances, in reverse repurchase agreements with respect to more than 33⅓% of their respective assets. Reverse repurchase agreements involve sales by a Fund of portfolio assets concurrently with an agreement by a Fund to repurchase the same assets at a later date at a fixed price.

The Funds may engage in short sales transactions in which a Fund sells a security it does not own. To complete such a transaction, a Fund must borrow

8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); and Trust Units (as described in NYSE Arca Equities Rule 8.500).

or otherwise obtain the security to make delivery to the buyer. A Fund then is obligated to replace the security borrowed by purchasing the security at the market price at the time of replacement.

The Funds, and certain of the Underlying ETPs in which the Funds invest, may enter into time deposits and Eurodollar time deposits. Time deposits are non-negotiable deposits, such as savings accounts or certificates of deposit, held by a financial institution for a fixed term with the understanding that the depositor can withdraw its money only by giving notice to the institution.

The Funds, and certain Underlying ETPs in which the Funds invest, from time to time, in the ordinary course of business, may purchase securities on a when-issued or delayed-delivery basis (*i.e.*, delivery and payment can take place between a month and 120 days after the date of the transaction). These securities are subject to market fluctuation and no interest accrues to the purchaser during this period.

The Funds may not purchase or sell commodities or commodity contracts unless acquired as a result of ownership of securities or other instruments issued by persons that purchase or sell commodities or commodity contracts; but this shall not prevent a Fund from purchasing, selling, and entering into financial futures contracts (including futures contracts on indices of securities, interest rates, and currencies), options on financial futures contracts (including futures contracts on indices of securities, interest rates, and currencies), warrants, swaps, forward contracts, foreign currency spot and forward contracts, or other derivative instruments that are not related to physical commodities.

Other Restrictions of the Funds

A Fund may not, with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. government, its agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of the issuer, or acquire more than 10% of the outstanding voting securities of any one issuer (and for purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective depositary receipt).

A Fund may not invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries. This limitation does not apply to investments

in securities issued or guaranteed by the U.S. government, its agencies or instrumentalities, or shares of investment companies. A Fund will not invest 25% or more of its total assets in any investment company that so concentrates.

Each Fund may invest up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser,²⁸ consistent with Commission guidance. Each Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of a Fund's net assets are invested in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

Each Fund will seek to qualify for treatment as a Regulated Investment Company under the Internal Revenue Code.

Each Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While a Fund may invest in inverse ETFs, a Fund will not invest in leveraged (*e.g.*, 2X, -2X, 3X, or -3X) ETFs.

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act²⁹ and the rules and regulations thereunder applicable to a national securities exchange.³⁰ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,³¹ which requires, among other things, that the Exchange's rules be designed to promote just and

²⁸ In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.*, the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

²⁹ 15 U.S.C. 78f.

³⁰ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

³¹ 15 U.S.C. 78f(b)(5).

equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Funds and the Shares must comply with the initial and continued listing criteria in NYSE Arca Equities Rule 8.600 for the Shares to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,³² which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares, Underlying ETPs, REITs, certain Equity Financial Instruments, pooled vehicles, and other U.S. exchange-traded equities will be available via the Consolidated Tape Association ("CTA") high-speed line, and, for the underlying securities that are U.S. exchange-listed, will be available from the national securities exchange on which they are listed. Price information relating to non-U.S. exchange-traded Equity Financial Instruments will be available from major market data vendors or the foreign exchanges on which these securities are traded. Price information relating to fixed income securities will be available from major market data vendors. Information relating to futures and options on futures also will be available from the exchange on which such instruments are traded. Information relating to exchange-traded options will be available via the Options Price Reporting Authority. Quotation information from brokers and dealers or pricing services will be available for spot currency transactions, hybrid instruments, and non-exchange-traded derivatives, including forwards, swaps, and certain options.

On each business day, before commencement of trading of Shares in the Core Trading Session on the Exchange, the Funds' Web site will disclose the Disclosed Portfolio that will form the basis for each Fund's calculation of NAV at the end of the business day.³³ In addition, the Portfolio

³² 15 U.S.C. 78k-1(a)(1)(C)(iii).

³³ On a daily basis, the Funds' Web site, or, if applicable, a Fund's subsidiary's Web site, will disclose for each portfolio security and other financial instrument (*e.g.*, futures, forwards, swaps) of each Fund and each Fund's subsidiary, the

Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.³⁴ The NAV per Share for a Fund will be calculated by the administrator and determined as of the close of the regular trading session on the New York Stock Exchange (“NYSE”) (ordinarily 4:00 p.m., Eastern Time) on each day that such exchange is open. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services. Information regarding the previous day’s closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. In addition, a basket composition file, which includes the security names and share quantities (as applicable) required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the National Securities Clearing Corporation. The Funds’ Web site will include a form of the prospectus for the Funds as well as additional quantitative information updated on a daily basis.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Trading in Shares of the Funds will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in

following information: Ticker symbol (if applicable); name and, when available, the individual identifier (CUSIP) of the security and/or financial instrument; number of shares, if applicable, and dollar value of securities and financial instruments held in the portfolio; and percentage weighting of the security and financial instrument in the portfolio. The Web site information will be publicly available at no charge.

³⁴ According to the Exchange, several major market data vendors display or make widely available Portfolio Indicative Values taken from CTA or other data feeds.

the Shares inadvisable,³⁵ and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth additional circumstances under which Shares of a Fund may be halted. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. Consistent with NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the Adviser must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the Fund’s portfolio. In addition, the Exchange states that neither the Adviser nor Sub-Adviser is a broker-dealer or is affiliated with a broker-dealer.³⁶ The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.³⁷ The Exchange further represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and

³⁵ These reasons may include: (1) The extent to which trading is not occurring in the securities or the financial instruments composing the Disclosed Portfolio of the Funds; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund.

³⁶ See *supra* note 6 and accompanying text. The Exchange states that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“Advisers Act”). As a result, the Adviser, Sub-Adviser, and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless the investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

³⁷ The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA’s performance under this regulatory services agreement.

detect violations of Exchange rules and applicable federal securities laws. Moreover, prior to the commencement of trading, the Exchange states that it will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares.

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange’s existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including the following:

(1) The Shares of each Fund will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, Underlying ETPs, exchange-listed equity securities (including Equity Financial Instruments), futures, options on futures, exchange-traded options, REITs, and pooled vehicles with other markets and other entities that are members of the ISG, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading such securities and financial instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, Underlying ETPs, exchange-listed equity securities (including Equity Financial Instruments), futures, options on futures, exchange-traded options, REITs, and pooled vehicles from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. With respect to its investments in exchange-listed equity securities (including Equity Financial Instruments), a Fund will invest at least 90% of its assets in equity securities that trade in markets that are members of the ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in creation unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a),

which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (d) how information regarding the Portfolio Indicative Value is disseminated; (e) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and continued listing, the Funds must be in compliance with Rule 10A-3 under the Act,³⁸ as provided by NYSE Arca Equities Rule 5.3.

(6) The Funds may invest up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser consistent with Commission guidance.

(7) The Funds will utilize cleared swaps if available and to the extent practicable and not enter into any swap agreement unless the Adviser believes that the other party to the transaction is creditworthy. The Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. Any swaps used will be cash collateralized as required.

(8) The Funds, and certain Underlying ETPs in which the Funds invest, will invest no more than 10% of a Fund's net assets in non-investment grade debt securities. In addition, the Funds, and certain Underlying ETPs in which the Funds invest, will invest no more than 10% of their net assets in asset-backed and mortgaged-backed securities.

(9) The Funds will effect repurchase transactions only with large, well-capitalized and well-established financial institutions whose condition will be continually monitored by the Sub-Adviser. In addition, the value of the collateral underlying the repurchase agreement will always be at least equal to the repurchase price, including any accrued interest earned on the repurchase agreement. The Funds do not expect to engage, under normal circumstances, in reverse repurchase agreements with respect to more than 33 $\frac{1}{3}$ % of their respective assets.

(10) The Funds will not invest in leveraged (e.g., 2X, -2X, 3X, or -3X) ETFs.

(11) A minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice, and the Exchange's description of the Funds.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act³⁹ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁴⁰ that the proposed rule change (SR-NYSEArca-2013-116), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014-02502 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71452; File No. SR-NYSE-2014-05]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List To Introduce Fees and Credits for A New Order Type Called a Midpoint Passive Liquidity Order

January 31, 2014.

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 January 22, 2014, New York Stock Exchange LLC ("NYSE" or the "Exchange") 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.

³⁹ 15 U.S.C. 78f(b)(5).

⁴⁰ 15 U.S.C. 78s(b)(2).

⁴¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to introduce fees for a new order type called a Midpoint Passive Liquidity ("MPL") Order. The proposed fees would be operative on January 27, 2014. 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 its Price List to introduce fees for a new order type called a MPL Order. The proposed fees would be operative on January 27, 2014.

The Exchange recently introduced the MPL Order type,⁴ which is an undisplayed limit order that automatically executes at the mid-point of the protected best bid or offer ("PBBO"). An MPL Order is not eligible for manual executions, including openings, re-openings, or closing transactions. An MPL Order also is not eligible to trade if it would trade at a price below \$1.00 or if the execution price would be out to five decimal places above \$1.00. All market participants—customers, Floor brokers, Designated Market Makers ("DMMs"), and Supplemental Liquidity Providers ("SLPs")—may use the MPL order type.

The Exchange proposes to charge \$0.0025 per share for all MPL Orders that remove liquidity from the Exchange if the security is priced \$1.00 or more. The Exchange also proposes to offer a

⁴ See Rule 13 and Securities Exchange Act Release No. 71330 (January 16, 2014) (SR-NYSE-2013-71).

³⁸ See 17 CFR 240.10A-3.

credit of \$0.0015 per share for all MPL Orders that provide liquidity to the Exchange if the security is priced \$1.00 or more.⁵ The fee and credit will apply to all market participants. MPL Orders that add liquidity will contribute to adding liquidity requirements, including Tier 1 Adding Credit, Tier 2 Adding Credit, SLP credits for \$0.0023 and \$0.0025 credits, and DMM providing liquidity. However, the Exchange notes that MPL Orders will not be eligible for any tiered or additional credits or reduced fees even if the MPL Orders contribute to a member organization qualifying for an additional credit. For example, if a member organization qualified for the Tier 1 Adding Credit, the member organization will receive the proposed \$0.0015 per share credit for MPL Orders, not \$0.0018 per share for such order under the tier. Where the MPL Order fee or credit does not differ from the current fee or credit, the Exchange has not proposed a change to the Price List.

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 fee of \$0.0025 per share for all MPL Orders that remove liquidity from the Exchange and the proposed credit of \$0.0015 per share for all MPL Orders that provide liquidity to the Exchange if the security is priced \$1.00 or more are reasonable because the fee and credit would be the same as the fee and credit that would otherwise apply for all other non-Floor broker transactions (*i.e.*, \$0.0025 per share fee for taking liquidity from the Exchange and \$0.0015 per share credit under the non-Tier Adding Credit). The Exchange notes that the proposed credit and fee are within the same range as at least one other exchange for MPL Orders.⁸ The

Exchange also believes that the proposed fee and credit are equitable and not unfairly discriminatory because they may provide opportunities for market participants to interact with orders priced at the midpoint of the PBBO, thus providing price improving liquidity to market participants and thereby increase the quality of order execution on the Exchange's market, which benefits all market participants. The Exchange also believes that providing the same fees and credits for MPL Orders that would otherwise apply is equitable and not unfairly discriminatory. Moreover, all market participants will be eligible for the proposed fee and credit. The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to limit additional or higher credits for MPL Orders for which market participants may otherwise qualify because it will ensure that all market participants pay the same fees and receive the same credits regardless of Floor broker, DMM, or SLP designation. The Exchange believes that it is reasonable to allow MPL Orders to count toward adding liquidity because it is consistent with the purpose of those credits. The Exchange also believes it is equitable and not unfairly discriminatory because all market participants that use the MPL Order type will pay the same fee and receive the same credit.

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 Exchange believes the proposed MPL Order fees and credits will enhance order execution opportunities for member organizations. Further, the Exchange believes that providing the same fees and credits for MPL Orders that would otherwise apply will enhance competition between the Exchange and other exchanges that currently offer similar order types by offering investors another option to access liquidity at the midpoint of the PBBO.

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 or credit levels at a particular

venue to be unattractive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For these reasons, the Exchange believes that the proposed rule change reflects this competitive environment and is therefore consistent with the Act.

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-4¹¹ 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 proposal 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-NYSE-2014-05 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

⁵ The Exchange's current rates for transactions in securities with a per share price less of than \$1.00 would continue to apply.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

⁸ For Tape A Securities under its Tier 1, Tier 2, and Basic Rate Tier, the Exchange's affiliate, NYSE Arca Equities, Inc., currently charges \$0.0030 per share for all MPL Orders that remove liquidity and provides a credit of \$0.0015 per share for all MPL

Orders that provide liquidity. See NYSE Arca Equities, Inc. Schedule of Fees and Charges, available at https://usequities.nyx.com/sites/usequities.nyx.com/files/nyse_arca_marketplace_fees_for_1-2-14.pdf.

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).

Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2014-05. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2014-05 and should be submitted on or before February 27, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2014-02498 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71455; File No. SR-NSCC-2013-13]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change To Discontinue Its Stock Borrow Program

January 31, 2014.

I. Introduction

On December 10, 2013, the National Securities Clearing Corporation

(“NSCC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change SR-NSCC-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 December 27, 2013.³ The Commission did not receive comments on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

NSCC is amending its Rules and Procedures (“Rules”) to discontinue its Stock Borrow Program. The effective date of the rule change will be announced by NSCC via an Important Notice.

Currently, NSCC Members may elect to participate in the Stock Borrow Program by designating specific securities from their inventory at the Depository Trust Company (“DTC”) as available to be lent in the event that NSCC's Continuous Net Settlement (“CNS”) system cannot complete a delivery of a security to a long Member because a short Member has not completed its delivery to CNS. In such a case, if a lender has identified such a security as available through the Stock Borrow Program and the lender has a free excess position of the security at DTC, NSCC initiates deliveries through CNS to the long Member and sets up a pending receive for the lending Member. If the position is not returned to the lender by the end of the settlement day, i.e., the Member with the original obligation to deliver to CNS does not complete that delivery, the lender receives full market value for the securities through NSCC settlement.

Usage of NSCC's Stock Borrow Program has declined over the past few years. In 2007, NSCC borrowed a daily average of approximately \$1.85 billion in market value at the close of each day from the approximately 21 Members that participated in the Stock Borrow Program. In October 2013, only three Members participated in the Stock Borrow Program and the average daily value borrowed at the close of day during that month was approximately \$81 million. Usage of the program has continued to drop since the end of October 2013. Given the reduction in the use of the program, NSCC has determined that it is not economically efficient to maintain the service.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 34-71156 (Dec. 20, 2013), 78 FR 79028 (Dec. 27, 2013) (SR-NSCC-2013-13).

III. Discussion and Commission Finding

Section 19(b)(2)(C) of the Act ⁴ directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act ⁵ requires that the rules of a clearing agency be designed to, among other things, “promote the prompt and accurate clearance and settlement of securities transactions and . . . to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.” ⁶ The Commission finds that NSCC's proposed rule change is consistent with these requirements because discontinuing an underutilized service will enable NSCC to allocate its resources to core clearing agency functions in a more efficient and effective manner.

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 ⁷ and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change SR-NSCC-2013-13 be, and it hereby is, *approved*.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2014-02501 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

⁴ 15 U.S.C. 78s(b)(2)(C).

⁵ 12 U.S.C. 78q-1(b)(3)(F).

⁶ 15 U.S.C. 78q-1(b)(3)(F).

⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

⁸ 17 CFR 200.30-3(a)(12).

¹³ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71451; File No. SR-NYSEMKT-2014-11]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List To Introduce Fees and Credits for A New Order Type Called a Midpoint Passive Liquidity Order

January 31, 2014.

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 January 22, 2014, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) 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 Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to introduce fees for a new order type called a Midpoint Passive Liquidity (“MPL”) Order. The proposed fees would be operative on January 27, 2014. 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 its Price List to introduce fees for a new order type called a MPL Order. The proposed fees would be operative on January 27, 2014.

The Exchange recently introduced the MPL Order type,⁴ which is an undisplayed limit order that automatically executes at the mid-point of the protected best bid or offer (“PBBO”). An MPL Order is not eligible for manual executions, including openings, re-openings, or closing transactions. An MPL Order also is not eligible to trade if it would trade at a price below \$1.00 or if the execution price would be out to five decimal places above \$1.00. All market participants—customers, Floor brokers, Designated Market Makers (“DMMs”), and Supplemental Liquidity Providers (“SLPs”)—may use the MPL order type.

The Exchange proposes to charge \$0.0028 for listed securities and \$0.0030 for NASDAQ securities traded pursuant to Unlisted Trading Privileges (“UTP”) for all MPL Orders that remove liquidity from the Exchange if the security is priced \$1.00 or more. The Exchange also proposes to offer a credit of \$0.0016 for listed securities and \$0.0025 for NASDAQ securities traded pursuant to UTP for all MPL Orders that provide liquidity to the Exchange if the security is priced \$1.00 or more.⁵ The fees and credits will apply to all market participants. MPL Orders that add liquidity will contribute to any adding liquidity requirements. However, the Exchange notes that MPL Orders will not be eligible for any additional credits or reduced fees even if the MPL Orders contribute to a member organization qualifying for an additional credit. For example, if a DMM qualified for the \$0.0042 equity per share credit when adding liquidity to the Exchange because its consolidated average daily volume in all Exchange-listed stocks during the current month was equal to or greater than 135 million shares per day, the DMM will receive the proposed \$0.0016 per share credit for MPL Orders, not \$0.0042 per share credit for such order. Where the MPL Order fee or credit does not differ from the current

fee or credit, the Exchange has not proposed a change to the Price List.

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 fees of \$0.0028 for listed securities and \$0.0030 for NASDAQ securities traded pursuant to UTP for all MPL Orders that remove liquidity from the Exchange and the proposed credits of \$0.0016 for listed securities and \$0.0025 for NASDAQ securities traded pursuant to UTP for all MPL Orders that provide liquidity to the Exchange if the security is priced \$1.00 or more are reasonable because the fees and credits would be the same as the fees and credits that would otherwise apply for all other transactions (*i.e.*, \$0.0028 or \$0.0030 fee for taking liquidity from the Exchange and \$0.0016 or \$0.0025 credit when adding liquidity to the Exchange). The Exchange notes that the proposed credits and fees are within the same range as at least one other exchange for MPL Orders.⁸ The Exchange also believes that the proposed fees and credits are equitable and not unfairly discriminatory because they may provide opportunities for market participants to interact with orders priced at the midpoint of the PBBO, thus providing price improving liquidity to market participants and thereby increase the quality of order execution on the Exchange’s market, which benefits all market participants. The Exchange also believes that providing the same fees and credits for MPL Orders that would otherwise apply is equitable and not unfairly discriminatory. Moreover, all market participants will be eligible for the proposed fees and credits. The Exchange believes that it is reasonable, equitable, and not unfairly

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

⁸ For Tape A Securities under its Tier 1, Tier 2, and Basic Rate Tier, the Exchange’s affiliate, NYSE Arca Equities, Inc., currently charges \$0.0030 per share for all MPL Orders that remove liquidity and provides a credit of \$0.0015 per share for all MPL Orders that provide liquidity. See NYSE Arca Equities, Inc. Schedule of Fees and Charges, available at https://usequities.nyx.com/sites/usequities.nyx.com/files/nyse_arca_marketplace_fees_for_1-2-14.pdf.

⁴ See Rule 13—Equities and Securities Exchange Act Release No. 71329 (January 16, 2014) (SR-NYSEMKT-2013-84).

⁵ The Exchange’s current rates for transactions in securities with a per share price less than \$1.00 would continue to apply.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

discriminatory to limit higher credits for MPL Orders for which market participants may otherwise qualify because it will ensure that all market participants pay the same fees and receive the same credits regardless of Floor broker, DMM, or SLP designation. The Exchange believes that it is reasonable to allow MPL Orders to count toward adding liquidity because it is consistent with the purpose of those credits. The Exchange also believes it is equitable and not unfairly discriminatory because all market participants that use the MPL Order type will pay the same fee and receive the same credit.

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 Exchange believes the proposed MPL Order fees and credits will enhance order execution opportunities for member organizations. Further, the Exchange believes that providing the same fees and credits for MPL Orders that would otherwise apply will enhance competition between the Exchange and other exchanges that currently offer similar order types by offering investors another option to access liquidity at the midpoint of the PBBO.

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 or credit levels at a particular venue to be unattractive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For these reasons, the Exchange believes that the proposed rule change reflects this competitive environment and is therefore consistent with the Act.

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-4¹¹ 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 proposal 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-2014-11 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-2014-11. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2014-11 and should be submitted on or before February 27, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014-02497 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71453; File No. SR-NYSEMKT-2014-13]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Price List To Increase the Fee for Executions in New York Stock Exchange Crossing Session II

January 31, 2014.

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 January 23, 2014, NYSE MKT LLC (the "Exchange" or "NYSE MKT") 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 Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to increase the fee for

¹³ 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.

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).

⁹ 15 U.S.C. 78f(b)(8).

executions in New York Stock Exchange (“NYSE”) Crossing Session II. The Exchange proposes to implement the fee change effective February 1, 2014. The text of the proposed rule change is available on the Exchange’s Web site at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List increase the fee for executions in NYSE Crossing Session II. The Exchange proposes to implement the fee change effective February 1, 2014.⁴

A fee of \$0.0002 per share currently applies to executions in NYSE Crossing Session II. The Exchange proposes to increase the fee to \$0.0004. Fees for executions in NYSE Crossing Session II would continue to be capped at \$50,000 per month per member organization.

The proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that member organizations would have in complying with the proposed change.

⁴ The Exchange notes that it has previously filed with the Securities and Exchange Commission a proposed rule change to amend the Price List (File No. SR-NYSEMKT-2014-11). Exhibit 5 to SR-NYSEMKT-2014-11 specified an effective date for the revised Price List of January 27, 2014 (changed from December 16, 2013). Exhibit 5 to the instant proposed rule change specifies an effective date of February 1, 2014 (changed from December 16, 2013). On January 27, 2014, subject to effectiveness of SR-NYSEMKT-2014-11, the Exchange will update the Price List to reflect the fee change reflected in SR-NYSEMKT-2014-11, with an effective date of January 27, 2014. On February 1, 2014, the Exchange will further update the Price List to reflect the changes set forth in the instant proposed rule change, with an effective date of February 1, 2014.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁶ 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 increase in the fee for NYSE Crossing Session II transactions is reasonable because it would more closely align the rate with the other rates within the Price List. The increase would also align the rate with the corresponding fee in the NYSE Price List for Crossing Session II transactions, which NYSE has also proposed to increase from \$0.0002 to \$0.0004.⁷ The Exchange also believes that the proposed increase in the fee for NYSE Crossing Session II transactions is equitable and not unfairly discriminatory because such fees would apply to executions of all member organizations in NYSE Crossing Session II and because such fees would continue to be capped at \$50,000 per member organization per month.

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,⁸ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The increase in the fee for executions in NYSE Crossing Session II would not burden competition because it would apply to all member organizations and because fees for member organizations that are particularly active in NYSE Crossing Session II would continue to be capped at \$50,000 per member organization per month. The proposed increase would also align the fee with the corresponding fee in the NYSE Price

List that is applicable to Crossing Session II transactions.⁹

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 or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee 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 changes will impair the ability of member organizations 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)¹⁰ of the Act and subparagraph (f)(2) of Rule 19b-4¹¹ 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

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

⁷ See SR-NYSE-2014-06.

⁸ 15 U.S.C. 78f(b)(8).

⁹ See *supra* note 7.

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).

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-NYSEMKT-2014-13 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-2014-13. 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 Section, 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 will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at www.nyse.com. 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-NYSEMKT-2014-13 and should be submitted on or before February 27, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014-02499 Filed 2-5-14; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF STATE

[Public Notice 8623]

60-Day Notice of Proposed Information Collection: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to April 7, 2014.

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

- *Web:* Persons with access to the Internet may use the Federal Docket Management System (FDMS) to comment on this notice by going to www.Regulations.gov. You can search for the document by entering "Public Notice 8623" in the Search bar. If necessary, use the Narrow by Agency filter option on the Results page.

- *Email:* ciupekra@state.gov.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Raymond Ciupek, Department of State, Office of Directives Management, 1800 G St. NW., Suite 2400, Washington, DC 20522-2202, who may be reached at ciupekra@state.gov.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Generic Clearance for the Collection of

Qualitative Feedback on Agency Service Delivery.

- *OMB Control Number:* 1405-0193.
- *Type of Request:* Extension of an approved collection.
- *Originating Office:* Office of Directives Management, A/GIS/DIR.
- *Form Number:* Various public surveys and comment cards.
- *Respondents:* Individuals responding to Department of State customer service evaluation requests.
- *Estimated Number of Respondents:* 50,000.
- *Estimated Number of Responses:* 50,000.
- *Average Time per Response:* 5 minutes
- *Total Estimated Burden Time:* 4,167 hours.
- *Frequency:* Once per request.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of proposed collection: The information collection activity will garner qualitative customer feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. This qualitative feedback will provide insights into customer perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful

¹³ 17 CFR 200.30-3(a)(12).

information, but it will not yield data that can be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

Methodology: Respondents will fill out a brief customer survey after completing their interaction with a Department Office or Embassy. Surveys are designed to gather feedback on the customer's experiences.

Dated: February 3, 2014.

Janet Freer,

*Director, Office of Directives Management,
Department of State.*

[FR Doc. 2014-02567 Filed 2-5-14; 8:45 am]

BILLING CODE 4710-24-P

DEPARTMENT OF STATE

[Public Notice 8624]

In the Matter of the Review of the Designation of Lashkar i Jhangvi (and Other Aliases) As a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2008 decision to maintain the designation of the aforementioned organization as a Foreign Terrorist Organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned

organization as a Foreign Terrorist Organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: December 9, 2013

John F. Kerry,

Secretary of State, Department of State.

[FR Doc. 2014-02569 Filed 2-5-14; 8:45 am]

BILLING CODE 4710-10-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2014-0006]

Draft Core Toll Concessions Public Private Partnership Model Contract Guide

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice; request for comments.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) requires DOT and FHWA to develop public-private partnership (P3) transaction model contracts for the most popular types of P3s for transportation projects. Based on public input on the most prevalent P3 transaction type and the need for an educational, rather than prescriptive contract model, the FHWA has developed a draft Core Toll Concession Model Contract Guide. The FHWA values public input in the development of the model contracts, and seeks continuing input. A draft of the Core Toll Concession Model Contract Guide is provided with this notice so that the general public and interested stakeholders may provide comments. This model contract guide has been prepared solely for informational purposes and should be not construed as a statement of DOT or FHWA policy.

DATES: Comments must be received on or before March 10, 2014. Late comments will be considered to the extent practicable.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

- **Mail:** Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., W12-140, Washington, DC 20590-0001.

- **Hand Delivery:** West Building Ground Floor, Room W12-140, 1200

New Jersey Ave. SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

- **Instructions:** You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah E. Brown-Davis, Office of Innovative Program Delivery, (202) 366-4249, Ms. Alla Shaw, Office of the Chief Counsel, (202) 366-1042, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, and Mr. Prabhat Diksit, Office of Innovative Program Delivery, 12300 W Dakota Ave., Suite 370, Lakewood, CO 80227, (720) 963-3202, or via email at prabhat.diksit@dot.gov. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: <http://www.regulations.gov>. The Web site is available 24 hours every day of the year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: http://www.archives.gov/federal_register and the Government Printing Office's Web page at: <http://www.gpoaccess.gov>.

Background

Public-private partnerships are contractual arrangements between public and private sector entities that allow for greater participation by the private sector in the delivery of surface transportation projects and associated services. Generally, in addition to designing or building a project, a private partner in a P3 may be involved in financing, operating, and maintaining the project. By transferring certain risks and responsibilities to the private partner, P3s can result in more efficient and effective project delivery. However, P3 contracts are complex and are of a much longer-term duration than traditional construction contracts. Their terms and conditions address many requirements not covered by traditional construction contracts such as financing arrangements and performance during a concession period, among others. Public agencies need special expertise to

ensure that they can successfully negotiate P3 agreements. Section 1534(d) of MAP-21 (Pub. L. 112-141; 126 Stat. 405) requires the DOT to develop model P3 contracts that could serve as a model and a guide to States and other public transportation providers in developing their own P3 contracts. The legislation states:

“(d) STANDARD TRANSACTION CONTRACTS.—

(1) DEVELOPMENT.—Not later than 18 months after the date of enactment of this Act, the Secretary shall develop standard public-private partnership transaction model contracts for the most popular types of public-private partnerships for the development, financing, construction, and operation of transportation facilities.

(2) USE.—The Secretary shall encourage States, public transportation agencies, and other public officials to use the model contracts as a base template when developing their own public-private partnership agreements for the development, financing, construction, and operation of transportation facilities.”

Development activities to date, include receipt of comments during a January 16, 2013, Listening Session attended by a broad cross-section of P3 stakeholders. In addition, DOT solicited comments regarding model P3 contracts in a prior notice published at 78 FR 1918, January 9, 2013. All comments may be viewed at: http://www.fhwa.dot.gov/ipd/p3/resources/model_p3_contracts.htm.

Based on comments received thus far, the DOT has advanced the development of a draft model P3 contract guide for the most popular type of P3 contract, namely the toll concession contract. We request comment from the general public and stakeholders on the Core Toll Concession Model Contract Guide provided.

About the Core Toll Concession Model P3 Contract Guide

During the January 16, 2013, Listening Session, the majority of the commenters requested that the FHWA not provide a rigid model contract that States and localities would be required or encouraged to follow, particularly when Federal grant or credit assistance was an essential element of a project. The concern was that model contract provisions would become mandatory—an approach that would not work in a nation of many diverse States and localities. Stakeholders expressed a preference for an “educational” style of model contract that would assist State and local governments in negotiating

and developing their own P3 contracts. The FHWA agrees with these comments. The FHWA has never intended for these model contracts to be mandatory. Rather, these model contracts are merely intended as an informational tool for State and local governments to refer to whenever entering into a P3 transaction. These model contracts should be not construed as a statement of DOT or FHWA P3 contract requirements or policy.

Stakeholders also expressed a preference for a model contract that: (i) Does not include standard boilerplate language; (ii) focuses only on those provisions specific to P3s; and (iii) focuses primarily on the more controversial and/or complex provisions that warrant amplified discussion.

After considering the comments received from the January 2013 notice and listening session, FHWA has chosen to focus first on seven specific contractual provisions critical to achieving public sector objectives and protecting the interest of the taxpaying and traveling public:

1. Tolling regulation (The right to charge tolls; how tolls are set);
2. Revenue Sharing (Approaches to sharing of “excess revenues or profits” between concessionaires and a public owner for projects that produce revenue);
3. Supervening Events (Types of contractual relief typically granted for unforeseen events, and compensation as required);
4. Changes in Law (How changes in law, after a contract has been in effect, will be dealt with);
5. Changes in ownership (Restrictions on transfers and permitted transfers);
6. Default, early terminations and compensation (How the various types of terminations and default events are to be treated); and
7. Hand-back (Issues related to the hand-back of facilities on contract termination).

The draft Core Toll Concessions Model P3 Contract Guide discusses these key issues with an eye to helping states with their own P3 contracts. The draft Guide includes an introduction, discussion of the key provisions in the context of a typical contract; and an appendix with a glossary of terms as used in the Guide. An electronic copy of the draft Guide can be found at: http://www.fhwa.dot.gov/ipd/pdfs/p3/model_p3_core_toll_concessions.pdf.

In addition to addressing the seven key provisions discussed above, FHWA will also develop several secondary, yet still important provisions, found in typical P3 tolling contracts. The secondary provisions will include

issues such as performance standards, contract length, capacity triggers, consumer protections, continuing disclosure requirements, Federal requirements, and perhaps brief discussions of other provisions, as well. A draft compilation of a tolling concessions model P3 contract guide including both primary and secondary provisions will be published in the **Federal Register** after completion to solicit comments from stakeholders and other interested parties.

Based on public input, the second most popular type of P3 contract is the availability payment based contract. These are transactions where payments from public sector revenues are the source of payments to the private sector partner. Although this model has been implemented only three times in the U.S., FHWA will be publishing an Availability Payments Model P3 Contracts Guide in 2014. Issues such as performance standards, hand back requirements, changed circumstances, default/termination, and Federal requirements, as well as other non-core issues will be discussed in the document. Many of the provisions from the Toll Concessions Model P3 Contracts Guide are also germane to the Availability Payments Model P3 Contracts Guide. There will be a draft version of the availability payment contract template published in the **Federal Register** to solicit comments from stakeholders and other interested parties.

The core Toll Concession Model Contract Guide provisions are being delivered early to ensure that the congressionally established deadline of April 1, 2014, is met. However, please be advised that FHWA will incrementally produce additional provisions to more fully build out the model contracts guide for toll and availability payment P3 concessions.

Authority: Section 1534 (d) of Moving Ahead for Progress in the 21st Century, MAP-21, enacted October 1, 2012.

Issued on: January 30, 2014.

Gregory G. Nadeau,

Deputy Administrator.

[FR Doc. 2014-02589 Filed 2-5-14; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****[FTA Docket No. 2014-0005]****Notice of Request for the Extension of a Currently Approved Information Collection****AGENCY:** Federal Transit Administration, DOT.**ACTION:** Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to renew the following information collections: Title VI as it Applies to FTA Grant Programs; Nondiscrimination as it Applies to FTA Grant Programs; and Charter Service Operations. The collections involve FTA's Title VI, Nondiscrimination, and Charter Service Operations Programs. The information to be collected for the Title VI Program is necessary to ensure that service and benefits are provided non-discriminatorily without regard to race, color, or national origin. The information to be collected for the Nondiscrimination Program is necessary to ensure that any employee or applicant for employment is not discriminated against on the basis of race, color, creed, sex, national origin, age or disability. The information collected for the Charter Service Program is necessary to protect charter service providers from unauthorized competition by FTA recipients.

DATES: Comments must be submitted before April 7, 2014.**ADDRESSES:** To ensure that your comments are not entered more than once into the docket, submit comments identified by the docket number by only one of the following methods:

1. *Web site:* www.regulations.gov. Follow the instructions for submitting comments on the U.S. Government electronic docket site. (Note: The U.S. Department of Transportation's (DOT's) electronic docket is no longer accepting electronic comments.) All electronic submissions must be made to the U.S. Government electronic docket site at www.regulations.gov. Commenters should follow the directions below for mailed and hand-delivered comments.

2. *Fax:* 202-493-2251.

3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey

Avenue SE., Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

Instructions: You must include the agency name and docket number for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted and will be available to Internet users, without change, to www.regulations.gov. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit www.regulations.gov. Docket: For access to the docket to read background documents and comments received, go to www.regulations.gov at any time. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT:

Title VI as it applies to Federal Transit Programs—Mr. Jonathan Ocana, Equal Opportunity Specialist (202) 366-4018, or email: Jon.Ocana@dot.gov.

Nondiscrimination as it Applies to FTA Grant Programs—Ms. Anita Heard, Equal Opportunity Specialist (202) 493-0318, or email: Anita.Heard@dot.gov.

Charter Service Operations—Candace Key, Attorney Advisor (202) 366-4011 or email: Candace.Key@dot.gov.

SUPPLEMENTARY INFORMATION: Interested parties are invited to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

Title: Title VI as it Applies to FTA Grant Programs*(OMB Number: 2132-0540)*

Background: Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) states:

“No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

To achieve this purpose, each Federal department and agency which provides financial assistance for any program or activity is authorized and directed by the Department of Justice (DOJ) to effectuate provisions of Title VI for each program or activity by issuing generally applicable regulations or requirements. The Department of Transportation (DOT) has issued its regulation implementing this DOJ mandate.

In this regard, the responsibility of the FTA is to ensure that Federally-supported transit services and benefits are distributed by applicants, recipients, and subrecipients of FTA assistance in a manner consistent with Title VI. The employment practices of a grant applicant, recipient, or subrecipient are also covered under Title VI if the primary purpose of the FTA-supported program is to provide employment or if those employment practices would result in discrimination against beneficiaries of FTA-assisted services and benefits.

FTA policies and requirements are designed to clarify and strengthen Title VI (service equity) procedures for FTA grant recipients by requiring submission of written plans and approval of such plans by the agency. All project sponsors receiving financial assistance pursuant to an FTA-funded project shall not discriminate in the provision of services because of race, color, or national origin. Experience has demonstrated that a program requirement at the application stage is necessary to assure that benefits and services are equitably distributed by grant recipients. The requirements prescribed by the Office of Civil Rights are designed to accomplish this objective and diminish possible vestiges of discrimination among FTA grant recipients. FTA's assessment of the requirements indicated that the formulation and implementation of the Title VI Program should occur with a decrease in costs to such applicants and recipients.

Respondents: Transit agencies, States and Metropolitan Planning Organizations.

Estimated Total Annual Burden on Respondents: 45 hours for each of the 316 Equal Employment Opportunity (EEO) submissions.

Estimated Total Burden: 5,332 hours.
Frequency: Annually.

Title: Nondiscrimination as It Applies to FTA Grant Programs

(OMB Number: 2132-0542)

Background: 49 Code of Federal Regulations, part 21.5 states: "Where a primary objective of the Federal financial assistance to a program to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees)."

All entities receiving Federal financial assistance from FTA are prohibited from discriminating against any employee or applicant for employment because of race, color, creed, sex, national origin, age, or disability. To ensure that FTA's EEO procedures are followed, FTA requires grant recipients to submit written EEO plans to FTA for approval. FTA's assessment of this requirement shows that formulating, submitting, and implementing EEO programs should minimally increase costs for FTA applicants and recipients. To determine a grantee's compliance with applicable laws and requirements, grantee submissions are evaluated and analyzed based on the following criteria. First, an EEO program must include an EEO policy statement issued by the chief executive officer covering all employment practices, including recruitment, selection, promotions, terminations, transfers, layoffs, compensation, training, benefits, and other terms and conditions of employment. Second, the policy must be placed conspicuously so that employees, applicants, and the general public are aware of the agency's EEO commitment. The data derived from written EEO and affirmative action plans will be used by the Office of Civil Rights in monitoring grantees' compliance with applicable EEO laws and regulations. This monitoring and enforcement activity will ensure that minorities and women have equitable

access to employment opportunities and that recipients of federal funds do not discriminate against any employee or applicant because of race, color, creed, sex, national origin, age, or disability.

Respondents: Transit agencies, States and Metropolitan Planning Organizations.

Estimated Total Annual Burden on Respondents: 25 hours for each of the 97 EEO submissions.

Estimated Total Burden: 2,425 hours.
Frequency: Annually.

Title: Charter Service Operations

(OMB Number: 2132-0543)

Background: FTA recipients may only provide charter bus service with FTA-funded facilities and equipment if the charter service is incidental to the provision of transit service (49 U.S.C. 5323(d)). This restriction protects charter service providers from unauthorized competition by FTA recipients.

The requirements of 49 U.S.C. 5323(d) are implemented in FTA's charter regulation (Charter Service Rule) at 49 CFR part 604. Amended in 2008, the Charter Service Rule now contains five (5) provisions that impose information collection requirements on FTA recipients of financial assistance from FTA under Federal Transit Law.

First, 49 CFR 604.4 requires all applicants for Federal financial assistance under Federal Transit Law, unless otherwise exempted under 49 CFR 604.2, to enter into a "Charter Service Agreement," contained in the Certifications and Assurances for FTA Assistance Programs. The Certifications and Assurances become a part of the Grant Agreement or Cooperative Agreement for Federal financial assistance upon receipt of Federal funds. The rule requires each applicant to submit one Charter Service Agreement for each year that the applicant intends to apply for the Federal financial assistance specified above.

Second, 49 CFR 604.14(3) requires a recipient of Federal funds under Federal Transit Law, unless otherwise exempt, to provide email notification to all registered charter providers in the recipient's geographic service area each time the recipient receives a request for charter service that the recipient is interested in providing.

Third, 49 CFR 604.12(c) requires a recipient, unless otherwise exempt under 49 CFR Part 604.2, to submit on a quarterly basis records of all instances that the recipient provided charter service.

Fourth, 49 CFR 604.13 requires a private charter provider to register on

FTA's Charter Registration Web site at <http://ftawebprod.fta.dot.gov/CharterRegistration/> in order to qualify as a registered charter service provider and receive email notifications by recipients that are interested in providing a requested charter service. The rule requires that a registered charter service provider must update its information on the Charter Registration Web site at least once every two years. Currently, there are a total of 192 registered private charter service providers. Registration has consistently decreased over the years.

Lastly, 49 CFR 604.7 permits recipients to provide charter service to Qualified Human Service Organizations (QHSO) under limited circumstances. QHSOs that do not receive Federal funding under programs listed in Appendix A to Part 604 and seek to receive free or reduced rate services from recipients must register on FTA's Charter Registration Web site (49 CFR 604.15(a)).

Respondents: State and local government, business or other for-profit institutions, and non-profit institutions.

Estimated Annual Burden on Respondents: 1.75 hours for each of the 955 Recipient respondents, 0.5 hours for each of the 53 non-profit respondents, and 0.5 hours for each of the 192 for-profit respondents.

Estimated Total Burden: 369.7 hours.

Frequency: Annually, bi-annually, quarterly, and as required.

Matthew M. Crouch,

Associate Administrator for Administration.

[FR Doc. 2014-02421 Filed 2-5-14; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice To Rescind Notice of Intent To Prepare an Environmental Impact Statement (EIS) for Proposed Transit Improvements in the Corridor Between the Anaheim Regional Transportation Intermodal Center (ARTIC) and the Anaheim Resort® in the City of Anaheim, Orange County, California

AGENCY: Federal Transit Administration, DOT.

ACTION: Rescind notice of intent to prepare an Environmental Impact Statement.

SUMMARY: The Federal Transit Administration (FTA), in cooperation with the Orange County Transportation Authority (OCTA) and the City of Anaheim, are issuing this notice to advise the public that the Notice of

Intent (NOI) to prepare an Environmental Impact Statement (EIS) for proposed transit improvements in the corridor between the Anaheim Regional Transportation Intermodal Center (ARTIC) and The Anaheim Resort in the city of Anaheim is being rescinded.

FOR FURTHER INFORMATION CONTACT: Mr. Ted Matley, Community Planner, Region IX, Federal Transit Administration, 201 Mission Street, Suite 1650, San Francisco, CA 94105, phone (415) 744-2590, email ted.matley@dot.gov.

SUPPLEMENTARY INFORMATION: The FTA, in cooperation with the OCTA and the City of Anaheim, published a NOI in the **Federal Register** on October 27, 2009 (74 FR 55279-55281) to prepare an EIS for proposed transit improvements over a 3.5-mile corridor between the future Anaheim Regional Transportation Intermodal Center on the east and The Anaheim Resort on the west in the City of Anaheim. At that time, the alternatives proposed for evaluation included: A No-Build Alternative, a Transportation System Management Alternative, a Bus Rapid Transit Alternative, and an Elevated Fixed-Guideway Alternative. In October 2012, an Alternatives Analysis was completed, which screened these alternatives as well as a Streetcar Alternative. Based upon the results of the AA, in October 2012, the Anaheim City Council selected the Streetcar Alternative as the LPA for further environmental analysis.

The mode and alignment for the proposed project has been refined substantially. It is anticipated that an Environmental Assessment, leading to a Finding of No Significant Impact (FONSI), would be the appropriate class of action under NEPA. Therefore, the FTA has determined that the NOI for the EIS will be rescinded.

Comments and questions concerning the proposed action should be directed to FTA at the address provided above.

Issued on: January 24, 2014.

Leslie T. Rogers,

Regional Administrator, Federal Transit Administration, Region IX.

[FR Doc. 2014-01925 Filed 2-5-14; 8:45 am]

BILLING CODE 4910-57-P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

[Docket ID Number RITA 2008-0002]

Agency Information Collection: Activity Under OMB Review; Report of Traffic and Capacity Statistics—The T-100 System

AGENCY: Bureau of Transportation Statistics (BTS), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, Public Law 104-13, the Bureau of Transportation Statistics invites the general public, industry and other governmental parties to comment on the continuing need for and usefulness of DOT requiring U.S. and foreign air carriers to file traffic and capacity data pursuant to 14 CFR 241.19 and Part 217, respectively. These reports are used to measure air transportation activity to, from, and within the United States.

DATES: Written comments should be submitted by April 7, 2014.

FOR FURTHER INFORMATION CONTACT: Jennifer Rodes, Office of Airline Information, RTS-42, Room E34-420, RITA, BTS, 1200 New Jersey Avenue SE., Washington, DC 20590-0001, Telephone Number (202) 366-8513, Fax Number (202) 366-3383 or EMAIL jennifer.rodes@dot.gov.

Comments: Comments should identify the associated OMB approval # 2138-0040 and Docket ID Number RITA 2008-0002. Persons wishing the Department to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: Comments on OMB # 2138-0040, Docket—RITA 2008-0002. The postcard will be date/time stamped and returned.

SUPPLEMENTARY INFORMATION:

OMB Approval No. 2138-0040.

Title: Report of Traffic and Capacity Statistics—The T-100 System.

Form No.: Schedules T-100 and T-100(f).

Type of Review: Extension of a currently approved collection.

Respondents: Certificated, commuter and foreign air carriers that operate to, from or within the United States.

T100 Form

Number of Respondents: 130.

Number of Annual Responses: 1,560.

Total Burden per Response: 6 hours.

Total Annual Burden: 9,360 hours.

T100F Form

Number of Respondents: 175.

Number of Annual Responses: 2,100.
Total Burden per Response: 2 hours.
Total Annual Burden: 4,200 hours.
Needs and Uses:

Airport Improvement

The Federal Aviation Administration uses enplanement data for U.S. airports to distribute the annual Airport Improvement Program (AIP) entitlement funds to eligible primary airports, i.e., airports which account for more than 0.01 percent of the total passengers enplaned at U.S. airports. Enplanement data contained in Schedule T-100/T-100(f) are the sole data base used by the FAA in determining airport funding. U.S. airports receiving significant service from foreign air carriers operating small aircraft could be receiving less than their fair share of AIP entitlement funds. Collecting Schedule T-100(f) data for small aircraft operations will enable the FAA to more fairly distribute these funds.

Air Carrier Safety

The FAA uses traffic, operational and capacity data as important safety indicators and to prepare the air carrier traffic and operation forecasts that are used in developing its budget and staffing plans, facility and equipment funding levels, and environmental impact and policy studies. The FAA monitors changes in the number of air carrier operations as a way to allocate inspection resources and in making decisions as to increased safety surveillance. Similarly, airport activity statistics are used by the FAA to develop airport profiles and establish priorities for airport inspections.

Acquisitions and Mergers

While the Justice Department has the primary responsibility over air carrier acquisitions and mergers, the Department reviews the transfer of international routes involved to determine if they would substantially reduce competition, or determine if the transaction would be inconsistent with the public interest. In making these determinations, the proposed transaction's effect on competition in the markets served by the affected air carriers is analyzed. This analysis includes, among other things, a consideration of the volume of traffic and available capacity, the flight segments and origins-destinations involved, and the existence of entry barriers, such as limited airport slots or gate capacity. Also included is a review of the volume of traffic handled by each air carrier at specific airports and in specific markets which would be affected by the proposed acquisition or

merger. The Justice Department uses T-100 data in carrying out its responsibilities relating to airline competition and consolidation.

Traffic Forecasting

The FAA uses traffic, operational and capacity data as important safety indicators and to prepare the air carrier traffic and operation forecasts. These forecasts as used by the FAA, airport managers, the airlines and others in the air travel industry as planning and budgeting tools.

Airport Capacity Analysis

The mix of aircraft type are used in determining the practical annual capacity (PANCAP) at airports as prescribed in the FAA Advisory Circular *Airport Capacity Criteria Used in Preparing the National Airport Plan*. The PANCAP is a safety-related measure of the annual airport capacity or level of operations. It is a predictive measure which indicates potential capacity problems, delays, and possible airport expansions or runway construction needs. If the level of operations at an airport exceeds PANCAP significantly, the frequency and length of delays will increase, with a potential concurrent risk of accidents. Under this program, the FAA develops ways of increasing airport capacity at congested airports.

Airline Industry Status Evaluations

The Department apprizes Congress, the Administration and others of the effect major changes or innovations are having on the air transportation industry. For this purpose, summary traffic and capacity data as well as the detailed segment and market data are essential. These data must be timely and inclusive to be relevant for analyzing emerging issues and must be based upon uniform and reliable data submissions that are consistent with the Department's regulatory requirements.

Mail Rates

The Department is responsible for establishing international and intra-Alaska mail rates. International mail rates are set based on scheduled operations in four geographic areas: Trans-border, Latin America, operations over the Atlantic Ocean and operations over the Pacific Ocean. Separate rates are set for mainline and bush Alaskan operations. The rates are updated every six months to reflect changes in unit costs in each rate-making entity. Traffic and capacity data are used in conjunction with cost data to develop the required unit cost data.

Essential Air Service

The Department reassesses service levels at small domestic communities to assure that capacity levels are adequate to accommodate current demand.

System Planning at Airports

The FAA is charged with administering a series of grants that are designed to accomplish the necessary airport planning for future development and growth. These grants are made to state metropolitan and regional aviation authorities to fund needed airport systems planning work. Individual airport activity statistics, nonstop market data, and service segment data are used to prepare airport activity level forecasts.

Review of IATA Agreements

The Department reviews all of the International Air Transport Association (IATA) agreements that relate to fares, rates, and rules for international air transportation to ensure that the agreements meet the public interest criteria. Current and historic summary traffic and capacity data, such as revenue ton-miles and available ton-miles, by aircraft type, type of service, and length of haul are needed to conduct these analyses: To (1) develop the volume elements for passenger/cargo cost allocations, (2) evaluate fluctuations in volume of scheduled and charter services, (3) assess the competitive impact of different operations such as charter versus scheduled, (4) calculate load factors by aircraft type, and (5) monitor traffic in specific markets.

Foreign Air Carriers Applications

Foreign air carriers are required to submit applications for authority to operate to the United States. In reviewing these applications the Department must find that the requested authority is encompassed in a bilateral agreement, other intergovernmental understanding, or that granting the application is in the public interest. In the latter cases, T-100 data are used in assessing the level of benefits that carriers of the applicant's homeland presently are receiving from their U.S. operations. These benefits are compared and balanced against the benefits U.S. carriers receive from their operations to the applicant's homeland.

Air Carrier Fitness

The Department determines whether U.S. air carriers are and continue to be fit, willing and able to conduct air service operations without undue risk to passengers and shippers. The Department monitors a carrier's load

factor, operational, and enplanement data to compare with other carriers with similar operating characteristics. Carriers that expand operations at a high rate are monitored more closely for safety reasons.

International Civil Aviation Organization

Pursuant to an international agreement, the United States is obligated to report certain air carrier data to the International Civil Aviation Organization (ICAO). The traffic data supplied to ICAO are extracted from the U.S. air carriers' Schedule T-100 submissions.

The Confidential Information Protection and Statistical Efficiency Act of 2002 (44 U.S.C. 3501 note), requires a statistical agency to clearly identify information it collects for non-statistical purposes. BTS hereby notifies the respondents and the public that BTS uses the information it collects under this OMB approval for non-statistical purposes including, but not limited to, publication of both Respondent's identity and its data, submission of the information to agencies outside BTS for review, analysis and possible use in regulatory and other administrative matters.

Issued on January 31, 2014.

Rolf Schmitt,

Deputy Director, Bureau of Transportation Statistics.

[FR Doc. 2014-02492 Filed 2-5-14; 8:45 am]

BILLING CODE 4910-HY-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[OCC Charter Number 704476]

Edgewater Bank, St. Joseph, Michigan; Approval of Conversion Application

Notice is hereby given that on November 12, 2013, the Office of the Comptroller of the Currency (OCC) approved the application of Edgewater Bank, St. Joseph, Michigan, to convert to the stock form of organization. Copies of the application are available on the OCC Web site at the FOIA Reading Room (<https://foia-pal.occ.gov/palMain.aspx>) under Mutual to Stock Conversion Applications. If you have any questions, please contact Licensing Activities at (202) 649-6260.

Dated: January 28, 2014.

By the Office of the Comptroller of the Currency.

Stephen A. Lybarger,

Deputy Comptroller for Licensing.

[FR Doc. 2014-02445 Filed 2-5-14; 8:45 am]

BILLING CODE 4810-33-P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Three Individuals Blocked Pursuant to Executive Order 13219, as Amended

SUB-AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the name of three individuals whose property and interests in property are being unblocked pursuant to Executive Order 13219 of June 26, 2001 "Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans," as amended by Executive Order 13304 of May 28, 2003 "Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001."

DATES: The unblocking of property and interests in property and the removal of the three individuals identified in this Notice from the list of Specially Designated Nationals and Blocked Persons ("SDN List") is effective on February 6, 2014.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622-2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (www.treasury.gov/ofac) or via facsimile through a 24-hour fax-on-demand service, tel.: 202/622-0077.

Background

On June 26, 2001, the President, invoking the authority of, *inter alia*, the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) ("IEEPA"), issued Executive Order 13219, "Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans" (66 Fed. Reg. 34777, June 29, 2001) ("E.O. 13219"). In E.O. 13219, the

President declared a national emergency with respect to the actions of persons engaged in, or assisting, sponsoring, or supporting: (i) Extremist violence in the former Yugoslav Republic of Macedonia, southern Serbia, the Federal Republic of Yugoslavia, and elsewhere in the Western Balkans region, or (ii) acts obstructing implementation of the Dayton Accords in Bosnia or United Nations Security Council Resolution 1244 in Kosovo.

On May 28, 2003, the President issued Executive Order 13304, "Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001" (68 FR 32315, May 29, 2003) ("E.O. 13304"), terminating the national emergencies declared in Executive Order 12808 of May 20, 1992, and Executive Order 13088 of June 9, 1998, with respect to the former Socialist Federal Republic of Yugoslavia, revoking those and related executive orders, and taking additional steps with regard to the national emergency declared in E.O. 13219. Section 1 of E.O. 13219, as amended by E.O. 13304, blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, of: (i) Persons listed in its Annex and (ii) persons designated by the Secretary of the Treasury, in consultation with the Secretary of State, because they are determined: (A) To be under open indictment by the International Criminal Tribunal for the former Yugoslavia, unless circumstances warrant otherwise, or (B) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of threatening the peace in or diminishing the stability or security of any area or state in the Western Balkans region, undermining the authority, efforts, or objectives of international organizations or entities present in the region, or endangering the safety of persons participating in or providing support to the activities of those international organizations or entities; or (C) to have actively obstructed, or pose a significant risk of actively obstructing, the Ohrid Framework Agreement of 2001 relating to Macedonia, United Nations Security Council Resolution 1244 relating to Kosovo, or the Dayton Accords or the Conclusions of the Peace Implementation Conference held in London on December 8-9, 1995, including the decisions or conclusions of the High Representative, the Peace

Implementation Council or its Steering Board, relating to Bosnia and Herzegovina; or (D) to have materially assisted in, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such acts of violence or obstructionism or any person listed in or designated pursuant to E.O. 13219, as amended; or (E) to be owned or controlled by, or acting or purporting to act directly or indirectly for or on behalf of, any of the foregoing persons.

The Department of the Treasury's Office of Foreign Assets Control, in consultation with the Department of State, has determined that circumstances no longer warrant inclusion of the following individuals in the Annex to E.O. 13219, as amended by E.O. 13304, and that these individuals should be removed from the SDN List:

Individuals

1. GOTOVINA, Ante; DOB 12 Oct 1955; POB Pasman, Croatia; ICTY indictee individual) [BALKANS].
2. ORIC, Naser; DOB 3 Mar 1967; POB Potocari, Bosnia-Herzegovina; ICTY indictee in custody (individual) [BALKANS].

The Department of the Treasury's Office of Foreign Assets Control, in consultation with the Department of State, has determined that the following individual should be removed from the SDN List:

Individual

3. SAROVIC, Mirko; DOB 16 Sep 1956; POB Rogatica, Serbia (individual) [BALKANS].

The removal of the individuals listed above from the SDN List is effective as of [date of **Federal Register** Notice publication], 2014. All property and interests in property of these individuals that are in or hereafter come within the United States or the possession or control of United States persons are no longer blocked pursuant to E.O. 13219, as amended by E.O. 13304.

Dated: January 30, 2014.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2014-02562 Filed 2-5-14; 8:45 am]

BILLING CODE 4810-AL-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0041]

Agency Information Collection (Compliance Inspection Report) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0041" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0041."

SUPPLEMENTARY INFORMATION:

Title: Compliance Inspection Report, VA Form 26-1839.

OMB Control Number: 2900-0041.

Type of Review: Revision of a currently approved collection.

Abstract: Fee-compliance inspectors complete VA Form 26-1839 during their inspection on properties under construction. The inspections provides a level of protection to veterans by assuring them and VA that the adaptation are in compliance with the plans and specifications for which a specially adapted housing grant is based.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register**

Notice with a 60-day comment period soliciting comments on this collection of information was published on November 29, 2013, at page 71725.

Affected Public: Individuals or households.

Estimated Annual Burden: 900 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 3,600.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02531 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0786]

Proposed Information Collection (Vocational Rehabilitation and Employment Longitudinal Study Survey) 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 revision of a current approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine the long-term outcomes of Veterans participating in VBA's Vocational Rehabilitation and Employment (VR&E) Program.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 7, 2014.

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. 2900-0786" in any

correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT:

Nancy J. Kessinger at (202) 632-8924 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.

Title: Vocational Rehabilitation and Employment Longitudinal Study Survey.

OMB Control Number: 2900-0786.

Type of Review: Revision of a currently approved collection.

Abstract: As required by Public Law 110-389 Section 334, VBA will collect survey data on individuals who began participating in the VR&E program during fiscal years 2010, 2012, and 2014. VA will conduct a study of this data to determine the long-term positive outcomes of individuals participating in VBA's VR&E program. The purpose of this study is to monitor the effectiveness of VR&E program, so that we can find ways to improve the program and increase the support VA provide to Veterans on a daily basis.

Affected Public: Individuals and Households.

Estimated Annual Burden: 2,333 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 7,000.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02551 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0139]

Agency Information Collection (Notice—Payment Not Applied) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-00139" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0139."

SUPPLEMENTARY INFORMATION:

Title: Notice—Payment Not Applied, VA Form 29-4499a.

OMB Control Number: 2900-0139.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 29-4499a is used by policy holders to reinstate their National Service Life Insurance (NSLI) policy. The information collected is used to determine the insurer's eligibility for reinstatement to government life insurance.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 31, 2013, at pages 46423-46424.

Affected Public: Individuals or households.

Estimated Annual Burden: 300 hours.

Estimated Average Burden per

Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,200.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02547 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0159]

Agency Information Collection (Matured Endowment Notification) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0159" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records

Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0159."

SUPPLEMENTARY INFORMATION:

Title: Matured Endowment

Notification, VA Form 29-5767.

OMB Control Number: 2900-0159.

Type of Review: Revision without change of a currently approved collection.

Abstract: VA Form 29-5767 is used to notify the insured that his or her endowment policy has matured. The form also request that the insured elect whether he or she prefer to receive the proceeds in monthly installment or in a combination of cash and monthly installment and to designate a beneficiary(ies) to receive the remaining proceeds.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 31, 2013 (78 FR 46418).

Estimated Annual Burden: 2,867 hours.

Estimated Average Burden per

Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 8,600.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02540 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0521]

Agency Information Collection (Credit Underwriting Standards and Procedures for Processing VA Guaranteed Loans) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of

Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oira_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0521" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0521."

SUPPLEMENTARY INFORMATION:

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.

Abstract: 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 are used to ensure that 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 does 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.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 1, 2013, at pages 60379-60380.

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: One Time.

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: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02532 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0474]

Agency Information Collection (Create Payment Request for the VA Funding Fee Payment System (VA FFPS) a Computer Generated Funding Fee Receipt) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits

Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oira_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0474" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0474."

SUPPLEMENTARY INFORMATION:

Title: Create Payment Request for the VA Funding Fee Payment System (VA FFPS) Computer Generated Funding Fee Receipt, VA Form 26-8986.

OMB Control Number: 2900-0474.

Type of Review: Revision of a currently approved collection.

Abstract: Veterans obtaining a VA-guaranteed home loan must pay a funding fee to VA before the loan can be guaranteed. The only exceptions are loans made to Veterans receiving VA compensation for service-connected disabilities, (or veterans whom, but for receipt of retirement pay, would be entitled to receive compensation) and unmarried surviving spouse of veterans who died in active military service or from service-connected disability regardless of whether the spouse has his or her own eligibility.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 27, 2013 (78 FR 59771).

Affected Public: Business or other for profit.

Estimated Annual Burden: 9,167 hours.

Estimated Average Burden per Respondent: 2 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents:
275,000.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02539 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0055]

Agency Information Collection (Request for Determination of Loan Guaranty Eligibility—Unmarried Surviving Spouses) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0055" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0055."

SUPPLEMENTARY INFORMATION:

Title: Request for Determination of Loan Guaranty Eligibility—Unmarried Surviving Spouses, VA Form 26-1817.

OMB Control Number: 2900-0055.

Type of Review: Revision of a currently approved collection.

Abstract: Unmarried surviving spouse of a veteran whose death occurred while serving on active duty or was a direct result of service-connected disabilities completes VA Form 26-1817 to request a certificate of eligibility for home loan benefits. VA uses the data collected to verify the veteran's service-connected death and to determine the applicant's eligibility for home loan benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 27, 2013, at pages 59772-59773.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,250 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 5,000.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02527 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0500]

Agency Information Collection (Status of Dependents Questionnaire) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through

www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0500" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0500."

SUPPLEMENTARY INFORMATION:

Title: Status of Dependents Questionnaire, VA Form 21-0538.

OMB Control Number: 2900-0500.

Type of Review: Revision without change of a currently approved collection.

Abstract: Veterans receiving compensation for service-connected disability which includes an additional amount for their spouse and/or child(ren) complete VA Form 21-0538 to certify the status of the dependents for whom additional compensation is being paid.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 31, 2013, at pages 46422-46423.

Affected Public: Individuals or households.

Estimated Annual Burden: 14,083 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Once every eight years.

Estimated Number of Respondents: 84,500.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02538 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0613]

Agency Information Collection (Recordkeeping at Flight Schools) Activity Under OMB Review**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.**ACTION:** Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0613" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0613."

SUPPLEMENTARY INFORMATION:

Title: Recordkeeping at Flight Schools (38 U.S.C. 21.4263(h)(3)).

OMB Control Number: 2900-0613.

Type of Review: Revision of a currently approved collection.

Abstract: Flight schools are required to maintain records on students to support continued approval of their courses. VA uses the data collected to determine whether the courses and students meet the requirements for flight training benefits and to properly pay students.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection

of information was published on September 27, 2013, at page 59771.

Affected Public: Business or other for-profit and Not-for-profit institutions.

Estimated Annual Burden: 91 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 357.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02546 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P**DEPARTMENT OF VETERANS AFFAIRS**

[OMB Control No. 2900-0166]

Proposed Information Collection (Application for Ordinary Life Insurance) 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 extension without change 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 determine eligibility for replacement insurance.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before April 7, 2014.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov; or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email nancy.kessinger@va.gov. Please refer to "OMB Control No. 2900-0166" in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632-8924 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. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 65, National Service Life Insurance, VA Form 29-8485.

b. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 70, National Service Life Insurance, VA Form 29-8485a.

c. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 65, National Service Life Insurance, VA Form 29-8700.

d. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 65, National Service Life Insurance, VA Forms 29-8700a-e.

e. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 70, National Service Life Insurance, VA Form 29-8701.

f. Application for Ordinary Life Insurance, Replacement Insurance for Modified Life Reduced at Age 70, National Service Life Insurance, VA Form 29-8701a-e.

OMB Control Number: 2900-0166.

Type of Review: Revision without change of a currently approved collection.

Abstract: Policyholder's use the forms to apply for replacement of Modified Life insurance. Modified Life insurance

coverage is reduced automatically by one-half from its present face value on the day before a policyholder's 65th and 70th birthdays. Policyholder's who wish to maintain the same amount of coverage must purchase whole life insurance prior to their 65th and 70th birthdays to replace the coverage that will be lost when the Modified Life insurance is reduce.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,284 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 15,400.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02573 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0149]

Agency Information Collection (Application for Conversion (Government Life Insurance)) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through

electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0149" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0149."

SUPPLEMENTARY INFORMATION:

Title: Application for Conversion (Government Life Insurance), VA Form 29-0152.

OMB Control Number: 2900-0149.

Type of Review: Revision without change of a currently approved collection.

Abstract: VA Form 29-0152 is completed by insured Veterans to convert his/her term insurance to a permanent plan of insurance.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 31, 2013 (78 FR 46420).

Affected Public: Individuals or households.

Estimated Annual Burden: 1,125 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 4,500.

Dated: February 3, 2014.

By direction of the Secretary.

Crystal Rennie,

Department Clearance Officer, Department of Veterans Affairs.

[FR Doc. 2014-02541 Filed 2-5-14; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0624]

Agency Information Collection (Obligation To Report Factors Affecting Entitlement) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 10, 2014.

ADDRESSES: Submit written comments on the collection of information through www.Regulations.gov, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to oir_submission@omb.eop.gov. Please refer to "OMB Control No. 2900-0624" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-7492 or email crystal.rennie@va.gov. Please refer to "OMB Control No. 2900-0624."

SUPPLEMENTARY INFORMATION:

Title: Obligation to Report Factors Affecting Entitlement (38 CFR 3.204(a)(1), 38 CFR 3.256(a) and 38 CFR 3.277(b)).

OMB Control Number: 2900-0624.

Type of Review: Revision without change of a currently approved collection.

Abstract: Claimants who applied for or receives compensation, pension or dependency and indemnity compensation benefits must report changes in their entitlement factors. Individual factors such as income, marital status, and the beneficiary's number of dependents, may affect the amount of benefit that he or she receives or affect the right to receive such benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on July 31, 2013 (78 FR 46418).

Affected Public: Individuals or households.
Estimated Annual Burden: 31,017 hours.
Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.
Estimated Number of Respondents: 372,209.
Dated: February 3, 2014.

By direction of the Secretary:
Crystal Rennie,
Department Clearance Officer, Department of Veterans Affairs.
[FR Doc. 2014-02542 Filed 2-5-14; 8:45 am]
BILLING CODE 8320-01-P



FEDERAL REGISTER

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February 6, 2014

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 493

Office of the Secretary

45 CFR Part 164

CLIA Program and HIPAA Privacy Rule; Patients' Access to Test Reports;
Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 493

Office of the Secretary

45 CFR Part 164

[CMS-2319-F]

RIN 0938-AQ38

CLIA Program and HIPAA Privacy Rule; Patients' Access to Test Reports

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS; Centers for Disease Control and Prevention (CDC), HHS; Office for Civil Rights (OCR), HHS.

ACTION: Final rule.

SUMMARY: This final rule amends the Clinical Laboratory Improvement Amendments of 1988 (CLIA) regulations to specify that, upon the request of a patient (or the patient's personal representative), laboratories subject to CLIA may provide the patient, the patient's personal representative, or a person designated by the patient, as applicable, with copies of completed test reports that, using the laboratory's authentication process, can be identified as belonging to that patient. Subject to conforming amendments, the final rule retains the existing provisions that require release of test reports only to authorized persons and, if applicable, to the persons responsible for using the test reports and to the laboratory that initially requested the test. In addition, this final rule amends the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule to provide individuals (or their personal representatives) with the right to access test reports directly from laboratories subject to HIPAA (and to direct that copies of those test reports be transmitted to persons or entities designated by the individual) by removing the exceptions for CLIA-certified laboratories and CLIA-exempt laboratories from the provision that provides individuals with the right of access to their protected health information. These changes to the CLIA regulations and the HIPAA Privacy Rule provide individuals with a greater ability to access their health information, empowering them to take a more active role in managing their health and health care.

DATES: *Effective Date:* These regulations are effective on April 7, 2014.

HIPAA covered entities must comply with the applicable requirements of this final rule by October 6, 2014.

FOR FURTHER INFORMATION CONTACT:

For CLIA regulations: Nancy Anderson, CDC, (404) 498-2280. Judith Yost, CMS, (410) 786-3531.

For HIPAA Privacy Rule: Andra Wicks, OCR, (202) 205-2292.

SUPPLEMENTARY INFORMATION:

I. Background

A. CLIA Statute and Regulations

The Clinical Laboratory Improvement Amendments of 1988 (CLIA) and the implementing regulations established nationwide quality standards to ensure the accuracy, reliability and timeliness of clinical laboratories' test results. The standards vary based on the complexity of the laboratory test method; that is, the more complicated the test method, the more stringent the requirements for the laboratory.

The CLIA regulations established three categories of testing based on complexity level. In increasing order of complexity, these categories are waived, moderate complexity (which includes the subcategory of provider-performed microscopy (PPM)), and high complexity. Laboratories must hold a CLIA certificate for the most complex form of CLIA-regulated testing that they perform.

The CLIA regulations cover all phases of laboratory testing, including the reporting of test results. The CLIA regulatory limitations that govern to whom a laboratory may issue a test report have become a point of concern. The requirements for a laboratory test report are set forth in 42 CFR 493.1291.

Under the current CLIA regulations at § 493.1291(f), a CLIA laboratory may only disclose laboratory test results to three categories of individuals or entities: The "authorized person," the person responsible for using the test results in the treatment context, and the laboratory that initially requested the test. "Authorized person" is defined in § 493.2 as the individual authorized under state law to order or receive test results, or both. In states that do not allow individuals to access their own test results, the individuals must receive their test results through their health care providers.

Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (The Recovery Act), which was enacted on February 17, 2009, incorporated the Health Information Technology for Economic and Clinical Health (HITECH) Act. The HITECH Act created a Federal advisory committee known as the

Health Information Technology (HIT) Policy Committee. The HIT Policy Committee has broad representation from major health care constituencies and provides recommendations to the Department's Office of the National Coordinator for Health Information Technology (ONC) on issues relating to the implementation of an interoperable, nationwide health information infrastructure. The HIT Policy Committee has sought to identify barriers to the adoption and use of health information technology. According to the HIT Policy Committee, some stakeholders perceive the CLIA regulations as imposing barriers to the exchange of health information. These stakeholders include large and medium sized laboratories, public health laboratories, electronic health record (EHR) system vendors, health policy experts, health information exchange organizations (HIOs), and health care providers who believe that the individual's access to his or her own records is impeded, preventing patients from having a more active role in their personal health care decisions.

We believe these concerns, as well as the advent of certain health reform concepts (for example, personalized medicine, an individual's active involvement in his or her own health care, and the Department's work toward the widespread adoption of EHRs), call for revisiting barriers or challenges to individuals' gaining access to their health information.

The Centers for Medicare & Medicaid Services (CMS) worked with ONC, the Centers for Disease Control and Prevention (CDC), and the Office for Civil Rights (OCR) to propose changes to the CLIA regulations and to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule to remove barriers to an individual's direct access to his or her own test reports from laboratories. See *CLIA Program and HIPAA Privacy Rule; Patients' Access to Test Reports*, 76 Fed. Reg. 56712, September 14, 2011. The Department believes that this right is crucial to provide individuals with vital information to empower them to better manage their health and take action to prevent and control disease. In addition, removing barriers in this area supports the commitments and goals of the Secretary of the Department of Health and Human Services (the Department) and the Administrator of CMS regarding personalized medicine, an individual's active involvement in his or her own health care, and the widespread adoption of EHRs by 2014.

B. HIPAA Statute and Privacy Rule

The Health Insurance Portability and Accountability Act of 1996, Title II, subtitle F—Administrative Simplification, Public Law 104–191, 110 Stat., 2021, provided for the establishment of national standards to protect the privacy and security of certain individually identifiable health information. The Administrative Simplification provisions of HIPAA and their implementing regulations apply to three types of entities, which are known as “covered entities”: Health care providers who conduct covered health care transactions electronically, health plans, and health care clearinghouses.

A laboratory, as a health care provider, is only a covered entity if it conducts one or more covered transactions electronically, such as transmitting health care claims or equivalent encounter information to a health plan, requesting prior authorization from a health plan for a health care item or service it wishes to provide to an individual with coverage under the plan, or sending an eligibility inquiry to a health plan to confirm an individual’s coverage under that plan.

If a laboratory does not conduct any of these or the other HIPAA standard transactions electronically (either because it does not conduct the transactions at all or because it does so via paper), then the laboratory is not subject to the HIPAA Privacy Rule (45 CFR Part 160 and Part 164, subparts A and E). Any laboratory that conducts a single electronic transaction for which there is a HIPAA standard under the HIPAA Transactions and Code Sets Rule becomes a covered entity and is subject to the Privacy Rule with respect to all protected health information that it creates or maintains (that is, the application of the Privacy Rule is not limited to the individuals or records associated with an electronic transaction). This final rule does not alter the requirements for what makes a laboratory a HIPAA covered entity.

The Privacy Rule at § 164.524 provides individuals with a general right of access to inspect and obtain a copy of protected health information about the individual in a designated record set maintained by or for a covered entity. A “designated record set” is defined at 45 CFR § 164.501 as a group of records maintained by or for a covered entity that is comprised of: The medical records and billing records about individuals maintained by or for a covered health care provider; the enrollment, payment, claims adjudication, and case or medical management record systems maintained

by or for a health plan; or other records that are used, in whole or in part, by or for the covered entity to make decisions about individuals.

The term “record” means “any item, collection, or grouping of information that includes protected health information and is maintained, collected, used or disseminated by or for a covered entity.” Laboratory test reports that are maintained by or for a laboratory that is a covered entity are part of a designated record set.

The HIPAA Privacy Rule requires a HIPAA covered entity to provide the individual with a copy of the information in his or her designated record set in the form and format requested by the individual, if a copy in that form and format is readily producible. Where the information in the designated record set is maintained electronically, and the individual requests an electronic copy of the information, the covered entity must provide the individual with access to the information in the requested electronic form and format, if it is readily producible in that form and format. When it is not readily producible in the electronic form and format requested, then the covered entity must provide the copy in an alternative readable electronic format as agreed to by the covered entity and the individual (see § 164.524(c)(2)(ii)).

The right of access under § 164.524 extends not only to individuals, but also to individuals’ personal representatives, who generally are persons authorized under applicable law to make health care decisions for the individual. The rules governing who may act as a personal representative under the Privacy Rule are set forth at § 164.502(g). Additionally, under § 164.524(c)(3)(ii), if requested by an individual who is exercising his or her right of access, a covered entity must transmit the copy of protected health information directly to another person or entity designated by the individual.

However, while individuals (and personal representatives) generally have the right to inspect and obtain a copy of their protected health information in a designated record set, the current Privacy Rule includes a set of exceptions related to CLIA. Specifically, the right of access under § 164.524 of the Privacy Rule does not apply to: Protected health information maintained by a covered entity that is— (1) subject to CLIA to the extent the provision of access to the individual would be prohibited by law; or (2) exempt from CLIA. These exceptions, found at § 164.524(a)(1)(iii)(A) and (B) of the Privacy Rule, cover test reports

and other protected health information only at CLIA and CLIA-exempt laboratories. The individual has a right to access this information when held by any other type of covered entity (for example, a hospital or treating physician).

These exceptions were included in the Privacy Rule because the Department wanted to avoid a conflict with the CLIA regulatory requirements that limited patient access to test reports (65 FR 82485, December 28, 2000). However, because CMS proposed to amend the CLIA regulations to allow CLIA-certified laboratories to provide patients with direct access to their test reports, the Department simultaneously proposed to remove the exceptions for CLIA and CLIA-exempt laboratories from the right of access at § 164.524 so that HIPAA-covered laboratories would be required by HIPAA to provide individuals, upon request, with access to their completed test reports.

II. Summary of the Proposed Changes to the CLIA Regulations (§ 493.1291)

On September 14, 2011, we published a proposed rule in the **Federal Register** entitled, “Patients’ Access to Test Reports” (76 FR 56712) that, if finalized, would amend § 493.1291 of the CLIA regulations. Specifically, we proposed to add at 42 CFR 493.1291(l) to specify that, upon a patient’s request (or upon the request of the patient’s personal representative), the laboratory may provide a patient with access to his or her completed test reports that, using the laboratory’s authentication processes, can be identified as belonging to that patient. While we proposed to use the word “may,” we highlighted the importance of reading the proposed amendments to the CLIA regulations in concert with the proposed changes to the HIPAA Privacy Rule (discussed below), which would require covered entity laboratories to provide patients with access to test reports. We did not propose to specify in the CLIA regulations the mechanism by which patient requests for access would be submitted, processed, or responded to by the laboratories. In providing this latitude, we intended to allow patients and their personal representatives access to patient test reports in accordance with the requirements of the HIPAA Privacy Rule. Subject to conforming amendments, we proposed to retain the existing requirements at § 493.1291(f) that otherwise limit the release of test reports to authorized persons and, if applicable, the individuals (or their personal representatives) responsible for using

the test reports and the laboratory that initially requested the test.

III. Summary of the Proposed Changes to the HIPAA Privacy Rule (§ 164.524)

The Department also proposed to amend the HIPAA Privacy Rule at 45 CFR 164.524(a)(1)(iii)(A) and (B) to remove the exceptions to an individual's right of access that relate to CLIA and CLIA-exempt laboratories to align the Privacy Rule with CMS' proposed changes to the CLIA regulations and the Department's goal of improving individuals' access to their health information.

Under the proposal, HIPAA covered entities that are laboratories subject to CLIA, as well as those that are exempt from CLIA, would have the same obligations as other types of covered health care providers with respect to providing individuals (or their personal representatives) with access to their protected health information in accordance with § 164.524.

Consistent with the proposed change to the CLIA regulatory requirements, which would allow a laboratory to provide patients and their personal representatives with direct access to completed test reports when the laboratory can authenticate that the test report pertains to the patient, we also clarified that CLIA and CLIA-exempt laboratories that are HIPAA covered entities would have to satisfy the verification requirement of § 164.514(h) of the Privacy Rule before providing an individual with access. We recognized that a laboratory could receive a test order with only an anonymous identifier and be unable to identify the individual who is the subject of the test report. We noted that it was not our intent to discourage anonymous testing. As we discussed in the proposed rule, a laboratory that received a request for access from an individual where the laboratory could not authenticate that the requesting individual is the subject of a test report would be under no obligation to provide access.

The proposed rule also explained that the changes to the HIPAA Privacy Rule would result in the preemption of a number of state laws that prohibit a laboratory from releasing a test report directly to the individual or that prohibit the release without the ordering provider's consent because the state laws now would be contrary to the access provision of the HIPAA Privacy Rule mandating direct access by the individual.

Finally, we explained that it was our intent that HIPAA-covered laboratories would be required to comply with the revised individual access requirements

of the Privacy Rule by no later than 180 days after the effective date of any final rule. The effective date of the final rule would be 60 days after publication in the **Federal Register**, so laboratories subject to HIPAA would have a total of 240 days after publication of the final rule to come into compliance.

IV. Provisions of the Final Regulations

This final rule adopts the proposed changes to both the CLIA regulations and the HIPAA Privacy Rule, with minor clarifications and conforming changes, which are explained below in the relevant responses to comments. These modifications broaden individuals' rights to access their protected health information directly from laboratories subject to HIPAA. In addition, the changes remove federal barriers to direct access for laboratories not subject to HIPAA. With respect to the CLIA regulations, this final rule allows laboratories subject to CLIA, upon the request of a patient (or the patient's personal representative) to provide access to completed test reports that, using the laboratory's authentication process, can be identified as belonging to that patient. The final rule also clarifies that laboratories subject to CLIA may provide a copy of the patient's test reports to a person or entity designated by the patient to receive such reports in accordance with the HIPAA Privacy Rule at § 164.524(c)(3)(ii). Subject to certain conforming amendments, this final rule retains the CLIA regulatory provision that requires the release of test reports only to authorized persons, to the persons responsible for using the test reports, and to the laboratory that initially requested the test. These CLIA regulatory modifications take effect 60 days after publication of this final rule in the **Federal Register**.

With respect to the Privacy Rule, the final rule removes the exceptions to an individual's right of access at § 164.524(a)(1)(iii) related to CLIA and CLIA-exempt laboratories. Thus, as of the compliance date of this final rule, HIPAA-covered laboratories will be required to provide an individual (or the individual's personal representative) with access, upon request, to the individual's completed test reports (and other information maintained in a designated record set) in accordance with the provisions of § 164.524 of the Privacy Rule. The compliance date of this rule is October 6, 2014.

The Department's rationale for adopting the proposed provisions in this final rule, along with further clarifications and interpretations of the

provisions, is explained below in the responses to the public comments.

V. Analysis of and Responses to Public Comments

In response to the September 2011 proposed rule, we received over 160 timely public comments on various issues related to the rule. Interested parties that submitted comments included health care consumers and patient advocacy organizations; laboratories, hospitals, and other health care providers and their associations; information technology organizations; governmental organizations, and others. We have analyzed these comments and determined that it is appropriate to finalize the provisions as set forth in the proposed rule. The comments we received on these provisions and our responses are set forth below.

A. Right of Direct Access to Laboratory Test Reports

Comment: A number of providers and laboratories expressed concerns about giving individuals a way to receive laboratory test reports without the benefit of provider interpretation and without contextual knowledge that may be necessary to properly read and understand the reports. For example, commenters expressed concern that patients might receive and act upon results that appear to be abnormal (showing false positives or false negatives, or results that are out of the normal range for the general population) but may be normal for that particular patient due to his or her medical conditions. Commenters also requested that the Department clarify that the laboratories themselves would not be required to interpret test reports for individuals.

Other commenters stated that the proposed rule was redundant, and would add significant burden without a commensurate benefit to individuals, as existing HIPAA and HITECH Act (§ 13405(e)) laws already provide individuals with a comprehensive right to access their protected health information, including test reports, through their physicians. Further, some commenters stated that the Medicare and Medicaid Electronic Health Record (EHR) Incentive Programs,¹ which include criteria to ensure that certain laboratory test reports become standardized elements in a certified EHR, are a better mechanism than the proposed rule to ensure more timely access to all health information. The

¹ See <https://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/index.html>.

commenters also stated that the information provided to individuals through the Medicare and Medicaid EHR Incentive Programs' requirements will be in a more consistent, more user-friendly, and more interoperable format than that obtained directly from a laboratory. Furthermore, commenters stated that many providers have already invested significant dollars and resources in secure patient portals to provide for individual access to health information directly from these providers.

In contrast, other commenters, including certain laboratories, consumers, and consumer advocates, generally supported expanding an individual's right of access to include receiving test reports directly from laboratories. These commenters stated that providing individuals with the ability to access their laboratory test reports directly from laboratories would provide individuals with an increased ability to play a more active role in their health care and have more informed conversations with their health care providers, resulting in better health outcomes. Some commenters also thought that the proposals would remove barriers to the electronic exchange of individually identifiable health information.

Further, in response to concerns regarding instances in which patients might misunderstand or become distressed over the results of laboratory tests due to the lack of treating provider interpretation or counseling, some commenters stated that they would not anticipate that many patients will request direct access to any test reports that they do not feel prepared to review on their own. Rather, the commenters indicated that the proposals would encourage doctors to more proactively discuss the range of possible results and the consequences of each before tests are ordered. One laboratory noted that, in its experience, many patients do not request access to their test results until they have spoken to a physician about them. Some commenters challenged what they termed to be a "paternalistic" notion that patients are unable to understand their health data without physician explanation. These commenters stated that if patients want additional information from, or consultation with, their physicians, they will follow up with their physicians directly.

Response: We appreciate all of the comments that we received with regard to the right of individuals to access their laboratory test reports directly from laboratories. We agree with those commenters who stated that the rule is

necessary to ensure patients have better and more complete access to their health information, which will enable patients to be more proactive and more informed with regard to their health care. However, we disagree with those commenters who argued that the rule would be redundant. While individuals do have a right of access to their health information under the HIPAA Privacy Rule, there may be circumstances when an ordering or treating provider is not subject to the HIPAA Privacy Rule (for example, because the provider does not bill health plans electronically) and, thus, is not required to provide an individual with access to his or her health information. Further, some studies have found that physician practices failed to inform patients of abnormal test results about seven percent of the time, resulting in a substantial number of patients not being informed by their providers of clinically significant tests results. See *Casalino LP, Dunham D, Chin MH, et al. Frequency of Failure To Inform Patients of Clinically Significant Outpatient Test Results, Arch Intern Med., June 22, 2009, 169 (12): 1123–1129*. The rule strengthens individuals' current ability to have access to completed test reports by ensuring they are able to access them directly from HIPAA-covered laboratories.

Finally comments regarding the provision of access through the mechanisms established by EHR Incentive Programs failed to recognize the voluntary nature of the programs or the fact that the programs' requirements do not pertain to laboratories.

Furthermore, the rule does not diminish the investment health care providers have made to provide individuals with access to their health information through patient portals, as those portals provide patients with access to a much broader range of health information than just test results. The rule provides an additional avenue for an individual to obtain test reports directly from laboratories, which we expect will reduce the chances of patients not being informed of laboratory test results and potentially reduce the numbers of patients who fail to seek appropriate care. We also agree with commenters that increased patient access to laboratory test reports, which can then be shared with the patient's other providers, will help reduce unnecessary and duplicative testing.

With respect to those comments concerned about patients receiving test reports without the benefit of provider interpretation, we emphasize that this rule does not alter the role of the ordering or treating provider in

reporting and explaining test results to patients. We expect that patients will continue to obtain test results and advice about what those test results mean, through their ordering or treating providers. Further, as noted above, for those individuals who do or will request access to test reports from a laboratory, it was the experience of one large laboratory that many patients do not request access to their test reports from a laboratory until they have spoken with their physicians. We expect this trend to continue to generally be the case. We also agree with commenters that the rule will further encourage ordering and treating providers to more proactively discuss with patients the range of possible test results and what the results may mean for the particular patient before or at the time the test is ordered.

Further, under the HIPAA Privacy Rule, in most cases, laboratories will be required to provide individuals with access to their laboratory test reports within 30 days of the request (see § 164.524(b)(2)(i)). As discussed more fully below, in cases where an individual requests access to completed test reports, we believe 30 days will generally be sufficient to allow the ordering or treating provider to receive the test report in advance of the patient's receipt of the report, and to communicate the result to the patient, and counsel the patient as necessary with regard to the result.

Finally, we clarify that this final rule does not require that laboratories interpret test results for patients. Patients merely have the right to inspect and receive a copy of their completed test reports and other individually identifiable health information maintained in a designated record set by a HIPAA-covered laboratory. Laboratories may continue to refer patients with questions about the test results back to their ordering or treating providers.

Comment: Some commenters indicated they would support changes to the regulations, which would permit, but not require, laboratories to provide individuals with access to their completed test reports. One commenter stated that the proposed rule was unclear as to whether laboratories will have the discretion to provide access, or whether they will be required to provide access, to individuals who request their test reports. Other commenters were concerned about the differential application of the rule to HIPAA-covered versus non-HIPAA-covered laboratories, stating that this construct will create confusion and frustration among patients who may expect to be able to access their test reports from any

laboratory and who may not understand the distinction among laboratories based on HIPAA covered entity status.

Response: Laboratories that are HIPAA covered entities are required by this final rule to provide, upon request by an individual or the individual's personal representative, access to the protected health information about the individual maintained in a designated record set in accordance with the HIPAA Privacy Rule at § 164.524. CLIA laboratories that are not subject to HIPAA will have discretion to provide patients with direct access to their laboratory test reports, subject to any applicable state laws that may constrain access.

We do not believe it is appropriate to only permit rather than require HIPAA-covered laboratories to provide individuals with access to their test reports. This may not significantly expand individuals' ability to access their health information, as some laboratories not currently providing individuals with direct access to their test reports might choose not to begin providing direct access. Further, in a number of states, state law prohibits laboratories from providing individuals with direct access to their test reports. If the HIPAA Privacy Rule merely permitted access, it would not preempt those state laws that prohibit direct access, because a permissive federal requirement is not contrary to a prohibitive state law (see § 160.202). As of the effective date of this final rule, the CLIA regulations will expressly permit the disclosure of test reports to the individual. The combination of the change in the HIPAA Privacy Rule, combined with the change to the CLIA regulations, will result in HIPAA-covered laboratories being required to disclose test reports to patients, in most cases, within 30 days of a request.

Comment: A few commenters stated that the rule should only apply to the primary laboratory to which the specimen was submitted, as opposed to reference laboratories that may perform some or all of the testing. These commenters stated that reference laboratories have no relationship with the individual and have either limited or inadequate information about the individual to enable the laboratory to provide individuals with access. A few commenters indicated that, while applying the rule to hospital laboratories with respect to the test reports of the hospital's own patients may not be a significant challenge, applying the rule to hospital laboratories in their role as reference laboratories for other providers, such as community physicians and other

laboratories, would raise significant operational challenges.

In contrast, one laboratory commenter recommended that no laboratories be exempt from the individual access requirements, stressing the importance of uniform application of the rule and a patient's ability to access his or her test report from whatever laboratory performed the test.

Response: We appreciate the commenters' concerns regarding laboratory contact with individuals; however, we do not agree that limited information about the individual who is the subject of a test report is a sufficient reason to exempt reference laboratories from the access requirements of the HIPAA Privacy Rule. We believe applying the access requirements as broadly and uniformly as possible best furthers the Department's goal of increasing direct individual access rights to health information. To the extent that reference laboratories are covered entities under HIPAA, they will be required, upon the compliance date of this rule, to provide individuals with access to test reports in compliance with § 164.524 of the Privacy Rule. Reference laboratories that are not subject to HIPAA will not be under any federal obligation to provide access, but they will be permitted to do so under Federal law. However, we expect that, in most cases, individuals will continue to request access to their health information either from their treating provider, or from the referring laboratories. This expectation is based on our understanding that many, if not most, individuals will not be aware of the identity of the reference laboratory, or may not know that a reference laboratory is conducting all or part of the ordered tests. Therefore, we do not expect reference laboratories to encounter many individual requests for access. Furthermore, in the limited circumstances where a patient may request access to test reports from a laboratory acting as a reference laboratory with respect to that patient, the reference laboratory need only provide the individual with the requested access to the extent the laboratory can authenticate the test report as belonging to that patient. The same applies for hospital laboratories that also act as reference laboratories. Finally, we do not believe that there will be significant operational issues for hospital laboratories as hospitals already have policies and procedures in place to comply with the existing HIPAA Privacy Rule access provisions and the hospital laboratories can use these policies and procedures for purposes of this rule.

B. Scope of Information to Which an Individual Has Access

Comment: A number of commenters indicated that the rule should apply only to tests administered after the final rule is published or becomes effective. These commenters expressed concern with laboratories having to retrieve copies of old test reports that have been archived and may exist offsite. For example, commenters stated that many laboratories have archived test reports that exist on paper or on backup tapes, and that it would be costly and burdensome to retrieve and transfer the archived test reports to other suitable media to transmit to an individual.

A few commenters asked that the rule not require laboratories to provide test reports that have been kept beyond the retention date(s) required in the CLIA regulations. One commenter indicated that the rule should specify a timeframe after a test report is first generated beyond which an individual would not have a right to access the test report directly from the laboratory.

Response: While we appreciate the commenters' concerns, as with any other HIPAA covered entity, under this final rule, an individual has a right to access information about the individual in one or more designated record sets maintained by a HIPAA-covered laboratory, for as long as the information is maintained by the laboratory (see § 164.524(a)(1)). This right extends to test reports and other information about the individual in a designated record set maintained offsite, archived, or created before the publication or effective date of this final rule. We do not agree that information created before the effective date of this final rule should be exempt from the access requirement. The reasons for granting individuals access to health information pertaining to them do not vary with the date the information was created. In cases where retrieving records that have been archived may take longer than 30 days from the individual's request, a covered laboratory may request one 30-day extension, if it provides the reason for the delay in writing to the requesting individual. See the Privacy Rule requirements for timely action on access requests at § 164.524(b)(2).

We also clarify that this final rule does not impose any new record retention requirements for laboratory test reports. These obligations are established under CLIA and other applicable Federal and state laws. See, for example, 42 CFR § 493.1105. Rather, it provides an individual with a right to access protected health information in the designated record set of a HIPAA-

covered laboratory for as long as the laboratory maintains the information (even in those cases where the information is maintained beyond applicable record retention requirements).

Comment: Some commenters supported the language in the proposed rule at § 493.1291(l) that limited patients' access to "completed" test reports. Other commenters felt that additional guidance was needed as to what information qualified as a "completed" test report. For example, one commenter asked whether a test report is considered "completed" (and subject to the right of access) each time a component of a multi-step test is completed or only when all aspects of the ordered test are completed and recorded in a finalized report that is ready for issuance. The commenter also asked, in circumstances where a single order involves a test to be performed multiple times over a period of time, whether the report is considered complete each time the test is performed or only after the entire series of tests is performed. This commenter suggested that the test report should be considered "complete," and subject to the right of access, only when all of the test results are final.

Response: Under the HIPAA Privacy Rule at § 164.524(a)(1), an individual has a general right to access the protected health information about the individual in a designated record set maintained by a covered entity or its business associate. As described above, laboratory test reports maintained by or for a laboratory that is a HIPAA covered entity fall within the definition of "designated record set." However, test reports may be only part of a designated record set that a HIPAA-covered laboratory holds. To the extent an individual requests access to all of his or her protected health information, a HIPAA-covered laboratory is required to provide access to all of the protected health information in the entire designated record set. This could include, for example, completed test reports, test orders, ordering provider information, billing information, and insurance information.

While an individual may have a right to all of this information, we do not expect that many individuals will request access to all of the protected health information about the individual that the laboratory may hold in a designated record set. Rather, we expect that most individuals will request access to test reports of discrete laboratory tests that they know were ordered by their providers. In these cases, the Privacy Rule requires a

HIPAA-covered laboratory to provide the individual with a copy of or access to only the specific information requested by the individual.

Further, a HIPAA-covered laboratory is required to provide an individual with access only to that information that it actually maintains about the individual in a designated record set at the time the request for access is fulfilled. For purposes of this final rule, we clarify that we do not consider test reports to be part of the designated record set until they are "complete." To maintain consistency with CLIA, we consider a test report to be complete when all results associated with an ordered test are finalized and ready for release.

If an individual requests access to a particular test report, we expect that the HIPAA Privacy Rule's time allowance of 30 days from the request to provide access will be sufficient in most cases to provide the individual with access to the completed test report as we expect many requests for access will be made days after the order has been placed by the physician or even after the patient has discussed a particular result with his or her physician. In those limited cases where 30 days may not be sufficient to complete the test report, due to the nature of the tests to be performed, and the laboratory knows this at the time the individual requests access, we expect a covered entity laboratory to explain this circumstance to the individual. Upon informing individuals when they request access that the test report they are seeking will take longer than 30 days to complete, the individuals are likely to be willing to withdraw or hold their request until a later time to ensure that they get access to what they want or need. If an individual chooses not to withdraw his or her request for access, the individual will then have a right only to obtain the protected health information in the designated record set at the time the request is fulfilled, which may not include a particular test report because it is not yet complete. If a laboratory determines, after it has accepted a request, that the requested test will take more than 30 days to analyze and complete, it may notify the individual in writing within the initial 30-day period of the need and specific reason for the delay in providing access to the completed test result and the date by which the laboratory will complete its action on the request, in accordance with § 164.524(b)(2)(iii) of the HIPAA Privacy Rule. We note, however, that the HIPAA Privacy Rule allows only one extension on an access request. In the rare circumstance where 60 days is not

sufficient to provide the individual with access to a completed test report, the covered laboratory must provide the individual with only the existing protected health information that is part of the designated record set within that time (for example, other completed test reports or test requisitions), which would then not include the test report requested by the individual, because the test report is not yet complete.

In general, we expect the initial 30-day period allowed by the Privacy Rule to provide sufficient time to provide individuals with access to completed test reports. However, we acknowledge there may be rare circumstances when it would not be, and we expect covered laboratories to communicate and work with individuals concerning these limitations.

Comment: Some providers and laboratories objected to individuals having direct access to laboratory test reports they characterize as "sensitive," including genetic, cancer, pregnancy, sexually-transmitted disease, and mental health test results. Commenters stated there are tests for which it is acceptable to release results to the patient without physician involvement (for example, cholesterol test results) and there are tests for which it is not (for example, cancer or HIV test results). One commenter stated, for example, that under California law, before the disclosure of HIV test results, the physician has a duty to discuss what the results may mean and offer the patient appropriate education and psychological counseling. Some commenters recommended giving ordering and treating providers ample discretion to determine when it is in the patient's best interest to receive test reports without the benefit of a physician's interpretation. Others recommended that laboratories be permitted to identify tests or categories of tests that may only be released to the physician and to limit an individual's direct access to the reports.

In contrast, some commenters stated that all test reports should be treated equally, providing several reasons, including: Patients today are much better informed and have access to interpretative information on laboratory results from many sources, including the internet; given the timeframes allowed for providing access under the HIPAA Privacy Rule, it is likely that the ordering or treating provider will receive results well before the patient and will have adequate time to discuss the result and what it means in terms of the patient's health care with the patient; and trying to identify which tests are sensitive is subjective and not

necessarily in the best interest of the patient.

Response: Under the HIPAA Privacy Rule, an individual generally has a broad right of access to any or all of his or her health information maintained in a designated record set. In this final rule, we extend that broad right to the laboratory setting. With a very limited exception, covered entities may not deny an individual access to his or her health information based on the information's sensitive nature or potential for causing distress to the individual. The limited exception is for cases where a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person, and the individual is provided a right to have the denial of access reviewed by an unaffiliated health care professional (see § 164.524(a)(3)(i)).

As we discuss elsewhere in this final rule, we do not believe that this rule will eliminate or interfere with the role or obligation of the treating or ordering provider to report and counsel patients on laboratory test results. The rule provides ample time to ensure providers receive sensitive test reports before the patient and to allow providers to counsel individuals on the test reports. In addition, as indicated above, we believe the rule will further encourage providers, at the time the test is ordered, to counsel patients on the potential outcomes of a test and what they may mean for the patient, given his or her medical history.

Finally, we agree with commenters who stated that categorizing laboratory testing into "sensitive" and "non-sensitive" categories would be a subjective endeavor that would not necessarily result in policies that are in the patient's best interest. This endeavor also would result in a lack of uniformity across states and laboratories with respect to the types of information to which an individual has access under the rule. This outcome would be too complex and burdensome for laboratories to administer and confusing for individuals attempting to exercise their rights.

Comment: A few commenters, while in general support of the proposed rule, raised specific concerns about providing laboratory test reports directly to certain mental health patients (for example, those who may be suffering from medical conditions such as paranoia). These commenters were concerned that direct access to laboratory test reports without any involvement of the treatment team could have a very

negative impact on the mental health of these patients. Some commenters asked that the current provision in the HIPAA Privacy Rule allowing the denial of access to protected health information when the access is reasonably likely to endanger the life or physical safety of the individual or another person also apply to access made available under this final rule. They suggested that this would allow providers to determine when prior provider review and approval would be required before the release of given laboratory test reports to mentally ill patients.

Response: We believe the existing exceptions to access in the Privacy Rule appropriately balance an individual's right to access his or her health information with other considerations, such as the potential for harm. Therefore, we decline to provide a specific exception to the right of access for mental health patients. A laboratory is subject to the same requirements under the HIPAA Privacy Rule as other covered entities to generally provide all individuals with access to their health information. As previously discussed, we believe the 30 day time-frame (plus one 30 day extension) provides laboratories with sufficient time to ensure treating or ordering physicians receive test reports before the patient's receipt of the test report, which will allow them to counsel the patient with respect to the test result.

As noted above, the HIPAA Privacy Rule at § 164.524(a)(3)(i) provides that a covered entity may deny access to an individual if a "licensed health care professional" has determined, in the exercise of professional judgment, that the access requested by the individual is reasonably likely to endanger the life or physical safety of the individual or another person. However, this is a limited exception to an individual's right of access and applies only with respect to endangerment of the life or physical safety of the individual or another person; thus, concerns about psychological or emotional harm are not sufficient to justify denial of access. Furthermore, a HIPAA-covered laboratory that wishes to deny access to the individual based on a determination by a licensed health care professional must provide the individual with an opportunity to have the denial reviewed by a licensed health care professional who is designated by the laboratory to act as a reviewing official and who did not participate in the original decision to deny. The HIPAA-covered laboratory must promptly refer a request for review to the reviewing official, who must determine, within a reasonable amount of time, whether or not to deny the

access requested. See § 164.524(d). The laboratory would then be required to provide or deny access in accordance with the determination of the reviewing official (see § 164.524(a)(4)).

Comment: Two commenters requested clarification on whether the expanded right of individual access would apply to food or environmental test reports maintained by a laboratory, that are the result, for example, of testing done after an outbreak of disease, and that may be linked to particular patients. A public health laboratory requested clarification on how this rule applies to public health surveillance or outbreak test reports. One commenter requested clarification as to whether individuals would have a right to employment-related test results, such as testing for drug and alcohol use. Finally, another commenter asked that patient access to laboratory results be expanded to include the results of radiologic assessments.

Response: This final rule is intended to remove barriers in the HIPAA Privacy and CLIA regulations to individual access to test reports maintained by laboratories subject to or exempt from CLIA. If the samples tested are not of the human body, the entity conducting the testing is not subject to CLIA for purposes of that testing or those test results. Furthermore, if the testing is not for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of human beings, that testing and those test results are also not subject to CLIA. Some outbreak and surveillance activities may involve testing samples from humans and thus be subject to CLIA if individual patient-specific test results are reported to ordering providers. However, CLIA does not apply to test results that are only used for epidemiological studies or reported in the aggregate without patient identifiers.

As for employment-related testing, the CLIA regulations are not applicable to an employer or entity that performs substance abuse testing strictly for the purpose of employment screening where test results are merely used to determine compliance with conditions of employment, as opposed to counseling or some other form of treatment. Substance abuse testing as part of a treatment program is covered by CLIA.

Even if CLIA does not apply to the conduct of certain types of laboratory tests, HIPAA may still apply to require access to certain test reports to the extent the laboratory is a HIPAA covered entity and the information to

which an individual is requesting access is protected health information under HIPAA. Individuals have a right to access test reports in designated record sets held by or for HIPAA-covered laboratories that constitute protected health information under the HIPAA Privacy Rule—that is, those reports that relate to the past, present, or future physical or mental health or condition of an individual or the provision of health care to an individual (which would include testing for the presence of alcohol or drugs) and that identify the individual, or with respect to which there is a reasonable basis to believe that information in the test report can be used to identify the individual. See the definitions of “individually identifiable health information” and “protected health information” at § 160.103. Food, environmental, or other test reports that do not identify or relate to an individual are not protected health information for purposes of the HIPAA Privacy Rule.

Although the CLIA regulations do not cover radiologic testing or assessments, these tests and assessments have always been subject to an individual’s right of access under the HIPAA Privacy Rule to the extent they are maintained by a hospital or other HIPAA covered entity.

C. Access by Personal Representatives and Designated Third Parties

Comment: Several commenters raised concerns regarding access to an individual’s sensitive laboratory test reports, such as those concerning reproductive health, by the individual’s parents, spouse, partner, or other persons, when the individual may not want these persons to see the test report.

Response: We understand commenters’ concerns and provide the following guidance to HIPAA-covered laboratories regarding how the Privacy Rule ensures that only persons with appropriate authority are provided access. With respect to adult individuals, the only persons that have a right to access an individual’s test reports directly from a HIPAA covered entity are those persons who qualify as a personal representative of the individual. A personal representative for purposes of the Privacy Rule generally is a person who has authority under applicable law to make health care decisions for the individual (see § 164.502(g)). Before providing access to a person other than the individual who is requesting access, a HIPAA-covered laboratory is required under § 164.514(h) of the Privacy Rule to verify both the identity and authority of the person to have access to the individual’s protected health information. In order to conduct the

required verification, a covered laboratory may need to obtain documentation that the person requesting access to the individual’s protected health information qualifies as the individual’s personal representative, for example, by having the person present a written health care power of attorney or, general power of attorney or durable power of attorney that includes the power to make health care decisions, or other evidence of the person’s authority to act as a personal representative.

With respect to an unemancipated minor, in most cases, a parent is the personal representative of the minor, because the parent usually has the authority under state law to make health care decisions about his or her minor child. However, there are limited exceptions in the HIPAA Privacy Rule to the parent being a personal representative of his or her minor child, which generally apply in circumstances where minors are able to obtain specified health care services without parental consent under state or other laws, or standards of professional practice. Additional information on these circumstances is available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/personalreps.html>.

Regardless, however, of whether a parent is the personal representative of a minor child, the Privacy Rule defers to state or other applicable laws that expressly address the ability of the parent to obtain health information about the minor child. In doing so, the Privacy Rule permits a covered entity to provide the parent with access to a minor child’s protected health information when and to the extent it is permitted or required by state or other laws (including relevant case law). Likewise, the Privacy Rule prohibits a covered entity from providing a parent with access to a minor child’s protected health information, when and to the extent it is prohibited under state or other laws (including relevant case law). If state or other applicable law is silent concerning parental access to the minor’s protected health information, and a parent is not the personal representative of a minor child based on one of the exceptional circumstances described above, a covered entity has discretion to provide or deny the parent access to the minor’s health information, if doing so is consistent with state or other applicable law, and provided the decision is made by a licensed health care professional in the exercise of professional judgment. For example, where a minor is able under state law to consent and obtain

treatment for a reproductive health care service that involves laboratory testing, and the state law is otherwise silent on parental access to a minor’s protected health information, a testing laboratory that has received a parent’s request for access to this test report of the minor child may wish to take into account any instructions of the treating medical professional in determining whether to grant or deny access to the parent of the minor.

In general, we expect personal representatives will continue to obtain access to individuals’ health information through the individual’s treating providers, with whom many personal representatives will already have established a relationship and be known to the provider. Therefore, we do not expect HIPAA-covered laboratories will receive many requests from persons requesting access as a personal representative of the individual.

With respect to laboratories that are not HIPAA covered entities, the changes to the CLIA regulations in this final rule merely permit, not require, the disclosure of completed test reports to an individual’s personal representative. Thus, laboratories not subject to HIPAA should exercise their judgment in providing access to personal representatives, while taking into account any other applicable federal or state laws.

Comment: A few commenters asked how a laboratory should determine whether a person requesting access to another individual’s completed test reports has the appropriate legal authority to act on behalf of the individual, and, by virtue of that authority, is a personal representative for the individual. Commenters indicated that the laboratory test order from the ordering provider does not include this information. These commenters also expressed concern about the costs to determine whether a particular person had authority to access an individual’s laboratory test reports.

Response: As indicated above, a HIPAA-covered laboratory is required to verify the identity and authority of any person requesting access to laboratory test reports as a personal representative of an individual. Depending on the circumstances, a HIPAA-covered laboratory could verify a person’s authority by asking for documentation of a health care power of attorney, or general power or durable power of attorney that includes the power to make health care decisions, proof of legal guardianship, or, in the case of a parent, information that establishes the relationship of the person to the minor

individual. A HIPAA-covered laboratory may also contact the treating provider to inquire whether the treating provider can provide documentation of the person's status as a personal representative of the individual.

We address the costs that a HIPAA-covered laboratory may incur in the verification process, in section VII below. We note here as we did above, however, that we do not anticipate HIPAA-covered laboratories will receive many requests from persons requesting access as a personal representative of the individual. Thus, we do not expect HIPAA-covered laboratories will incur significant costs for verification of such persons. Several clinical laboratory commenters indicated that most patients or personal representatives do not know what laboratory conducted the laboratory tests. Based on these comments, we expect personal representatives, like individuals themselves, generally will continue to obtain access to the individuals' health information through the individuals' treating providers, with whom many personal representatives will already have established a relationship for the purposes of obtaining access.

Comment: One commenter requested that the same requirements for denying access to protected health information by a personal representative in cases where access may cause substantial harm to the individual (for example, in cases of spousal abuse) should also be available when personal representatives request direct access to an individual's test reports from laboratories.

Response: As described above, the Privacy Rule's access and personal representative provisions apply in the same manner to HIPAA-covered laboratories as to other types of covered entities. Section 164.524(a)(3)(iii) of the Privacy Rule permits a covered entity to deny a personal representative access to an individual's protected health information when a licensed health care professional has determined, in the exercise of professional judgment, that providing access to the personal representative is reasonably likely to cause substantial harm to the individual or another person. Thus, a HIPAA-covered laboratory may deny a personal representative access to an individual's protected health information under this provision when the laboratory has received and documented the requisite determination from a licensed health care professional that granting access to the personal representative is reasonably likely to cause substantial harm to the individual or another person. As was described above with respect to individuals denied access to

their own records because of concerns of endangerment, the personal representative retains the right to have the denial reviewed by another licensed health care professional who is designated by the HIPAA-covered laboratory to act as a reviewing official and who did not participate in the original decision to deny. A laboratory denying access must inform the personal representative of this right and have the ability to have the denial reviewed in accordance with these requirements.

We also note that § 164.502(g)(5) of the Privacy Rule allows a covered entity to elect not to treat a person as the personal representative of an individual if the covered entity has a reasonable belief that the individual has been or may be subjected to domestic violence, abuse, or neglect by the person, and the covered entity, in the exercise of professional judgment, decides that it is not in the best interests of the individual to treat the person as the individual's personal representative. We do not anticipate that this provision will frequently apply in the circumstances where a personal representative is requesting direct access to an individual's test report maintained by a HIPAA-covered laboratory, as most laboratories will not have the requisite relationship with the individual that will enable them to make this type of assessment. However, there may be situations where a HIPAA-covered laboratory is made aware of the dangers by a treating provider or the individual. The HIPAA-covered laboratory should consider this information in the exercise of its own professional judgment.

Comment: One commenter stated that it was unclear from the proposed rule whether a patient's access right would include the right to have the test reports shared with others who do not have independent access rights. This commenter urged the Department to amend the CLIA regulations to clarify that the laboratory may provide access to the patient, his or her personal representative, or any other party designated by the patient or his or her personal representative.

Response: We clarify that, in certain circumstances, an individual's access right includes the right to have test reports shared with others who do not have independent access rights. In addition to access by personal representatives, the HITECH Act strengthened an individual's right of electronic access, which included giving individuals the right to direct that a covered entity transmit an electronic copy of the individual's protected health information directly to another

person or entity designated by the individual (see, section 13405(e) of the HITECH Act). The regulations that implemented these statutory provisions were published as part of the HIPAA Privacy Rule on January 25, 2013, and became effective on March 26, 2013. While Section 13405(e) of the HITECH Act is applicable to electronic copies, the Department also used its general authority under sections 262 and 264 of HIPAA to implement this right uniformly regardless of whether the access requested is for an electronic or a paper copy of the individual's protected health information. Thus, upon the compliance date of this final rule, HIPAA-covered laboratories will be required to abide by an individual's request to have the laboratory transmit the copy of the individual's protected health information to another person or entity designated by the individual. The Privacy Rule requires that such requests must be made in writing, signed by the individual, clearly identify the designated person or entity, and provide information regarding where to send the copy of the protected health information. See § 164.524(c)(3)(ii) and the preamble to the final HITECH rule (78 FR 5566) for more information.

With respect to the changes to the CLIA regulations, the CLIA regulatory text as written in this rule will be sufficient to allow a laboratory to, upon the request of a patient (or their personal representative, if applicable), provide a copy of the patient's test report to a person or entity designated by the individual in accordance with the HIPAA Privacy Rule.

Comment: One commenter requested that organ procurement organization laboratories that perform tests on decedent tissue and blood be exempted from the rule altogether, since the outcome of these tests would not be of meaningful value to the personal representatives of decedents, and in the case of blood tests, could cause undue concern given the frequency of false positive results.

Response: We appreciate that Organ Procurement Organization laboratories operate under different circumstances than clinical laboratories. However, we do not believe there should be an exemption for these laboratories. Laboratories that are covered entities under HIPAA are required to provide individuals (or their personal representatives) with access to protected health information, including that of decedents (see § 164.524). We do not believe the concerns raised by the commenter justify removing a personal representative's right to access the protected health information of a

decendent at an Organ Procurement Organization laboratory that is a covered entity. However, we do not expect many Organ Procurement Organization laboratories will be HIPAA covered entities unless they also provide clinical or other laboratory services that involve reimbursement by health plans. Further, we emphasize that a HIPAA-covered laboratory is only required to provide an individual (or personal representative) with access when they receive a request for access, which we do not expect to be a very frequent occurrence in the context of testing for organ procurement purposes.

D. Requests for and Provision of Access

1. HIPAA Access Processes

Comment: Several commenters supported allowing flexibility in how requests for access may be submitted, processed, and responded to by laboratories. Commenters indicated a flexible approach was important since laboratories vary greatly in terms of how they interact with patients, if at all, and flexibility would allow laboratories to implement processes that would not disrupt operations. One commenter stated that some state laws may affect the processes that laboratories may put in place and urged that the Department clarify that the authority for specifying the processes for handling requests for access lies with the laboratories rather than the states. Another commenter expressed concern with the rule not spelling out the mechanisms by which patient requests for access would be submitted, processed, or responded to by laboratories. The commenter suggested that the final rule should require some type of written record, such as a signature on an office form, and verification of the identity of the person requesting the records.

Response: We agree with the commenters that flexibility in how laboratories receive and respond to access requests is important given the varied circumstances of each laboratory. This final rule provides laboratories with flexibility as to how to set up systems to receive, process, and respond to requests for access by individuals, so long as these processes comply with the timing and other requirements for access in § 164.524 of the HIPAA Privacy Rule where HIPAA-covered laboratories are concerned. For example, some laboratories that interact directly with individuals may give individuals the option to request a copy of their completed test reports when the individuals are physically present at the laboratory for specimen collection.

With regard to state laws, it is unclear from the comments how exactly these laws impact laboratory processes. The HIPAA Privacy Rule only preempts contrary provisions of state law. Thus, where a HIPAA-covered laboratory can continue to comply with both the HIPAA Privacy Rule and state law, it must frame its policies and procedures in a way that complies with both laws. Further, the HIPAA Privacy Rule does not preempt more stringent state laws, even if contrary to the Privacy Rule. In the context of individuals' rights to access their health information, "more stringent" means that the state law provides greater rights of access. Therefore, a HIPAA-covered laboratory must continue to abide by state laws that provide the individual with a greater right of access. For example, if a state law requires individual access to test reports within a shorter timeframe than the Privacy Rule requires, access must be provided within that shorter timeframe. Finally, as noted above and discussed more fully below, while the HIPAA Privacy Rule provides some flexibility to HIPAA-covered laboratories in how their access processes are developed, it does have specific requirements for verification of identity and authority of the individual requesting access, as well as timeliness and the form of access provided, among other requirements, that must be followed in providing access to individuals. With respect to the form of the individual's request, the Privacy Rule does permit covered entities to require that individuals make requests for access in writing (see § 164.524(b)(1)).

Comment: Some commenters asked for clarification as to whether hospital laboratories may continue to rely on existing hospital HIPAA access processes, which may have been implemented through their health information management departments, to provide individuals with access to their test reports, rather than having to create an additional process outside the normal customary practices followed by hospitals to comply with the access requirements of the HIPAA Privacy Rule. A few commenters specifically noted that some hospitals have patient portals in place to provide individuals with access to their protected health information, including laboratory results.

Response: Laboratories that operate as part of a larger legal entity that is a hospital or that are part of an affiliated covered entity or organized health care arrangement with a hospital (see the definition of "organized health care arrangement" in the HIPAA Rules at

§ 160.103, and the provisions for affiliated covered entities at § 164.105(b)), may continue to utilize the hospital's already established mechanisms for providing access to individuals requesting their test reports from the hospital laboratories, provided that the established mechanisms are compliant with the access provisions of the HIPAA Privacy Rule. This includes providing individuals with access to their test reports through a patient portal to the extent the individuals have agreed to receive access in this manner. However, laboratories that are not part of a hospital need to establish their own process for providing individuals with direct access to their protected health information in accordance with the Privacy Rule, even if the laboratories' test reports are otherwise available to an individual through an unaffiliated treating hospital or provider's patient portal or other access mechanism.

Comment: One commenter asked whether a patient will be expected to make a request for access from the laboratory to test reports at the time the patient is in the treating provider's office, or whether patients have a right to contact the laboratory directly for access. Another commenter asked whether, with regard to the referral of specimens from one laboratory to another, a patient will need to request access to the test reports of both laboratories or just request access from one of the laboratories to obtain all of the test results.

Response: Under this final rule, individuals have a right to make requests for access to their protected health information directly to HIPAA-covered laboratories. Laboratories may not require individuals to make requests through their providers. While laboratories cannot require individuals to submit requests for access to protected health information maintained by the laboratories through their treating providers, individuals may do so if that is one avenue the laboratory uses to receive requests for access from individuals. Laboratories, however, may require that individuals make access requests directly to the laboratory.

With respect to laboratories that refer specimens to another laboratory, an individual has a right to access his or her protected health information maintained in a designated record set at either laboratory. However, where one laboratory refers only one part of a test to another laboratory, the individual may need to request access from the referring laboratory to obtain access to a complete set of test results. As explained above, a HIPAA-covered laboratory is required to provide an

individual with access only to that protected health information maintained by the laboratory in its designated record sets.

2. Time Frame for Providing Access

Comment: Some commenters were concerned that the required 30-day timeframe in the HIPAA Privacy Rule for providing an individual with access to laboratory test reports may not be sufficient to ensure that a provider receives the report before the patient. The commenters believe this is particularly problematic in the case of “sensitive” test results. One commenter suggested that laboratories should have the option of using up to two 30-day extensions when a licensed health care professional has determined, in the exercise of professional judgment, that the ordering provider should have additional time to receive and review the test report before the patient is provided access. Another commenter stated that the rule should not require laboratories to release a test report to a patient before a treating provider, except in emergency circumstances. Other commenters suggested that there should be a defined delay or lag time, such as 48 or 72 hours, between when a laboratory provides a test report to a treating provider and when the laboratory provides the test report to the patient.

In contrast, other commenters were against providing a defined delay between when the provider and the patient could obtain the test report. Some commenters stated that the Privacy Rule’s 30-day timeframe for providing access affords ample opportunity for a provider to receive a test report and consult with the patient before the patient receives the test report he or she requested directly from the laboratory. For example, one commenter suggested that the 30-day period provides laboratories with sufficient flexibility to release routine test results within a few days, while delaying the results of more sensitive tests to allow more time for consultation between the provider and the patient.

Response: We believe 30-days is generally sufficient time to allow a treating provider to receive a test report in advance of the patient’s receipt of the report and to communicate the result to and counsel the patient as necessary with regard to the result. Specifically, requests to a laboratory for access may be made some time after the provider has ordered the test or even after the provider has received the completed test report. In cases where the end of the initial 30-day period after an individual’s request for access is

approaching and, due to the nature of the test, the laboratory is just completing the test report, the laboratory may delay providing access to the individual to ensure the completed test report is provided first to the individual’s provider, so long as the delay is no more than 30 days and the individual is informed in writing of the reason for the delay and the date by which the laboratory will provide the individual with access. However, laboratories may have only one extension (see § 164.524(b)(2)(iii)). Since we believe the timeframes provided in the HIPAA Privacy Rule generally are sufficient to enable laboratories to provide test reports to ordering providers before patients, we decline to specify a specific lag time or to allow an additional 30-day extension beyond the one 30-day extension currently permitted.

Comment: A few commenters expressed concern that the 30-day period (and one 30-day extension) for providing access may not be sufficient for all laboratory test reports to be completed. One commenter suggested that the 30-day period to provide the individual with a copy of the test report should begin from the time of the individual’s request for access, or test completion, whichever is later.

Response: We understand the commenters’ concerns; however, we do not believe it is necessary to establish the completion of the test report as the trigger for the beginning of the 30-day period if the completion of the test report is later than the individual’s request for access, or to otherwise create a timeliness requirement for laboratories that is different than the requirement for other types of covered entities. As discussed above in the section on “Scope of Information to Which an Individual Has Access,” the Privacy Rule provides sufficient flexibility in most cases to enable laboratories to provide individuals with access to the completed test reports they request. In those rare cases where a test report is not completed, and therefore is not available, within the HIPAA timeframe for responding to requests and the individual is not willing to withdraw his or her request so that he or she will receive a completed test report, the Privacy Rule requires only that the laboratory provide access to the existing protected health information in its designated record set(s) about the individual, which would not include the completed test report requested. We believe that uniformity of the timeliness requirement in the Privacy Rule for all covered entities, including laboratories, is important to ensure consumer

understanding and covered entity compliance.

E. Allowable Fees for Copying

Comment: Several commenters stated that laboratories should be permitted to charge individuals that request a copy of one or more test reports an additional fee along with the current fee permitted by the HIPAA Privacy Rule. A number of commenters were specifically concerned with the costs of retrieving archived test reports, which may only be available on paper or limited media, and transferring them to a suitable medium for distribution to the patient. A few commenters suggested that a laboratory should be able to recoup the full costs of providing reports to the individual, including costs associated with retrieval of the information, copying, verification, documentation, liability insurance, and other administrative costs.

In contrast, a number of commenters stated that individuals should not encounter any additional fee to receive copies of test reports from laboratories, other than the costs associated with completing the tests.

Response: We appreciate the comments on this issue. The fee provisions in the Privacy Rule are carefully balanced to reduce costs to covered entities while at the same time avoid being an impediment to individuals’ ability to receive copies of their protected health information. Therefore, we decline to expand the fees that may be charged to individuals or to disallow any fees that are currently provided for under the HIPAA Privacy Rule. HIPAA-covered laboratories must comply with the same fee limitations at § 164.524(c)(4) of the Privacy Rule as other HIPAA covered entities in providing individuals with copies of their health information. This means a HIPAA-covered laboratory may charge an individual a reasonable, cost-based fee that includes only the cost of: (1) Labor for copying the protected health information requested by the individual, whether in paper or electronic form; (2) supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media; (3) postage, when the individual has requested the copy be mailed; and (4) preparation of an explanation or summary of the protected health information, if agreed to by the individual. HIPAA-covered laboratories may not charge fees to reflect the costs they incur in searching for and retrieving the information that is the subject of the individual’s request. Further, fees for costs associated with verification, documentation, liability

insurance, maintaining systems, and other similar activities are not permissible fees under this provision.

Comment: One commenter asked for a more definitive framework of what is an appropriate fee.

Response: We are unable to provide a more definitive framework of what is an appropriate fee, given that costs will vary depending on a number of circumstances, such as the form of the copy requested (paper versus electronic), the amount of information to be included in the copy, and whether the individual has requested the copy to be placed on electronic media or mailed. Covered entities may take into account all of these factors in determining what is a reasonable, cost-based fee. However, we consider fees expressly permitted under state law for copying and postage to be reasonable (as long as they do not include amounts associated with fees not provided for under the HIPAA Privacy Rule, such as the fees for the cost of search and retrieval or other costs).

F. Form and Format of Access

Comment: Some commenters stated that HIPAA-covered laboratories should be able to limit the types of electronic formats in which patients could receive copies of their completed test reports, and that the format provided should not be controlled solely by patient preference. These commenters were concerned with requiring laboratories to have the capability to convert test reports to all types of universal formats (for example, Microsoft (MS) Word, MS Excel, or Portable Document Format (PDF)). One commenter stated it is not practicable to reproduce all of the data of the official report into some formats, such as MS Excel. A few commenters expressed concern that HIPAA-covered laboratories will be required to invest in new technology to allow for patient portals into laboratory systems so that patients can view their test reports online. Certain commenters were specifically concerned about the resources involved with having to convert final laboratory reports that exist only on paper to PDF or other electronic format.

Other commenters advocated for the use of patient portals and personal health records (PHRs) to deliver test reports to patients in a readable and secure manner. One commenter stated that the rule should ensure laboratories are not allowed to provide test reports exclusively through proprietary formats that require expensive proprietary software to view, interpret, or process the results. Finally, one commenter

asked who makes the determination about which format is acceptable.

Response: The Privacy Rule does not require that a HIPAA-covered laboratory have the capability to produce a copy of a completed test report in whatever electronic format or manner the individual requests. Rather, the Privacy Rule requires a covered entity to provide the individual with a copy of the requested information in the form and format requested by the individual, if a copy in that form or format is readily producible. With respect to protected health information maintained by the covered entity only in paper form, the Privacy Rule requires the covered entity to provide the individual with a copy of the protected health information in the form and format requested by the individual, if it is readily producible. If not, the copy must be either a readable hard copy or in another form or format as agreed to by the covered entity and the individual (see § 164.524(c)(2)(i)). Thus, where an individual requests an electronic copy of test reports that a HIPAA-covered laboratory maintains only on paper, the laboratory is required to provide the individual with the type of electronic copy requested if it is readily producible electronically and in the format requested. For example, a HIPAA-covered laboratory maintaining the requested test reports on paper may be able to readily produce a scanned PDF version of the report but not the requested Word version. In this case, the laboratory may provide the individual with the PDF version if the individual agrees to accept the PDF version. If the individual declines to accept the PDF version, or if the laboratory is not able to readily produce a PDF version of the test reports, the laboratory may provide the individual with hard copies of the reports such as photocopies of the original reports.

However, when the protected health information to which the individual seeks access is maintained electronically by the covered entity and the individual requests an electronic copy of the information, the Privacy Rule requires the covered entity to provide the individual with access to the information in the requested electronic form and format if it is readily producible in that form and format. When it is not readily producible in the electronic form and format requested, then the covered entity must provide the copy in an alternative readable electronic format as agreed to by the covered entity and the individual (see § 164.524(c)(2)(ii)). In short, this means that any HIPAA-covered laboratory that maintains

protected health information about an individual in one or more designated record sets electronically must have the capability to provide the individual with some form of electronic copy of the individual's protected health information. For example, this would include providing the individual with an electronic copy of the protected health information in the format of MS Word or Excel, text, HTML, or text-based PDF. In addition, we encourage laboratories to make available to individuals, upon request, an electronic copy of their protected health information in machine-readable formats (such as in HL7), which will enable individuals to use their protected health information in electronic health information tools, such as PHRs, if they choose.

We agree with the commenters that individuals should not have an unlimited choice in the form of electronic copy they will receive. The Privacy Rule allows a covered laboratory to make some other agreement with individuals as an alternative means to provide a readable electronic copy to the individual where the covered laboratory is not able to readily provide the form of electronic copy requested. If an individual requests a form of electronic copy that the HIPAA-covered laboratory is unable to produce, the laboratory must offer the individual other electronic formats that are available on its systems. If the individual declines to accept any of the electronic formats that are readily producible by the HIPAA-covered laboratory, the laboratory must provide a hard copy as an option to fulfill the access request. We remain neutral on the type of technology that covered entities may adopt. We note that a PDF is a widely recognized format that would satisfy the electronic access requirement if it is the individual's requested format or if the individual agrees to accept a PDF instead of the individual's requested format. Alternatively, there may be circumstances where an individual prefers a simple text or rich text file and the laboratory is able to accommodate this preference. In this case, a hard copy of the individual's protected health information would not satisfy the electronic access requirement. However, a hard copy may be provided if the individual decides not to accept any of the electronic formats offered by the covered entity.

For example, if a HIPAA-covered laboratory receives a request from an individual to have access to test reports through a web-based portal, but the only readily producible version of the

protected health information by the laboratory is in PDF, the Privacy Rule requires the laboratory to provide the individual with the PDF copy of the protected health information, if the individual agrees to receive it in that form. If the individual declines to receive the PDF copy, the laboratory may provide the individual with a hard copy of the information.

Further, while we encourage laboratories to offer patients the ability to access their test reports through patient portals maintained by the laboratories, the HIPAA Privacy Rule does not require covered entities to have this capability. We recognize that what is available in a readable electronic form and format will vary by system and technological capabilities will improve over time. Therefore, the Privacy Rule allows covered entities the flexibility to provide individuals with electronic copies of protected health information that are currently readily producible and available on their various systems. A HIPAA-covered laboratory is not required to purchase new software or systems in order to accommodate an electronic copy request for a specific form that is not readily producible by the laboratory at the time of the request, provided the laboratory is able to provide some form of electronic copy. We note that providing the individual with an electronic copy of a test report in a proprietary format that will require the purchase or acquisition by the individual of proprietary software to view the report would not satisfy these access requirements.

Comment: A few commenters suggested that any electronic copies provided to individuals should include a digital signature to provide assurance that test results had not been modified.

Response: HIPAA-covered laboratories may include digital signatures on electronic copies of test reports given to individuals, provided the electronic copy is still in a format that has either been requested by the individual or is an alternative that has been agreed to by the individual and the laboratory.

Comment: Some commenters were concerned about the ability of laboratories to transmit electronic copies of test reports to individuals in a secure manner, and asked for guidance on how test reports should be transmitted to patients. A few commenters were concerned with transmitting test reports to patients via unencrypted email. One commenter expressed concern about being found responsible for a breach if a HIPAA-covered laboratory sent test reports in an unsecure manner after a specific

request by the individual to send them in that manner. Other commenters suggested that any method of transmitting test reports to individuals should be acceptable, whether it be by mail, email, transmission to a PHR or patient portal, or other method.

Response: How a test report is transmitted to an individual will vary depending on the circumstances and the request of the individual. In cases where an individual is in close proximity of the laboratory, the individual may wish to come and pick up the test report from the laboratory directly; however, the individual is not required to do so. Individuals also have a right under the Privacy Rule to have either the paper or electronic (for example, on compact disk) copies of their protected health information mailed to them, and HIPAA-covered laboratories may charge an individual for postage in cases where the individual has asked that the copy be mailed. In sending the copy to an individual, covered laboratories are required to reasonably safeguard the information (see § 164.530(c)). This may include ensuring the packaging is securely sealed and that none of the information from the test reports is visible from the outside of the package.

Individuals also may request that a laboratory email an electronic copy of a test report. In emailing copies of test reports to individuals, HIPAA-covered laboratories are required to comply with the HIPAA Security Rule, which, among other requirements, requires implementation of technical security measures to guard against unauthorized access to electronic protected health information that is being transmitted over an electronic communications network (see § 164.312(e)). As a security measure, the Security Rule requires encryption when transmitting electronic protected health information where it is reasonable and appropriate to encrypt the information. In general, encryption is a reasonable and appropriate measure to safeguard email transmissions. However, we have found that there may be instances when an individual may not want to receive his or her protected health information in an encrypted format or may be unable to access the information when encrypted. In these cases, a HIPAA-covered laboratory is permitted to send the individual copies of the test reports via unencrypted email, if it advises the individual of the risks associated with unencrypted email, and, after doing so, the individual still wishes to receive his or her protected health information via unencrypted email. A HIPAA-covered laboratory is not responsible for any unauthorized access that may occur

while protected health information is in transit using the means requested by the individual. Further, a HIPAA-covered laboratory is not responsible for safeguarding protected health information once it is delivered to the individual.

Finally, as mentioned above, we encourage laboratories to offer individuals access to their test reports and other health information through secure patient portals or PHRs. However, use of this method is not required.

Comment: One commenter asked if CMS has the regulatory authority to establish minimum requirements for the provision of electronic test results to patients in a structured format or at least to suggest guidance to laboratories if the test results are to be provided in an electronic format.

Response: CMS does not have current plans to establish regulations that would impose minimum requirements for the provision of electronic results in a structured format, but could examine these options going forward. Furthermore, CLIA guidance on electronic formats was provided as part of the March 2010 revision to the CLIA State Operations Manual Appendix C—Survey Procedures and Interpretive Guidelines for Laboratories and Laboratory Services (see, CMS Ref: S&C–10–12–CLIA).²

G. Content of Test Report, Educational Materials, and Standard Statements

Comment: A few commenters requested further guidance on what the test report that is provided to an individual should look like. Commenters noted that the laboratory coding schema on the official test report sent to the provider may need further interpretation and context before it would be useful to the patient. These commenters expressed concern with the resources and information system development that would be needed to provide a more understandable test report to the individual. Other commenters stated that the report furnished to the individual should be the “official” report furnished to the ordering provider rather than one that is reworded and redesigned in an effort to meet the needs of the individual. Otherwise, they noted, there could be inadvertent inconsistencies or inaccuracies when one compared the “official” report to the patient-centric report.

² <http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/downloads/SCLetter10-12.pdf>.

In addition, some commenters suggested that laboratories should provide brief explanations or patient-specific educational materials on the tests reported, including reference ranges, so that the individual can interpret the information (for example, similar to a pharmacy's provision of the package insert for prescription drugs).

Response: As discussed above, the final rule does not require laboratories to interpret test reports for individuals. An individual has a right to receive a copy of the information about the individual maintained by or on behalf of a HIPAA-covered laboratory in a designated record set, which may include the official test report that is also provided to the individual's provider. However, while not required, a laboratory may also provide additional educational or explanatory materials regarding the test results to individuals if it chooses to do so.

Comment: A number of commenters suggested that the information provided to individuals should include a standard statement explaining the limitations of the laboratory data alone in confirming or ruling out a diagnosis, explaining that the laboratory results are subject to a physician's interpretation and encouraging the individual to discuss the results with his or her physician, and providing the contact information of the physician who ordered the tests.

Response: As we explain above, this final rule does not supplant the treatment conversation a health care provider has with a patient about the patient's test results. We expect that individuals will continue to obtain test results through their treating or ordering providers, and even when individuals request access to test reports directly from laboratories, we believe that, in most cases, these individuals will have had conversations with their treating providers about their test results before receiving access. Therefore, we do not believe a regulatory requirement for a standard statement is warranted. However, laboratories that wish to include one with test reports are free to do so.

H. Verification of Identity and Authentication

Comment: Some commenters stated that many laboratories would have challenges with verifying an individual's identity because they often have no direct interaction with the individual and any contact information they receive from a health care provider can be incomplete or incorrect. One commenter indicated that these limitations would necessitate that an

individual make a request for a test report in person. These commenters requested guidance or sample authentication practices for verifying an individual's identity upon receiving a request, whether in person, by phone, fax, or other means. One commenter suggested that the Department should provide guidance on the appropriate assurance levels for identity proofing and authentication, as defined by the National Institute of Standards and Technology (NIST) (Publication 800-63).

Response: Under § 164.514(h) of the Privacy Rule, a covered entity is required to take reasonable steps to verify the identity of the individual making a request for access. The rule does not mandate any particular form of verification (such as obtaining a copy of a driver's license), but rather leaves the type and manner of the verification to the discretion and professional judgment of the covered entity. Further, covered entities may rely on industry standards in developing reasonable verification processes. The type of verification may also vary depending on how the individual is to receive access, the form of the request, and whether the covered entity is requiring that all requests for access be made in writing, as permitted by § 164.524(b)(1), or permitting oral requests for access. For example, in those cases where an individual requests to pick up a copy of a test report directly from a laboratory, the laboratory may require that some form of photo identification be provided before the individual receives a copy. When a HIPAA-covered laboratory requires that a request for a copy of the test report be made on its own supplied form (whether by fax, email, or otherwise), the laboratory could request basic information on the form (date of birth, provider's name, date specimen was collected, etc.) to verify that the person requesting access is the individual who is the subject of the test report. Similarly, if a laboratory allows an individual to verbally request access over the phone, the laboratory can, at that time, request the information needed to verify the person is the subject individual. For those laboratories using patient portals to provide access, those portals should already be set up with appropriate authentication controls, as required by § 164.312(d) of the HIPAA Security Rule, to ensure that the person seeking access is the one claimed. However, we do not prescribe specific levels of authentication.

We understand that, in many cases, a laboratory may not have extensive contact or other information about an

individual. However, the rule makes clear that a laboratory is only required to provide an individual with access to test reports that can be identified as belonging to the individual who has requested access, based on the laboratory's authentication processes. Thus, when a laboratory is able to authenticate a test report as belonging to a particular patient, that laboratory will have at least some basic information about the patient, such as name, date of birth, date specimen was collected, etc., that can also be used to verify the identity of a person requesting access to that test report. When a laboratory believes a provider may have supplied incorrect information for a patient, which prevents the laboratory from properly verifying the individual, the laboratory may contact the provider to see if correct information is available.

While the Privacy Rule requires verification of the identity of the person requesting access, a HIPAA-covered laboratory may not impose unreasonable verification measures on an individual as a means to avoid having to provide the individual with access. For example, a HIPAA-covered laboratory may not require an individual who wants a copy of his or her test reports mailed to his or her home address to physically come to the laboratory to request access and provide proof of identity in person.

I. Informing Individuals of Their New Right of Access

Comment: A few commenters stated that providers should be required to inform or notify individuals of their right to receive test reports directly from laboratories, and to provide the information necessary for individuals to request test reports from the appropriate clinical laboratories. One commenter suggested this information could be included in the provider's notice of privacy practices. Another commenter asked if this final rule would require HIPAA-covered laboratories to revise their notices of privacy practices to include a statement regarding an individual's right to receive test results directly from the laboratory.

Response: We encourage, but do not require, treating health care providers to inform individuals of their right to receive test reports directly from HIPAA-covered laboratories. We believe requiring providers to do so would create an unwarranted burden on providers. However, whenever providers send a specimen(s) to the laboratory, as opposed to the individual going to the laboratory himself or herself to provide the testing sample, we encourage providers to supply the individual with the name of the

laboratory to which the specimen is being or has been sent and the other information necessary for the individual to request access from the laboratory.

With respect to HIPAA notices of privacy practices, a covered entity is required to promptly revise its notice whenever there is a material change to any of its privacy practices, including those pertaining to individuals' rights to access their protected health information (see § 164.520(b)(3) of the Privacy Rule). This final rule provides individuals with a right to access their protected health information directly from HIPAA-covered laboratories. A change in an individual's access rights constitutes a material change to the privacy practices of HIPAA-covered laboratories. Thus, by the compliance date of this final rule, HIPAA-covered laboratories must revise their notices to inform individuals of this right and to include a brief description of how to exercise this right, and must remove any statements to the contrary (see § 164.520(b)(1)(iv)(C)). Further, HIPAA-covered laboratories must make the revised notice available as required by § 164.520(c). We do not require that other covered health care providers, such as ordering providers, revise their notices of privacy practices to inform individuals of their right to access protected health information directly from laboratories.

The Department recognizes that HIPAA-covered laboratories are already required by the modifications to the HIPAA Rules that were published on January 25, 2013 (78 FR 5566) to revise their notices by September 23, 2013. To avoid HIPAA-covered laboratories having to modify their notices twice within the same year to comply with both the January 25, 2013, final rule and this rule, the Department announced on September 19, 2013, that it was exercising its enforcement discretion to allow CLIA laboratories (including CLIA-exempt laboratories) that are HIPAA covered entities to take until the compliance date of this final rule, October 6, 2014, to revise their notices to reflect both sets of modifications. See <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/cli-labs.html>. Thus, CLIA and CLIA-exempt laboratories that are HIPAA covered entities need only update their notices once to comply with both rules.

J. Preemption

Comment: A number of commenters supported the rule's general preemption of contrary state laws, stating that it would bring further harmonization of federal and state laws and ensure, regardless of where an individual lives,

that he or she has access to laboratory test reports. Other commenters requested clarification with respect to preemption, asking whether state laws that require more timely access to test reports than the Privacy Rule or that would limit the types of identification a laboratory could ask an individual to present to verify identity would continue to stand. One commenter stated that the final rule should preempt state laws that restrict laboratory-initiated contact with patients for purposes of communicating laboratory results. This commenter stated that there can be compelling medical reasons for laboratories to initiate contact. Another commenter stated that the rule should not preempt state laws that require the provider to discuss the results and provide psychological counseling along with disclosure of HIV test results.

Response: We agree with commenters that preemption of certain contrary state law is necessary to ensure that individuals' access rights under the Privacy Rule are strengthened. A number of states have laws that prohibit a laboratory from releasing a test report directly to the individual or that prohibit the release without the ordering provider's consent. Upon the effective date of this final rule, the Privacy Rule preempts these laws and HIPAA-covered laboratories should begin to come into compliance.

With respect to those commenters requesting clarification on HIPAA preemption, we note that HIPAA preempts only state laws that are contrary to the Privacy Rule. "Contrary" generally means a covered entity would find it impossible to comply with both the state and HIPAA requirements. In certain cases, a contrary state law is not preempted, such as where a state law is more stringent than the Privacy Rule. "More stringent" means, with respect to individuals' access rights, that the state law provides greater rights of access to individuals (see, 45 CFR Part 160, Subpart B). A state law that requires a laboratory to provide an individual with more timely access to test reports is not contrary to the Privacy Rule and thus, is not preempted. Similarly, a state law that limits the types of identification a laboratory can ask an individual to produce is not contrary to the Privacy Rule, provided the laboratory is still able to verify the identity of the person requesting access as required by § 164.514(h). HIPAA-covered laboratories should be able to comply with both sets of requirements in providing individuals with access to their test reports. Further, we clarify that this final rule applies only to

laboratories. State laws that place requirements on other types of health care providers, such as those requiring a provider to discuss with and counsel a patient on HIV test results are not preempted by this final rule. Finally, the trigger for the access obligations under the Privacy Rule is a request from an individual or the individual's personal representative. This final rule does not impose any requirement or establish any permission in regard to a laboratory initiating contact with an individual for purposes of communicating test results.

K. Compliance Date

Comment: A number of commenters advocated for a longer time period for HIPAA-covered laboratories to come into compliance than the proposed 180-day compliance period. Commenters suggested a variety of different compliance dates, including one year and beyond. Some commenters raised specific concerns with respect to laboratories that do not currently provide individuals with access to test reports, since the laboratories would need to develop all new policies, protocols, and mechanisms for receiving and responding to requests for access to test reports.

Other commenters asked that the Department wait to finalize the rule until after the HITECH Act changes to the Privacy Rule become final so that HIPAA-covered laboratories would need to develop only one set of policies, protocols, and procedures one time, to comply with the Privacy Rule's access provisions. A few commenters requested that the Department implement reasonable, sequenced compliance deadlines for all related regulations under the HITECH Act and HIPAA, such as changes to the Privacy Rule, EHR Incentive Programs' requirements, and the implementation of HIPAA Version 5010 and ICD-10. Commenters stated that sequenced deadlines would better take into account the significant amount of financial, operational, and technological resources needed to fully comply with all of these new requirements.

Response: While we appreciate the commenters' concerns regarding the compliance date, we decline to extend the 180-day compliance period for this final rule. We believe 180 days will provide HIPAA-covered laboratories with sufficient time to become prepared to provide individuals who request them with copies of test reports and will also ensure that individuals are afforded and able to benefit from this new right in a timely manner after the rule's issuance. Thus, HIPAA-covered laboratories are required to comply with

the individual access provisions of the Privacy Rule by no later than 180 days after the effective date of the final rule. The effective date of the final rule is 60 days after publication in the **Federal Register**; therefore, laboratories have a total of 240 days after publication of this final rule to come into compliance.

Moreover, in a number of cases, laboratories that operate in states that allow an individual to receive test reports directly from the laboratories will already have policies for providing individuals with access to test reports, which can then be modified as needed to be consistent with Privacy Rule requirements. The HITECH Act enhancements to an individual's right of access under the Privacy Rule were finalized and incorporated into the Privacy Rule on March 26, 2013. Thus, in implementing this rule and the HITECH Act changes, HIPAA-covered laboratories need only develop one set of policies. Finally, while we understand that overlapping compliance deadlines for different rules may be burdensome to entities that are subject to all of the rules, we do not believe it is feasible to completely sequence regulatory deadlines and still realize in a timely manner the benefits and protections the new requirements are intended to provide.

L. Other Comments

Comment: Commenters asked whether a laboratory could be subject to penalties for charging more than the reasonable cost-based fee allowed by the Privacy Rule, for failing to comply with an individual's request for completed test reports within the appropriate time period, or for failing to comply with an individual's request altogether.

Response: HIPAA-covered laboratories that fail to comply with the Privacy Rule's access provisions are subject to an enforcement action for noncompliance by the Department, which may include the imposition of civil money penalties. More information about HIPAA enforcement is available on the OCR Web site at: <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/index.html>.

Comment: A few commenters suggested that the rule increases burden on individuals, by making them first call their provider's office to learn the name of the laboratory producing the test report and then making them call the laboratory for a copy of the test report, instead of just having them contact the provider's office for the test results.

Response: We do not agree that this final rule increases the burden on individuals. As previously discussed in

detail above, the rule does not supplant the role of the treating provider in discussing test results with a patient or an individual's right under the HIPAA Privacy Rule to access protected health information about the individual maintained by the provider, including laboratory test results. The rule merely provides an additional avenue for individuals to obtain copies of their test reports by allowing individuals to obtain their test reports directly from the laboratories.

Comment: One commenter stated that certain third-party payers and insurers do not allow laboratories to bill a patient any amount in addition to what is paid to the laboratory for testing services by that third-party payer or insurer. The commenter contended that this prohibition would prevent a laboratory from charging an individual a cost-based fee for providing a copy of the test report.

Response: First, we note that charging an individual a fee for access is optional and not required under the Privacy Rule. Second, the billing restriction described by the commenter is likely tied to the costs associated with the provision of health care services, and not to a laboratory's ability to charge an individual for reasonable costs associated with providing the individual access to his or her protected health information. It has not been our experience that covered health care providers subject to similar billing restrictions have been unable to charge individuals reasonable cost-based fees for access to their records.

Comment: One commenter asked, when a patient fails to compensate the laboratory for services provided, whether a laboratory may withhold future test results from the patient until payment is made.

Response: A covered entity may not withhold or suspend an individual's right under the HIPAA Privacy Rule to access his or her protected health information because the individual has not paid the covered entity for the health care services provided.

Comment: One commenter stated that laboratories should not be required to provide test reports in a patient's preferred language.

Response: A covered entity's obligations under civil rights or other laws to ensure equal access to health care for individuals, including requirements for when certain documents must be translated, are not diminished or disturbed by this rule.

Comment: A few commenters suggested that laboratories should be required to notify the ordering provider when a patient has received, or will

receive, copies of test reports directly from the laboratory.

Response: We do not believe this requirement is warranted. As discussed above, this rule does not change the ability of an ordering provider to receive test reports and discuss them with the patient. However, a laboratory that wishes to provide notification to a provider that an individual will receive a copy of a test report directly may do so.

Comment: One commenter stated that, by deferring to state law, the CLIA regulations impede disclosures of test reports to other HIPAA covered entities and business associates for purposes that are otherwise permitted by HIPAA. This commenter stated that the list of persons authorized to receive the reports should be expanded to include HIPAA covered entities and business associates. This commenter believes that the expansion of the list will eliminate barriers to legitimate disclosures to these entities, such as for treatment or quality improvement purposes.

Response: The CLIA regulations at § 493.1291(f) state that test results must be released only to authorized persons and, if applicable, to the persons responsible for using the test results, and to the laboratory that initially requested the test. "Responsible for using" would cover those HIPAA covered entities that are in a treatment relationship with the individual. CLIA also defines "authorized person" as an individual authorized under state law to order tests or receive test results, or both. State law can expand the list of entities that can be considered "authorized" persons under CLIA.

VI. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide 30-day notice in the **Federal Register** and to solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the

affected public, including automated collection techniques.

In our September 14, 2011 proposed rule (76 FR 56712), we solicited public comment on each of these issues, as required by section 3506(c)(2)(A) of the PRA. We did not receive any PRA-related comments.

Except as provided in § 493.1291(l), test reports must be released only to authorized persons and, if applicable, the individuals (or their personal representatives) responsible for using the test reports and, to the laboratory that initially requested the test. Under § 493.1291(l), the laboratory may, upon

request by the patient (or the patient's personal representative), provide access to the patient's test reports that the laboratory can identify as belonging to that patient. The CLIA regulations do not require that CLIA-certified laboratories provide this access—rather, these laboratories are allowed to provide for access. However, the accompanying changes to the HIPAA Privacy Rule in this final rule require that CLIA-certified laboratories that are HIPAA covered entities provide individuals with access in accordance with the Privacy Rule. The CLIA-certified laboratories that are covered entities under HIPAA will need

to ensure that their practices conform to CLIA and HIPAA requirements.

We have prepared the Paperwork Reduction Act and the Regulatory Impact Analysis (RIA) that represents the costs and benefits of the final rule based on an analysis of identified variables and data sources needed for this change. We identified known data elements (Table 1) and made assumptions on elements where a source could not be identified (Table 2). Our assumptions are based on internal discussions and consultation with laboratories representative of the industry.

TABLE 1—SUMMARY OF KNOWN DATA ELEMENTS

Variable	Data element	Source
States/territories where laboratories, as listed in Table 3, are impacted by the new individual access provisions.	39	Determination of this finding is based on two reports as listed here: 1. <i>Privacy and Security Solutions for Interoperable Health Information Exchange, Releasing Clinical Laboratory Test Results; Report on Survey of State Laws</i> prepared by Joy Pritts, JD, for the Agency for Health care Research and Quality and Office of the National Coordinator August 2009; RIT Project Number 0209825.000.015.100 (Accessed July 15, 2010). 2. <i>Electronic Release of Clinical Laboratory Results: A Review of State and Federal Policy, prepared by Kitty Purington, JD, for the California Health care Foundations</i> January 2010 (Accessed July 15, 2010).
Laboratories, as listed in Table 6, impacted by the new individual access provisions.	22,816	Data from CLIA Online Survey Certification and Reporting database (OSCAR) database accessed August 27, 2012. Includes Certificate of Compliance and Certificate of Accreditation in the 39 states impacted by the patient access provisions.
Test results in laboratories, as listed in Table 6, impacted by the new individual access provisions.	7,025,841,649	Data from OSCAR database accessed August 27, 2012 Includes Certificate of Compliance and Certificate of Accreditation in the 39 states impacted by the patient access provisions.
States/territories, as noted in Table 7, where the HIPAA Privacy Rule will pre-empt State Law ¹ .	46	Determination of this finding is based on two reports as listed here: 1. <i>Privacy and Security Solutions for Interoperable Health Information Exchange, Releasing Clinical Laboratory Test Results; Report on Survey of State Laws</i> prepared by Joy Pritts, JD, for the Agency for Health care Research and Quality and Office of the National Coordinator August 2009; RIT Project Number 0209825.000.015.100 (accessed July 15, 2010). 2. <i>Electronic Release of Clinical Laboratory Results: A Review of State and Federal Policy</i> prepared by Kitty Purington, JD, for the California Health care Foundations January 2010 (Accessed July 15, 2010).
Laboratories, as indicated in Table 7, required to update their HIPAA notices of privacy practices.	33,807	Data from OSCAR database accessed August 27, 2012 Includes Certificate of Compliance and Certificate of Accreditation in the 27 states impacted by the HIPAA provisions to update the notices of privacy practice.
Hourly salary of clerical level employee to process requests for test reports.	\$30.09	2013 salary/wages and benefits—use 2012 salary/wages and benefits obtained from the U.S. Bureau of Labor Statistics, Economic News Release, March 2012 U.S.—Total employer costs per hour worked for employee compensation: Civilian workers; Occupational Group: Service-providing at http://www.bls.gov/news.release/ecec.t01.htm and adjusts annually by 2.78 percent to reflect an average increase in total compensation costs from 2007–2011.
Hourly salary of management level employee to determine policy.	\$50.06	2013 salary/wages and benefits—use 2012 salary/wages and benefits obtained from the U.S. Bureau of Labor Statistics, Economic News Release, March 2012 U.S.—Total employer costs per hour worked for employee compensation: Civilian workers; Occupational Group: Service-providing at http://www.bls.gov/news.release/ecec.t01.htm and adjusts annually by 2.78 percent to reflect an average increase in total compensation costs from 2007–2011.

1. Note that there may be circumstances where a laboratory is able to comply with both HIPAA and the state law.

TABLE 2—SUMMARY OF ASSUMPTIONS

Variable	Low	High
Number of test results per test report	10 test results	20 test results.
Percentage of patients requesting test report	0.05%	0.50%.
Time required to process request for test report	10 minutes	30 minutes.

We determined that the impacted CLIA-certified laboratories can be broken down into four categories: Laboratories in states and territories where there is no law regarding who can receive test reports (N=26), laboratories in states and territories where test reports can only be given to the provider (N=13), laboratories in states and territories that allow test reports to go directly to the patient through some

means or mechanism (N=9), and laboratories in states and territories that allow the test reports to go to the patient with provider approval (N=7). Of these four categories, we believe that laboratories in the 39 states and territories where there is either no law regarding receipt of test reports or where reports can only go to the provider are affected by the individual access provisions contained in this rulemaking

(see Table 3 for a list of states and territories by category). Laboratories in the remaining categories would most likely have existing procedures in place to respond to patient requests for test reports, whereas the laboratories in the first two categories would most likely not have procedures in place and would have to develop mechanisms for handling these requests and providing access.

TABLE 3—IMPACT ON LABORATORIES OF NEW INDIVIDUAL ACCESS PROVISIONS

Impacts laboratories		Does not impact laboratories	
No State law	Allows test reports only to provider	Allows test reports to patient	Allows test reports to patient with provider approval
Alabama Alaska Arizona Colorado Guam Idaho Indiana Iowa Kentucky Louisiana Minnesota Mississippi Montana Nebraska New Mexico North Carolina North Dakota Northern Mariana Islands Ohio Oklahoma South Carolina South Dakota Texas Utah Vermont Virgin Islands	Arkansas Georgia Hawaii Illinois Kansas Maine Missouri Pennsylvania Rhode Island Tennessee Washington Wisconsin Wyoming	Delaware District of Columbia Maryland New Hampshire New Jersey Nevada Oregon Puerto Rico West Virginia	California Connecticut Florida Massachusetts Michigan New York Virginia

In addition to the impact from the access provisions, laboratories both in the 39 states and territories where there is either no law regarding receipt of test reports or where reports can only go to the provider, as well as in the 7 states and territories that currently allow test reports to go to the patient only with provider approval, will be affected by the requirement to update HIPAA notices of privacy practices as a result

of this final rule (see Table 4 for a list of states and territories by category). Even if laboratories in the 7 states and territories that currently allow test reports to go to the patient with provider approval have processes in place to provide test reports to patients, their notices of privacy practices may now contain inaccurate statements about how individuals can obtain copies of their test reports, given that this final

rule preempts these state laws. Therefore, by the compliance date of this rule, the laboratories in the 46 states and territories identified in Table 4 will need to revise their notices to inform individuals of their right to obtain reports directly from the laboratory, provide a brief description of how to exercise this right, and must remove any statements to the contrary (see § 164.520(b)(1)(iv)(C)).

TABLE 4—IMPACT ON LABORATORIES OF HIPAA PRIVACY RULE REQUIREMENT TO REVISE THEIR NOTICES OF PRIVACY PRACTICES

Impacts laboratories			Does not impact laboratories
No State law	Allows test reports only to provider	Allows test reports to patient with provider approval	Allows test reports to patient
Alabama Alaska Arizona Colorado Guam Idaho	Arkansas Georgia Hawaii Illinois Kansas Maine	California Connecticut Florida Massachusetts Michigan New York	Delaware District of Columbia Maryland New Hampshire New Jersey Nevada

TABLE 4—IMPACT ON LABORATORIES OF HIPAA PRIVACY RULE REQUIREMENT TO REVISE THEIR NOTICES OF PRIVACY PRACTICES—Continued

Impacts laboratories			Does not impact laboratories
No State law	Allows test reports only to provider	Allows test reports to patient with provider approval	Allows test reports to patient
Indiana Iowa Kentucky Louisiana Minnesota Mississippi Montana Nebraska New Mexico North Carolina North Dakota Northern Mariana Islands Ohio Oklahoma South Carolina South Dakota Texas Utah Vermont Virgin Islands	Missouri Pennsylvania Rhode Island Tennessee Washington Wisconsin Wyoming	Virginia	Oregon Puerto Rico West Virginia

The CMS Online Survey, Certification, and Reporting (OSCAR) database indicates that there are a total of 234,756 laboratories which provide approximately 12.8 billion tests annually (see Table 5) in the United States. We assume Certificate of Waiver laboratories and Certificate of PPM laboratories would not be impacted because the tests are usually performed in these sites during a patient’s visit. We

assume that the physician or health practitioner would inform the patient of those results during the visit, and we anticipate that the patient would ask that person with whom they interacted as opposed to the laboratory, if they have reason to seek copies of the test report in the future. In the 39 states and territories that are impacted by the patient access provision, there are

22,816 laboratories that perform over 7 billion tests annually (see Table 6).

However, we recognize that some laboratories included in these estimates may not be covered entities under HIPAA (because they do not conduct covered health care transactions electronically, for example, filing electronic claims for payment) and, therefore, would not be required to provide direct individual access.

TABLE 5—ALL U.S. LABORATORY TESTING SUBJECT TO CLIA

CLIA certificate type	Number of laboratories	Number of tests
Certificate of Compliance	20,470	3,122,772,023
Certificate of Accreditation	16,829	8,998,058,524
Certificate of Waiver	158,996	477,094,700
Certificate of Provider Performed Microscopy (PPM)	38,461	207,777,472
Totals	234,756	12,805,702,719

TABLE 6—NUMBER OF LABORATORIES IMPACTED BY NEW INDIVIDUAL ACCESS PROVISIONS

State or territory	Number of laboratories	Number of tests
Alaska	103	10,688,466
Alabama	868	252,267,262
Arkansas	540	74,686,910
Arizona	581	195,731,588
Colorado	499	138,847,079
Georgia	1,190	217,997,888
Guam	13	2,500,654
Hawaii	117	36,918,267
Idaho	230	33,092,465
Illinois	1,053	1,852,543,312
Indiana	621	190,732,493
Iowa	548	82,389,916
Kansas	438	240,744,893
Kentucky	710	133,586,267

TABLE 6—NUMBER OF LABORATORIES IMPACTED BY NEW INDIVIDUAL ACCESS PROVISIONS—Continued

State or territory	Number of laboratories	Number of tests
Louisiana	677	135,050,184
Maine	140	36,150,552
Minnesota	832	165,066,668
Mississippi	523	45,808,928
Missouri	683	192,145,580
Montana	961	300,480,983
Nebraska	317	33,103,996
New Mexico	189	44,642,110
North Carolina	673	48,771,993
North Dakota	177	49,833,112
Northern Mariana Islands	181	56,185,878
Ohio	634	163,151,403
Oklahoma	485	111,005,884
Pennsylvania	747	87,776,132
Rhode Island	477	91,657,444
South Carolina	453	38,185,190
South Dakota	469	171,638,497
Tennessee	2,626	949,935,182
Texas	1,594	155,118,958
Utah	705	256,856,757
Vermont	245	174,974,043
Virgin Islands	45	11,413,475
Washington	936	167,818,742
Wisconsin	482	73,457,876
Wyoming	54	2,884,622
Total	22,816	7,025,841,649

In addition to complying with the individual access requirements, a total of 33,087 laboratories in the states and territories that are affected by the HIPAA notice provisions will need to revise their notices of privacy practices to reflect the right of individuals to obtain test reports directly from laboratories (see Table 7). However, as stated above, we recognize that some laboratories included in these estimates may not be covered entities under HIPAA and, therefore, would not be required to provide direct individual access and would not be required to revise any notices.

TABLE 7—NUMBER OF LABORATORIES IMPACTED BY THE HIPAA PRIVACY RULE REQUIREMENT TO REVISE THEIR NOTICES OF PRIVACY PRACTICES

State	Number of laboratories
Alaska	103
Alabama	868
Arkansas	540
Arizona	581
California	2,919
Colorado	499
Connecticut	379
Florida	2,462
Georgia	1,190
Guam	13
Hawaii	117
Idaho	230

TABLE 7—NUMBER OF LABORATORIES IMPACTED BY THE HIPAA PRIVACY RULE REQUIREMENT TO REVISE THEIR NOTICES OF PRIVACY PRACTICES—Continued

State	Number of laboratories
Illinois	1,053
Indiana	621
Iowa	548
Kansas	438
Kentucky	710
Louisiana	677
Massachusetts	693
Maine	140
Michigan	926
Minnesota	832
Mississippi	523
Missouri	683
Montana	961
Nebraska	317
New Mexico	189
New York	2,425
North Carolina	673
North Dakota	177
Northern Mariana Islands	181
Ohio	634
Oklahoma	485
Pennsylvania	747
Rhode Island	477
South Carolina	453
South Dakota	469
Tennessee	2,626
Texas	1,594
Utah	705
Vermont	245
Virgin Islands	45
Virginia	467

TABLE 7—NUMBER OF LABORATORIES IMPACTED BY THE HIPAA PRIVACY RULE REQUIREMENT TO REVISE THEIR NOTICES OF PRIVACY PRACTICES—Continued

State	Number of laboratories
Washington	936
Wisconsin	482
Wyoming	54
Totals	33,087

A. Information Collection Requests (ICRs) Regarding the Development of Process To Provide Patient Access to Test Reports (§ 493.1291)

Under § 493.1291(l), we assume that the development of the mechanisms to provide patient access to laboratory test reports will be a one-time burden and that each laboratory will develop its own unique policies and procedures to address patient access or adopt mechanisms/procedures developed by consultants or associations representing laboratories. We assume a one-time burden of 2 to 9 hours to identify the applicable legal obligations and to develop the processes and procedures for handling patient requests for access to test reports. While we provide a range of burden estimates in this final rule, for purposes of OMB review and approval we will submit burden estimates based

on 9 hours. We also assume an hourly rate for a management-level employee to be \$50.06 (see Table 1).

The range of costs for laboratories to develop the necessary processes and procedures for handling patient requests is:

$$(2 \text{ hours} \times \$50.06 \text{ per hour} \times 22,816 \text{ laboratories}) = \$2,284,338$$

$$(9 \text{ hours} \times \$50.06 \text{ per hour} \times 22,816 \text{ laboratories}) = \$10,279,521$$

Since this is a one-time burden, the average annual cost over the 3-year OMB approval period, which is the period between approval and renewal of the information collection by OMB, will range between \$761,446 and \$3,426,507.

The ongoing burden associated with responding to test report requests is dependent upon the total number of test reports that exist in affected laboratories, the percent of the results that would be requested, and the cost of producing these reports for those individuals who ask for direct access.

Laboratory test reports are commonly understood to contain multiple test results with many laboratory tests being ordered as panels of tests. Each laboratory may have its own unique test

report panels which may contain anywhere from 1 to 20 individual test results.

Using a range of 10 to 20 test results in a test report, we estimated the annual number of test reports that may be requested to be:

$$(7,025,841,649 \text{ tests per year} / 20 \text{ tests per report}) = 351,292,082 \text{ test reports/year}$$

$$(7,025,841,649 \text{ tests per year} / 10 \text{ tests per report}) = 702,584,165 \text{ test reports/year}$$

We are unaware of any data that would provide a reasonable estimate for the number of patients who would request test reports from laboratories if they are available. We solicited public comments on this issue but did not receive any to inform our estimates. Therefore, we assume a range of 1 in 2,000 patients (0.05 percent) to 1 in 200 patients (0.50 percent) will request direct access to his or her test report.

Using these figures, the range of the number of patient requests per year will be:

$$(351,292,082 \text{ test reports per year} \times .0005) = 175,646 \text{ patient requests per year}$$

$$(702,584,165 \text{ test reports per year} \times .005) = 3,512,921 \text{ patient requests per year}$$

The processing of a patient request for a test report generally covers steps from actual receipt of the patient's request to the delivery of the report and documentation of the delivery. Requests for laboratory results are usually handled by non-managerial or clerical staff. Due to the lack of data that indicates the amount of time it takes for staff to process a test report request, we assume a range of 10 minutes (0.17 hours) to 30 minutes (0.5 hours) to handle a request from start to finish.

We then multiplied this range by the range of the anticipated number of patient requests to obtain the total annual burden hours:

$$(175,646 \text{ patient requests per year} \times 0.17 \text{ hours}) = 29,860$$

$$(3,512,921 \text{ patient request per year} \times 0.5 \text{ hours}) = 1,756,461$$

We then multiplied this range by the hourly rate of \$30.09 for a clerical-level employee (see Table 1) to develop the total labor cost of reporting:

$$29,860 \text{ (total annual burden hours)} \times \$30.09 = \$898,487$$

$$1,756,461 \text{ (total annual burden hours)} \times \$30.09 = \$52,851,911$$

TABLE 8—SUMMARY OF ANNUAL REQUIREMENTS AND BURDEN ESTIMATES

Regulation section(s)	OMB Control No.	Respondents	Responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting (\$)	Total labor cost of reporting (\$)	Total capital/maintenance costs (\$)	Total cost (\$)
42 CFR 493.1291	0938—New	22,816	22,816	9	205,344	50.06	10,279,521	0	10,279,521
42 CFR 493.1291	0938—New	3,512,921	3,512,921	.5	1,756,461	30.09	52,851,911	0	52,851,911
Total .....	.....	3,535,737	3,535,737	.....	1,961,804	.....	63,131,432	.....	63,131,432

We will exercise our enforcement discretion to allow HIPAA-covered laboratories to revise their notices only once to reflect the changes to privacy practices of these entities both resulting from this rule, as well as the final rule published on January 25, 2013, modifying the HIPAA Rules, which became effective on March 26, 2013 (78 FR 5566). Since we accounted for the overall burden to covered health care providers, including laboratories, of revising notices in the burden statement accompanying the January 25, 2013, final rule (78 FR 5669), we do not include estimates of any additional burden in this rule.

If you comment on these information collection and recordkeeping requirements, please submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, [CMS-2319-F] Fax:

(202) 395-6974; or Email: OIRA_submission@omb.eop.gov.

VII. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Laboratories regulated under CLIA that do not currently provide patients with an opportunity to receive, upon request, a copy of their laboratory test report (defined in CLIA § 493.1291) are affected by this final rule. According to the CMS OSCAR database accessed on August 27, 2012, there are 234,756

laboratories in the United States that are subject to CLIA. OSCAR is a data network maintained by CMS in cooperation with the state surveying agencies and accrediting organizations that provides a compilation of all the data elements collected during inspection surveys conducted at laboratories. Of the total CLIA-certified laboratories identified in the OSCAR database, we believe approximately 90 percent of these would not be impacted by the individual access provisions because they perform testing either under a Certificate of Waiver or Certificate of Provider Performed Microscopy (PPM) or they are located in states that already allow the laboratory to provide patient access to test reports, either directly or with provider approval. Removing the step in which the provider grants permission to the laboratory should not pose an additional impact on the laboratory, as we believe these laboratories already have processes in place to provide patients access to test reports once that permission is received.

We expect that 22,816 laboratories located in the 39 states and territories identified in Table 3 as having no state law or a state law that provides test reports only to the provider will be impacted by the individual access provisions in this final rule. In addition, we expect that 33,087 laboratories located in the 46 states and territories identified in Table 4 as having no state law, a state law that provides test reports only to the provider, or a state law that permits test reports to go to patients only with provider approval, will be affected by the HIPAA requirement to update their notices of privacy practices. We believe that this final rule does not constitute an economically significant rule because we estimate the range of overall annual costs that would be expended by the affected laboratories would be less than \$100 million for 2013.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we assume that the great majority of medical laboratories are small entities, either by virtue of being nonprofit organizations or by meeting the SBA definition of a small business by having revenues of less than \$13.5 million in any 1 year. We believe at least 83 percent of medical laboratories qualify as small entities based on their nonprofit status as reported in the American Hospital Association Fast Fact Sheet updated June 24, 2010 ([\[center/Statistics-and-Studies/Fast_Facts_Nov_11_2009.pdf\]\(http://www.aha.org/aha/resource-center/Statistics-and-Studies/Fast_Facts_Nov_11_2009.pdf\)\).](http://www.aha.org/aha/resource-</p></div><div data-bbox=)

Other options for regulatory relief of small businesses, as discussed in section E of this final rule, were determined not to be feasible and therefore these options were not analyzed for this final rule. We believe any alternative to allowing the laboratory to provide patient access to test reports would be counterproductive to the Department's efforts to provide patient-centered health care. We are unaware of any instances in which the changes included in this final rule would affect health care entities operated by small government jurisdictions.

Section 1102(b) of the Social Security Act also requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We do not expect this final rule would have a significant impact on small rural hospitals. The final rule applies only to laboratories. If a small rural hospital operates a laboratory, we anticipate compliance with this final rule will require minimal effort as we expect that the hospital already has procedures in place for responding to individual access requests for hospital records under the HIPAA Privacy Rule. We believe that these existing policies and procedures should be easy to translate for use in direct access requests to hospital-operated laboratories. Therefore, the Secretary has determined that this final rule does not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold is approximately \$142 million. We do not anticipate this final rule will impose an unfunded mandate on states, tribal governments, or the private sector of more than \$142 million annually. Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirements and costs on state and

local governments, preempts state law, or otherwise has Federalism implications.

The changes to the CLIA regulations at § 493.1291 will not have a substantial direct effect on state and local governments, preempt state law, or otherwise have a Federalism implication and there is no change in the distribution of power and responsibilities among the various levels of government.

The Federalism implications of the Privacy Rule were assessed as required by Executive Order 13132 and published as part of the preamble to the final rule on December 28, 2000 (65 FR 82462, 82797). Regarding preemption, though the changes to the Privacy Rule will preempt a number of state laws (see Table 4), this preemption of state law is consistent with the preemption provision of the HIPAA statute. The preamble to the final Privacy Rule explains that the HIPAA statute dictates the relationship between state law and Privacy Rule requirements, and the rule's preemption provisions do not raise Federalism issues.

We do not believe that this rule will impose substantial direct compliance costs on state and local governments. We do not believe that a significant number of laboratories affected by these proposals are operated by state or local governments. Therefore, the modifications in these areas will not cause additional costs to state and local governments.

In considering the principles in and requirements of Executive Order 13132, the Department has determined that the modifications to the Privacy Rule will not significantly affect the rights, roles and responsibilities of the states.

B. Anticipated Effects

The current CLIA regulations and related laws of the states and territories pose potential barriers to the laboratory exchange of health care information (test reports) directly with the patient. These regulatory changes will amend § 493.1291(f) and add § 493.1291(l) to the CLIA regulations and also amend § 164.524 of the Privacy Rule. These changes are being made in support of the Department's efforts toward achieving patient-centered and health IT-enabled health care and would allow patients direct access to their laboratory test reports from a laboratory.

The changes providing for individual access will impact laboratories in 39 states and territories (Table 3) where state law does not permit the laboratory to provide test reports directly to the patient. These changes do not impact the laboratories in the remaining 16

states and territories where the laboratory is allowed to provide the test report to the patient either directly or after provider approval. However, laboratories in 46 states and territories (Table 4) where state law does not permit the laboratory to provide test reports directly to the patient or permits direct access only after provider approval, will be impacted by the requirement to update their HIPAA notice of privacy practices to reflect individuals' new access rights under this final rule.

C. Costs

Although data are not available to calculate the estimated costs and benefits that will result from these changes, we are providing an analysis of the potential impact based upon available information and certain assumptions. These regulatory changes are anticipated to have the following associated costs and benefits:

- The impacted laboratories may require additional resources to ensure patients receive test reports when requested.
- Patients will benefit from having direct access to their laboratory test results. (See section D below).

1. Quantifiable Impacts

Laboratories that are issued a CLIA Certificate of Compliance or Certificate of Accreditation in the 39 states and territories identified in Table 3 will be required to provide patients with a copy of their test report upon request. The OSCAR database includes 22,816 laboratories in the 39 states and territories that will be impacted and the corresponding number of annual tests in these laboratories is approximately 7 billion as shown in Table 6. Data are not available for estimating the number of test results reported per test report. However, the majority of test reports contain multiple test results. Tests are frequently ordered as panels of individual tests. For example, according to 2008 CMS reimbursement data, three of the four most frequently ordered tests in the Medicare outpatient setting are panels of multiple individual tests,

some of which may contain up to 20 tests. As part of a medical encounter, frequently more than one panel is ordered per patient, and a test report could contain a large number of individual test results. Therefore, for the purposes of this analysis, an assumed range of 10 to 20 is used to represent the average number of test results per test report. Applying this range to the total number of annual tests (7,025,841,649) from Table 6, the estimated number of total annual test reports ranges from a low of 351,292,082 to a high of 702,584,165.

For the purposes of this analysis, we assume that many patients will still prefer to obtain their laboratory result information from their health care provider, who will also be able to provide interpretation of the test results, and thus an assumed range of from 1 in 2,000 (0.05 percent) to 1 in 200 (0.50 percent) is used to represent the proportion of test reports requested. Applying this range to the number of estimated annual test reports (351,292,082 to 702,584,165) yields an estimated annual number patient requests ranging from 175,646 to 3,512,921.

Processing a request for a test report, either manually or electronically, will require completion of the following steps: (1) Receipt of the request from the individual; (2) authentication of the identification of the individual; (3) retrieval of test reports; (4) verification of how and where the individual wants the test report to be delivered and provision of the report by mail, fax, email or other electronic means; and (5) documentation of test report issuance. We estimate the total time to process each test report request to be in the range of 10 minutes (0.17 hours) to 30 minutes (0.5 hours). This estimate for a range of total time includes estimates for a range of time for each of the five steps listed above. The time needed to complete each step is dependent on the capabilities of the laboratory, such as whether manual or automated processes are available, and the desired method of communication of test reports to the

individual patient as listed in step four. We multiplied the range for the number of patient requests, 175,646 to 3,512,921 by 0.17 hours and 0.5 hours to determine the total number of hours for processing the test reports to be in the range of 29,860 and 1,756,461. The estimated annual cost to process all test report requests in 2013 ranges from \$898,487 to \$52,851,911.

The analysis also assumed each of the estimated 22,816 laboratories to be impacted by individual access provisions of this rule (Table 6) will need to develop and implement a policy and process to receive and respond to patient requests as discussed above. To estimate the initial, one-time development cost, it is assumed to require laboratory management staff time ranging from a low of 2 hours to a high of 9 hours per laboratory. To convert the number of hours to an estimated cost per laboratory, we applied the rate of \$50.06 (see Table 1) to the assumed 2 to 9 hour time range yields an estimated cost per laboratory ranging from \$100.12 to \$450.54, which when applied to the estimated 22,816 laboratories impacted results in a total estimated one-time development cost ranging from \$2,284,338 to \$10,279,521.

Table 9 shows the total estimated range of annual costs for the change in undiscounted 2013 dollars and discounted at 3 percent and 7 percent to translate expected benefits or costs in any given future year into present value terms. To calculate the total estimated costs in 2013, we added the cost to develop the necessary policies and processes (which would only be applicable in the first year) and the cost of responding to test report requests. These costs total between \$3 million and \$63 million for 2013 to provide patients with access to their laboratory test reports. As subsequent years will only entail the costs associated with processing requests, we simply took the 2013 values for the cost of responding to test reports and applied the same inflation factor used in Table 1 for the hourly rate calculations. The resulting values can be found in Table 9.

TABLE 9—TOTAL ESTIMATED ANNUAL COSTS OF PATIENT TEST REPORT REQUESTS

[Policy development and processing for the patient access]

	Undiscounted (Base year: 2013 \$)		Discounted at 3%		Discounted at 7%	
	Low	High	Low	High	Low	High
2013	\$3,182,819	\$63,131,432	\$3,090,115	\$61,292,652	\$2,974,597	\$59,001,338
2014	932,243	55,934,563	878,728	52,723,690	814,257	48,855,414
2015	959,045	57,542,682	877,662	52,659,705	782,866	46,971,969
2016	986,617	59,197,034	876,597	52,595,798	752,686	45,161,134

TABLE 9—TOTAL ESTIMATED ANNUAL COSTS OF PATIENT TEST REPORT REQUESTS—Continued
 [Policy development and processing for the patient access]

	Undiscounted (Base year: 2013 \$)		Discounted at 3%		Discounted at 7%	
	Low	High	Low	High	Low	High
2017	1,014,982	60,898,949	875,533	52,531,968	723,668	43,420,109

Laboratories will be able to offset some of these costs pursuant to § 164.524(c)(4) of the HIPAA Privacy Rule, which permits covered entities to impose on the individual a reasonable, cost-based fee for providing access to their health information, including the cost of supplies for and labor of copying the requested information.

As we explain above, with respect to notices of privacy practices, we are exercising our enforcement discretion to allow HIPAA-covered laboratories to revise their notices only once to reflect the changes to privacy practices of these entities both resulting from this rule, as well as the final rule published on January 25, 2013, modifying the HIPAA Rules, which became effective on March 26, 2013 (78 FR 5669). Since we accounted for the overall costs to covered health care providers, including laboratories, of revising and reprinting notices in the impact statement accompanying the January 25, 2013, final rule (78 FR 5669), we do not include here any estimates of additional costs to revise and print notices.

Therefore, we estimate the cost to provide patients with access to their laboratory test reports is estimated to be between \$3 million and \$63 million for 2013.

2. Non-Quantifiable Impacts

The burden in this final rule would be primarily on laboratories to provide the laboratory test reports when requested by the patient; however, there may be some non-quantifiable impacts on the health care provider's office. If the patient does not know where the provider sent the test request, the provider may need to provide laboratory contact information to the patient so he or she may request the test report. We assume that notification of the laboratory name and contact information could be provided in as little as 30 seconds; however there are no data to confirm this, and we did not receive comments on the issue. We also note that since the provider may need to provide an interpretation of the test results, the provider may give the

patient a copy of the test report rather than referring the patient to the laboratory for the information. The time cost to patients of new interactions with laboratories is a further impact of the rule that has not been quantified.

D. Benefits

Although we cannot quantify the impact on patients, we believe that it will be positive in light of findings from studies that focused on patient receipt of test results from the provider. We found several studies where greater than 90 percent of patients stated they preferred being notified of all test results, both normal and abnormal (1. Baldwin DM, Quintela J, Duclos C, et al. Patient Preferences for Notification of Normal Laboratory Test Results: A Report from the ASIPS Collaborative. *BMC Fam Practice* 2005; 6:11; 2. Boohaver EA, Ward RE, Uman JE et al. Patient Notification and Follow-up of Abnormal Test Results. *Arch Intern Med* 1996; 327–331; 3. Grimes GC, Reis MD, Gokul B, et al. Patient Preferences and Physician Practices for Laboratory Test Result Notification. *JABFM* 2009;22:6:670–676; and 4. Meza JP and Webster DS. Patient Preferences for Laboratory Test Result Notification. *Am J Manag Care* 2000; 6:1297–300). These same studies reported, for both the health care provider and patient, the preferred method for receiving normal test results was the U.S. mail, and direct phone contact from the provider was the preferred method for abnormal test results. These preferences may have changed in the last 5 years given the increase in the use of electronic communications. Advantages reported in these studies for the patient having direct access to the test report include reduced workload for the health care provider's office, reduced chance of a patient not being informed of a laboratory test result, and reduced numbers of patients who fail to seek appropriate medical care. Additionally, we expect significant benefits to flow to patients as a result of increased access to their laboratory test results. Commenters to this final rule describe

these benefits as including increased patient participation in treatment programs, such as those that involve monitoring of chronic diseases, and the ability of patients to identify and treat health risks sooner and more effectively.

E. Alternatives Considered

The changes to the CLIA regulations and the HIPAA Privacy Rule are in support of the Department's efforts toward achieving patient-centered health care. Several alternatives were considered before selecting the approach in this final rule to provide access to laboratory test reports upon a patient's request. One alternative would have been to leave the regulations as written without making any changes. However, this option would leave in place the restrictions on patients' direct access to their laboratory test results and would therefore impede the goal of promoting patient-centered health care. Another alternative would have been to revise the definition of "authorized person" under CLIA to specifically include a patient as an authorized person. This alternative was not considered feasible because the definition of "authorized person" in the CLIA regulations also permits individuals to order tests, and it defers to state law for authorization. A last alternative considered would have been to require the laboratory to automatically provide each test report directly to each patient rather than the permissive approach to provide patients access to their reports upon request. However, this alternative would have had the potential of significantly increasing the cost for laboratories since 100 percent of the 350 million to 703 million test reports issued annually would need to be provided to the patients.

F. Accounting Statement and Table

We have prepared the following accounting statement showing the classification of the expenditures associated with the provisions of this final rule.

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (RIA, preamble, etc.)
BENEFITS:				
Monetized benefits	n/a	n/a	n/a	RIA Section C2
Annualized qualified, but unmonetized, benefits	n/a	n/a	n/a	RIA Section C2
(Unqualified benefits)	n/a	n/a	n/a	RIA Section C2
COSTS:				
Monetized costs (2012 \$):				
Patient access provisions 2013	n/a	\$3,182,819	\$63,131,432	RIA Sec C1 (Table 7)
Patient access provisions 2014	n/a	\$932,243	\$55,934,563	RIA Sec C1 (Table 7)
Patient access provisions 2015	n/a	\$959,045	\$57,542,682	RIA Sec C1 (Table 7)
Patient access provisions 2016	n/a	\$986,617	\$59,197,034	RIA Sec C1 (Table 7)
Patient access provisions 2017	n/a	\$1,014,982	\$60,898,949	RIA Sec C1 (Table 7)
Annualized quantified, but unmonetized, benefits	n/a	n/a	n/a	
Qualitative (unquantified) costs	n/a	n/a	n/a	RIA Section C2
TRANSFERS:				
Annualized monetized transfers: "on budget"	n/a	n/a	n/a	
From whom to whom?	n/a	n/a	n/a	
Annualized monetized transfers: "off-budget"	n/a	n/a	n/a	
From whom to whom?	n/a	n/a	n/a	
<i>Category</i>	<i>Effects</i>			<i>Source Citation (RIA, preamble, etc.)</i>
Effects on State, local, and/or tribal governments	n/a	n/a	n/a	RIA Sec A (Table 4)
Effects on small businesses	n/a	n/a	n/a	RIA Section A
Effects on wages	n/a	n/a	n/a	
Effects on growth	n/a	n/a	n/a	

G. Conclusion

We estimated the cost to laboratories to provide patients with a copy of their test reports upon request and determined it would cost between \$3 million and \$63 million in 2013. These costs will diminish in subsequent years. In addition laboratory provision of test reports to patients may provide information that could benefit the patient by reducing the chance of the patient not being informed of a laboratory test result, reducing the number of patients lost to follow-up, and benefiting health care providers by reducing their workload in providing laboratory test reports. Finally, as we explain above, to avoid HIPAA-covered laboratories having to modify their notices twice within the same year to comply with both the January 25, 2013, final rule and this rule, we will exercise our enforcement discretion to allow CLIA laboratories (including CLIA-exempt laboratories) that are HIPAA covered entities to take until the compliance date of this final rule to revise their notices to reflect both sets of modifications. See <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/cli-labs.html>. Therefore, CLIA and CLIA-exempt laboratories that are HIPAA covered entities need only update their notices once to comply with both rules.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

VIII. Analysis of and Responses to Public Comments on the Paperwork Reduction and Regulatory Impact Analysis

We have provided an analysis of the potential impact of this final rule, based upon available information and certain assumptions. We have prepared the Paperwork Reduction Act and the Regulatory Impact Analysis representing the costs and benefits of the final rule based on analysis of identified variables and data sources needed for this change. We requested that commenters provide any additional data that would assist us in the analysis of the potential impact of this regulation on CLIA certified laboratories but we did not receive any additional data.

Therefore, based on our analysis and assessment of the overall annual costs to the laboratories affected by this final rule, we are finalizing the provisions as set forth in the proposed rule. The comments we received on this provision and our responses are set forth below.

Comment: We received several comments from organizations and individuals suggesting the implementation and operations cost estimate provided in the regulatory impact analysis (that is, for the laboratory to receive the request, authenticate the requestor is allowed to have access to the test report, process the request and provide the test report) was too low. Some suggested there were other factors that were not considered in the proposed rule's RIA, such as costs for training staff to provide the reports

in a compliant manner, verification that the information was received, and for providing an explanation or summary of results, which may require higher level staff than those at a clerical level. Some recommended we review the anticipated cost structure and contact several laboratories to request best estimates. One organization recommended that we permit laboratories to charge a standard fee between \$10 to \$15 per test report issued to cover overall administrative costs, which would be in addition to the actual cost of the supplies used to provide the test report to the patient or personal representative or, if applicable, a third party designated by the individual.

Response: Our cost estimate was based on assumptions from internal discussions and consultation with two laboratories that provide test reports directly to patients. Although the proposed rule solicited comments and additional data from laboratories that already provide test reports directly to the patient, we did not receive any data to support adjusting the estimates provided in the proposed rule; therefore, we are not adjusting those estimates in this final rule and acknowledge that they may not reflect costs for every laboratory setting. We appreciate the commenter's suggestion about staff training costs; however we believe that there is no need to include additional costs for training staff to provide the reports in a HIPAA Privacy Rule compliant manner since training

cost was part of our original estimate for developing and implementing a policy and process.

In addition, the HIPAA Privacy Rule permits covered entities to charge a reasonable cost-based fee to provide individuals with copies of their protected health information. The fee may include only the cost of copying (including supplies and labor) and postage, if the individual requests that the copy be mailed. If the individual (or individual's personal representative) has agreed to receive a summary or explanation of his or her protected health information, the covered entity may also charge a reasonable, cost-based fee for preparation of the summary or explanation. The fee may not include costs associated with searching for and retrieving the requested information, nor does the HIPAA Privacy Rule permit charging a standard fee; therefore, this final rule does not permit laboratories to charge these fees. The fees permitted to be charged to individuals under the HIPAA Privacy Rule are discussed more fully above in section VII.

Comment: We received a few comments that smaller, rural hospitals, particularly Critical Access Hospitals (CAHs), may face financial constraints that would make compliance with this requirement challenging.

Response: The impacts discussed in the preamble affect only those laboratories that currently do not provide patients with access to their health information. Since most hospitals are HIPAA covered entities, they are required already to provide individuals with access to the protected health information in their designated record sets, including laboratory test results, in accordance with § 164.524 of the HIPAA Privacy Rule. As discussed above, laboratories that operate as part of a legal entity that is a hospital or that are part of an affiliated covered entity or organized health care arrangement with the hospital (see the definition of "organized health care arrangement" in the HIPAA Rules at § 160.103, and the provisions for affiliated covered entities at § 164.105(b)), may continue to utilize the hospital's already established mechanisms for providing access to the individuals requesting their test reports from the hospital laboratories, provided that the established mechanisms are compliant with the access provisions of the HIPAA Privacy Rule.

Comment: Several commenters asked why we used test volume data that was self-reported rather than validated Part B claims or actual claims. Other commenters asked why we did not analyze the cost of providing access to completed test reports to Medicare fee-

for-service beneficiaries in states that already allow laboratories to provide a copy of test results to the patient.

Response: We used data from the CMS OSCAR database for our estimates. The OSCAR database is not limited to Medicare-reimbursed tests only, but also includes testing totals for laboratory tests reimbursed by private payers and those that are not reimbursed. Test volume is self-reported by laboratories and validated by CMS surveyors during laboratory inspections. This data is more accurate for estimating the impact of these changes. We requested comments from laboratories that are currently providing test reports to the patient. We did not receive any comments that would support adjusting the estimates provided in the proposed rule; therefore, we conclude that these estimates are sufficiently accurate and have retained those estimates in this final rule.

Comment: We received several comments disagreeing with the time estimate of 2 to 9 hours for laboratories to identify the applicable legal obligations and develop processes or procedures to handle the patient requests for access to test reports. One commenter stated that his institution had reported spending several hours in meetings between administration, laboratory management, and legal counsel examining procedural options and the risks of each procedure. Other commenters stated that it would not be possible for the information technology/data privacy teams to meet this requirement in the allotted timeframe for implementation. Several commenters suggested some laboratories may need to develop policies related to sensitive issues, such as minors and parent/guardian access or release of the results of drug testing that might have an impact on the laboratory's liability insurance costs. Other comments stated that the policy development would not be a one-time charge since laboratories would need to monitor all new state and federal regulations related to the disclosure of protected health information.

Response: Our cost estimate was based on assumptions from internal discussions and consultation with two laboratories that provide test reports directly to patients. Although the proposed rule solicited comments and additional data from laboratories that already provide test reports directly to the patient, we did not receive any data to support adjusting the estimates provided in the proposed rule. We acknowledge that these estimates may not reflect costs for every laboratory setting. However, in the absence of data

to support changing our estimate, we are not adjusting those estimates in this final rule. Laboratories may be able to learn from those in the 16 states that allow the laboratory to provide a copy of the test results to the patient and from larger reference laboratories that have already developed policies to accommodate requests received from patients that receive testing in these 16 states. The HHS Office for Civil Rights, which administers and enforces the HIPAA Privacy Rule, provides guidance on its Web site and through other sources on many compliance issues, including regarding disclosure of information on minors. See <http://www.hhs.gov/ocr/privacy/> for more information. This may be a new requirement for laboratories, but other HIPAA covered entities have, for quite some time, followed the requirements in § 164.524 of the HIPAA Privacy Rule when providing protected health information.

Comment: We received comments from organizations that supported the proposed change, but noted it would be impossible to know how many individuals would request their test reports. Other comments suggested the laboratory could receive a barrage of requests. One comment said our estimates of 0.05 percent to 0.5 percent of patients requesting their test report from the laboratory falls short of what is needed to meet the Department's goal of patient engagement to ensure the provider receives and acts on the test results. The commenters suggested that under the health care transformation that is taking place, the patient could be provided a digitally signed copy of the laboratory report in his or her electronic patient health record (EHR) at the same time and in the same format as the laboratory report provided electronically to the requesting health care provider's electronic health record. Patients would only need to give the requesting provider the repository identifier for their personally controlled health record for inclusion with the laboratory test order.

Response: We agree that it is difficult to know how many individuals will request their test report from covered entity laboratories. However, we received several comments indicating that the preferred method for a patient to receive laboratory test results is the same procedure as currently practiced; that is, the health care provider's office notifies the patient of the results on the same day the results are received from the laboratory. This procedure allows the patient to ask the health care provider's office for interpretation of the laboratory test report in concert with

results of other procedures, as well as provides an opportunity to discuss any needed treatment or follow-up. Allowing patients to request and receive laboratory test reports directly from the laboratory will provide an additional route for them to receive the test report. However, this will not replace the current procedure. If the ordering physician does not contact the patient with critical or significant laboratory test results, patients may prompt the physician's office to find and act on the test results. The rate of apparent failures to inform or document informing the patient of abnormal test results ranges from 0 percent to 26.2 percent [Casalino LP, Dunham D, Chin MH, et al. Frequency of Failure to Inform Patients of Clinically Significant Outpatient Test Results. *Arch Intern Med.* 2009; 169(12):1123–1129]. When patients have their laboratory test results, they are more likely to ask appropriate questions of their health care provider and more fully participate in making better decisions that lead to better care. The regulations promulgated pursuant to the HITECH Act, particularly for Meaningful Use and Certification of EHRs, encourage patient access to comprehensive patient data through robust patient-centered health information exchange. Technology is currently being tested to allow patients the ability to retrieve personal health data directly from secured health records. We agree with the comment about electronic health records in that a request for access for protected health information to either the health care provider or the laboratory may be replaced with this technology as it becomes more readily available.

List of Subjects

42 CFR Part 493

Administrative practice and procedure, Grant programs—health, Health facilities, Laboratories, Medicaid, Medicare, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 164

Administrative practice and procedure, Computer technology, Electronic information system, Electronic transactions, Employer benefit plan, Health, Health care, Health facilities, Health insurance, Health records, Hospitals, Medicaid, Medical research, Medicare, Privacy, Reporting and recordkeeping requirements, Security.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR part 493 as set forth below:

PART 493—LABORATORY REQUIREMENTS

- 1. The authority citation for part 493 continues to read as follows:

Authority: Section 353 of the Public Health Service Act, secs. 1102, 1861(e), the sentence following sections 1861(s)(11) through 1861(16) of the Social Security Act (42 U.S.C. 263a, 1302, 1395x(e), the sentence following 1395x(s)(11) through 1395x(s)(16)).

Subpart K—Quality System for Nonwaived Testing

- 2. Section 493.1291 is amended by—

- A. Revising paragraph (f).

- B. Adding a new paragraph (l).

The revision and addition read as follows:

§ 493.1291 Standard: Test report.

* * * * *

(f) Except as provided in § 493.1291(l), test results must be released only to authorized persons and, if applicable, the persons responsible for using the test results and the laboratory that initially requested the test.

* * * * *

(l) Upon request by a patient (or the patient's personal representative), the laboratory may provide patients, their personal representatives, and those persons specified under 45 CFR 164.524(c)(3)(ii), as applicable, with access to completed test reports that, using the laboratory's authentication process, can be identified as belonging to that patient.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR Subtitle A, Subchapter C, part 164, as set forth below:

PART 164—SECURITY AND PRIVACY

- 1. The authority citation for part 164 continues to read as follows:

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 1320d–1320d–9; sec. 264, Pub. L. 104–191, 110 Stat. 2033–2034 (42 U.S.C. 1320d–2(note)); and secs. 13400–13424, Pub. L. 111–5, 123 Stat. 258–279.

- 2. Section 164.524 is amended by revising paragraphs (a)(1)(i) and (ii) and removing paragraph (a)(1)(iii) to read as follows:

§ 164.524 Access of individuals to protected health information.

(a) * * *

(1) * * *

(i) Psychotherapy notes; and

(ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding.

* * * * *

Dated: August 16, 2013.

Thomas R. Frieden,

Director, Centers for Disease Control and Prevention, Administrator, Agency for Toxic Substances and Disease Registry.

Dated: August 19, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Dated: August 19, 2013.

Leon Rodriguez,

Director, Office for Civil Rights.

Dated: August 27, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

Editorial Note: This document was received at the Office of the Federal Register on January 30, 2014.

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Part III

National Labor Relations Board

29 CFR Parts 101, 102, 103

Representation-Case Procedures; Proposed Rule

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101, 102, 103

RIN 3142-AA08

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board believes that the proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. The proposed amendments would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of regional directors' pre- and post-election determinations into a single, post-election request. The proposed amendments would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election.

DATES: Comments regarding this proposed rule must be received by the Board on or before April 7, 2014. Comments replying to comments submitted during the initial comment period must be received by the Board on or before April 14, 2014. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

The Board intends to issue a notice of public hearing to be held in Washington, DC, during the reply comment period, at which interested persons would be invited to share their views on the proposed amendments and to make any other proposals concerning the Board's representation case procedures.

ADDRESSES: The Board has established a docket for this action under Docket ID No. NLRB-2011-0002. All documents in the docket are listed on the <http://www.regulations.gov> Web site. You may submit comments identified by Docket

ID No. NLRB-2011-0002 only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>. To locate the proposed rule, search using the Docket ID No. NLRB-2011-0002. Follow the instructions for submitting comments.

Delivery—Comments should be sent by mail or hand delivery to: Gary Shinnners, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with www.regulations.gov. If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-3737 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD).

Only comments submitted through <http://www.regulations.gov>, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at <http://www.regulations.gov> and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on <http://www.regulations.gov> without making any changes to the comments, including any personal information provided. The Web site <http://www.regulations.gov> is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the <http://www.regulations.gov> Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Gary Shinnners, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273-3737 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Introduction

The National Labor Relations Board (Board or NLRB) is proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board is proposing a number of changes to remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation, to increase transparency and uniformity across regions, to provide parties with clearer guidance concerning representation case procedure, to eliminate unnecessary litigation, and to modernize the Board's representation procedures.

The present proposal is, in essence, a reissuance of the proposed rule of June 22, 2011. 76 FR 36812. The Board is again proposing the same changes which were proposed in 2011, and asking for any comments the public may have on whether or how the Board should act on these proposals.

In 2011, the Board accepted public comments on these proposals for 60 days, and reply comments for an additional 14 days. The Board received 65,958 written comments, tens of thousands supporting the proposals and tens of thousands opposing them. The Board Members also conducted two full days of hearing, during which 66 individuals representing diverse organizations and groups gave oral statements and answered questions asked by the Board members, resulting in 438 transcript pages of oral testimony. As described below, the Board also issued a final rule on December 22, 2011, which was set aside by the district court on procedural grounds relating to the voting process used by the Board for that rule. 76 FR 80138.

The Board is incorporating by reference into this docket the complete administrative record in the 2011 proceeding. This includes all testimony and comments, as well as the final rule, and separate statements by Board Members in the **Federal Register**. All of these documents are publically available on the <http://www.regulations.gov> Web site at docket ID No. NLRB-2011-0002. This extensive record contains numerous arguments both for and against the

proposals. All of this material will be fully considered by the Board in deciding whether to issue any final rule.

Because the 65,958 written comments and 438 transcript pages of oral testimony are part of this NPRM's docket and will be fully considered by the Board in deciding whether to issue a final rule, it is not necessary for any person or organization to resubmit any comment or repeat any argument that has already been made. However, the Board invites the submission of new information and argument, not previously submitted, during the comment period.

As indicated above, the proposals here were first contemplated by the Board in a notice of proposed rulemaking on June 22, 2011. 76 FR 36812. Following a period of public comment, on December 22, 2011, the Board issued a final rule, which adopted a limited number of the proposed amendments and deferred others for further consideration. 76 FR 80138–89.

The final rule was immediately challenged in federal district court. See *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 21, 24 (D.D.C. 2012). The court struck down the rule on only one ground: That the Board lacked a quorum when it issued the final rule because Member Hayes was “absent” from the vote—rather than “abstaining” from the vote, as the Board asserted. *Id.* at 28–30. Nonetheless, the court expressly stated:

In [setting aside the rule], however, the Court emphasizes that its ruling need not necessarily spell the end of the final rule for all time. The Court does not reach—and expresses no opinion on—Plaintiffs' other procedural and substantive challenges to the rule, but it may well be that, had a quorum participated in its promulgation, the final rule would have been found perfectly lawful. As a result, nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so. In the meantime, though, representation elections will have to continue under the old procedures.

Id. at 30.

Thus, though the rule was struck down, the court invited the Board to reapply itself to the proposals contemplated in 2011. By the present proposal, the Board is undertaking to do just that, and inviting the public to comment.

The discussion below is reprinted almost verbatim from the June 2011 notice of proposed rulemaking, but the statistics have been updated, and a dissent by Members Miscimarra and Johnson and a response by the Board majority has been substituted for former Member Hayes' dissent and the Board

majority's response from the June 22, 2011 NPRM. A more specific request for comments on employee privacy issues has been added in connection with the voter list proposals.

II. Background

Section 7 of the National Labor Relations Act (the Act or the NLRA), 29 U.S.C. 157, vests in employees the right “to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activity.” The Act vests in the National Labor Relations Board (the Board) a central role in the effectuation of that right when employers, employees, and labor organizations are unable to agree on whether the employer should recognize a labor organization as the representative of the employees. Section 9 of the Act, 29 U.S.C. 159, gives the Board authority to determine if such a “question of representation” exists and, if so, to resolve the question by conducting “an election by secret ballot.”

Congress left the procedures for determining if a question of representation exists and for conducting secret ballot elections almost entirely within the discretion of the Board. The Supreme Court has repeatedly recognized that “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). “The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *NLRB v. Waterman S.S. Co.*, 309 U.S. 206, 226 (1940); see also *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 37 (1942).

Since 1935, the Board has exercised its discretion to establish standard procedures in representation cases largely through promulgation and revision of rules and regulations or internal policies.¹ Thus, 29 CFR part

¹ The Board's failure to rely on rulemaking in other areas has met widespread scholarly criticism. See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB*, 5 FIU L. Rev. 347, 351–52 (2010); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 414–17, 435 (Spring 2010); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. Rev. 63 (1973); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 San Diego L.

102, subpart C sets forth the Board's Rules and Regulations governing “Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act.” Subparts D and E set forth related rules and regulations governing “Procedures for Unfair Labor Practice and Representation Cases Under Section 8(b)(7) and 9(c) of the Act” and “Procedure for Referendum Under Section 9(e) of the Act.” 29 CFR part 101, subparts C, D and E set forth the Board's Statements of Procedures in the same three types of cases. The Board's Casehandling Manual at Sections 11000 through 11886 describes procedures in representation cases in greater detail, including the mechanics of elections.²

Congress intended that the Board adopt procedures that permit questions concerning representation to be resolved both quickly and fairly. As the Supreme Court has noted, “[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 330–31. The Board has repeatedly recognized “the Act's policy of expeditiously resolving questions concerning representation.”³ “In . . . representation proceedings under Section 9,” the Board has observed, “time is of the essence if Board processes are to be effective.”⁴ Indeed, the Board's Casehandling Manual stresses that “[t]he expeditious processing of petitions filed pursuant to the Act represents one of the most significant aspects of the Agency's operations.”⁵

Expedient resolution of questions concerning representation is central to

Rev. 9 (1987); Cornelius Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board*, 70 Yale L.J. 729 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. Pa. L. Rev. 254 (1968); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction*, 25 Lab. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units*, 32 Lab. L.J. 105 (1981).

² The Casehandling Manual is prepared by the Board's General Counsel and is not binding on the Board. *Hempstead Lincoln*, 349 NLRB 552, 552 n.4 (2007); *Pacific Grain Products*, 309 NLRB 690, 691 n.5 (1992).

³ See, e.g., *Northeastern University*, 261 NLRB 1001, 1002 (1982).

⁴ *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1958).

⁵ Pt. 2, Representation Proceedings, Section 11000.

the statutory design because Congress found that “refusal by some employers to accept the procedure of collective bargaining lead[s] to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening and obstructing commerce.”⁶ Thus, Congress found that the Board’s expeditious processing of representation petitions and, when appropriate, conduct of elections would “safeguard[] commerce from injury, impairment or interruption.”⁷

One of the primary purposes of the original Wagner Act was to avoid “the long delays in the procedure . . . resulting from applications to the federal appellate courts for review of orders for elections.” *AFL v. NLRB*, 308 U.S. 401, 409 (1940). The Senate Committee Report explained that one of the “weaknesses in existing law” was “that the Government can be delayed indefinitely before it takes the first step toward industrial peace” by conducting an election.⁸ For this reason, Congress did not provide for direct judicial review of either interlocutory orders or final certifications or dismissals in representation proceedings conducted under section 9 of the Act. Rather, in order to insure that elections were conducted promptly, judicial review was permitted only after issuance of an order under section 10 relying, in part, on the Board’s certification under section 9.

A. Evolution of Board Regulation of Representation Case Procedures

1. Legislative and Administrative Delegation of Authority To Process Petitions in Order To Expedite Resolution of Questions Concerning Representation

The Board initially exercised its discretion over the conduct of representation elections through a procedure under which, in the event the parties could not agree concerning the conduct of an election, an employee of one of the Board’s regional offices would develop a record at a pre-election hearing.⁹ At the close of the hearing, the record was forwarded to the Board in Washington, DC, which either directed an election or made some other disposition of the matter.¹⁰ However, requiring the Board itself to address all of the myriad disputes arising out of the thousands of representation petitions

filed annually resulted in significant delays.

Accordingly, in 1959, as part of the amendments of the NLRA effected by the Labor-Management Reporting and Disclosure Act, Congress revised Section 3(b) of the Act to authorize the Board to delegate its election-related duties to the directors of the Board’s regional offices, subject to discretionary Board review.¹¹ Section 3(b) provides:

The Board is . . . authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

As Senator Goldwater, a member of the Conference Committee which added the new section to the amendments, explained, “[Section 3(b)] is a new provision, not in either the House or Senate bills, designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination. . . . This authority to delegate to the regional directors is designed, as indicated, to speed the work of the Board.”¹²

Soon after the authorizing amendment was adopted in 1959, the Board made the permitted delegation to its regional directors by amending its rules and regulations.¹³ Since the delegation, the Board’s regional directors have resolved pre-election disputes and directed elections, subject to a procedure through which aggrieved parties can seek Board review of regional directors’ pre-election decisions.¹⁴ The Board’s amended rules made such review discretionary, only to be granted in compelling circumstances, and that process was subsequently upheld by the Supreme Court.¹⁵

As intended by Congress, the implementation of the new procedure led to a significant decrease in the time it took to conduct representation elections. Immediately following the Board’s amendment of its rules in 1961,

the median number of days necessary to process election petitions to a decision and direction of election was roughly cut in half.¹⁶ By 1975, the Board was conducting elections in a median of 50 days from the filing of an election petition.¹⁷

The Board’s next major improvement in the efficiency of its election procedures came in 1977. After a decade and a half of experience with the request for review procedure, the Board again amended its rules to reduce delay in elections after the Board granted review of a regional director’s decision and direction of election or a preliminary ruling.¹⁸ Specifically, the Board established a procedure whereby the regional directors would proceed to conduct elections as directed, notwithstanding the Board’s decision to grant review, unless the Board ordered otherwise. Under this procedure, the regional director impounds the ballots at the conclusion of the election, and delays tallying them until the Board issues its decision. Although this change did not have a significant effect on the overall median number of days from petition to election, it substantially decreased the time it took to conduct elections in the small number of cases in which the Board granted review.¹⁹ These procedures remain in place today.

The Board continued to focus on processing representation petitions expeditiously in the years following implementation of the vote and impound procedure. As a result, more than 90 percent of elections were conducted within 56 days of the filing of a petition during the last decade, with a median time of 37–39 days between petition and election.²⁰

¹⁶ See NLRB Office of the General Counsel, *Summaries of Operations (Fiscal Years 1961–1962)* (reporting that the “median average” number of days from petition to a decision and direction of election was reduced from 82 days in 1960 to 43 days in 1962).

¹⁷ See U.S. DEP’T OF LABOR & U.S. DEP’T OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *FACT-FINDING REPORT*, 68, 82 (1994) (“Dunlop Commission Fact Finding”).

¹⁸ See 42 FR 41117 (Aug. 15, 1977); Chairman’s Task Force on the NLRB for 1976, Volume 1, Board Action on Recommendations of the Chairman’s Task Force Memorandum to the Task Force, 3 (May 25, 1977); Chairman’s Task Force, Volume 7, Task Force Report Memorandum to the Board, 10–15 (January 28, 1977).

¹⁹ See Dunlop Commission Fact Finding, 82. Comparing the change in figures from 1975 to 1985 demonstrates that the percentage of total elections conducted more than 60 days from the filing of a petition decreased from 20.1 percent to 16.5 percent, and the percentage of total elections conducted more than 90 days from the filing of a petition decreased from 11 percent to 4.1 percent.

²⁰ See NLRB Office of the General Counsel, *Summary of Operations (Fiscal Years 2004–2012); Percentage of Elections Conducted in 56 Days in FY*

⁶ 29 U.S.C. 151.

⁷ *Id.*

⁸ S. Rep. No. 573, 74th Cong., 1st Sess. pp. 5–6. See also H. Rep. No. 1147, 74th Cong., 1st Sess. p. 6.

⁹ 29 CFR 102.63 and 102.64 (1959).

¹⁰ 29 CFR 102.67 and 102.68 (1959).

¹¹ Public Law 86–257 (codified as amended in 29 U.S.C. 153(b)).

¹² 105 Cong. Rec. 19770.

¹³ 26 FR 3885 (May 4, 1961).

¹⁴ 29 CFR 102.67 (1961).

¹⁵ *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971).

Notably, however, the nature of the Board's review of regional directors' decisions varies, depending on whether the decision was issued before or after the election.²¹ As described above, the Board has exercised its authority to delegate to its regional directors the task of processing petitions through the conduct of an election subject only to discretionary Board review. In contrast, the current rules provide that any party, unless it has waived the right in a pre-election agreement, may in most cases obtain Board review of a regional director's resolution of any post-election dispute, whether concerning challenges to the eligibility of a voter or objections to the conduct of the election or conduct affecting the results of an election. The right to review of regional directors' post-election decisions has caused extended delay of final certification of election results in many instances.²²

2. Limiting the Pre-Election Hearing to Issues Genuinely in Dispute and Material to Determining if a Question Concerning Representation Exists

a. Identification and Joinder of Issues

Other than the petition, the parties to a representation proceeding under section 9 of the Act are not required to file any other form of pleading. The current regulations do not provide for any form of responsive pleading, in the nature of an answer, through which non-petitioning parties are required to give notice of the issues they intend to raise at a hearing. As a consequence, the petitioner is not required to join any such issues.

The Board has, nevertheless, developed administrative practices in an effort to identify and narrow the issues in dispute before or at a pre-election hearing. The regional director's initial letter to an employer following the filing of a petition asks the employer to state its position "as to the appropriateness of the unit described in the petition."²³ In some cases, regions will conduct pre-hearing conferences either face-to-face or by telephone in an effort to identify and narrow the issues in dispute. Further, section 11217 of the Casehandling Manual provides, "Prior

to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues to be heard." However, none of these practices is mandatory, and they are not uniformly followed in the regions.

In *Bennett Industries, Inc.*, 313 NLRB 1363, 1363 (1994), the Board observed, "in order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute." In *Bennett*, the Board sustained a hearing officer's ruling preventing an employer from introducing evidence relevant to the supervisory status of two classes of employees and included employees in the two classes in the unit without further factual inquiry when the employer refused to take a position concerning whether the employees were supervisors. The Board reasoned:

The Board's duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues. However, the Board also has an affirmative duty to protect the integrity of the Board's processes against unwarranted burdening of the record and unnecessary delay. Thus, while the hearing is to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case (NLRB Statement of Procedure Sec. 101.20(c)), hearings are intended to afford parties "full opportunity to present their respective *positions* and to produce the significant facts in support of their contentions." (emphasis added).

Id.

In *Allen Health Care Services*, 332 NLRB 1308 (2000), however, the Board held that even when an employer refuses to take a position on the appropriateness of a petitioned-for unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. The Board held that, "absent a stipulated agreement, presumption, or rule, the Board must be able to find—based on some record evidence—that the proposed unit is an appropriate one for bargaining before directing an election in that unit." *Id.* at 1309. The Board did not make clear in *Allen* whether a party that refuses to take a position on the appropriateness of a petitioned-for unit must nevertheless be permitted to introduce evidence relevant to the issue. The Casehandling Manual provides that parties should be given the following, unequivocal notice in such circumstances: "If a party refuses to state its position on an issue and no controversy exists, the party should be advised that it may be

foreclosed from presenting evidence on that issue." Section 11217.

b. Identification of Genuine Disputes as to Material Facts

The current regulations also do not expressly provide for any form of summary judgment or offer-of-proof procedures through which the hearing officer can determine if there are genuine disputes as to any material facts, the resolution of which requires the introduction of evidence at a pre-election hearing.

The Board has developed such a procedure in reviewing post-election objections to the conduct of an election or conduct affecting the results of an election. The current regulations provide that any party filing such objections shall also file, within seven days, "the evidence available to it to support the objections." 29 CFR 102.69(a). Casehandling Manual section 1132.6 further specifies, "In addition to identifying the nature of the misconduct on which the objections are based, this submission should include a list of the witnesses and a brief description of the testimony of each." If an objecting party fails to file such an offer of proof or if the offer fails to describe evidence which, if introduced at a hearing, could require the election results to be overturned, the regional director dismisses the objection without a hearing. In the post-election context, the courts of appeals have uniformly endorsed the Board's refusal to hold a hearing when no party has created a genuine dispute as to any material fact. See, e.g., *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir. 1967), *cert. denied*, 389 U.S. 917 (1967); *NLRB v. Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 249 (5th Cir. 1964).

The Board has also endorsed an offer-of-proof procedure in pre-election hearings when the petitioned-for unit is presumptively appropriate. See, e.g., *Laurel Associates, Inc.*, 325 NLRB 603 (1998); *Mariah, Inc.*, 322 NLRB 586, 587 (1996). In such circumstances, the Board has sustained a hearing officer's refusal to hear evidence after an employer has either refused to make an offer of proof or offered proof not sufficient to create a genuine dispute as to facts material to the question of whether the presumption of appropriateness can be rebutted.

Because the current regulations do not describe a procedure for identifying genuine disputes as to material facts, there has been continuing uncertainty concerning the circumstances under which an evidentiary hearing is necessary. In *Angelica Healthcare Services Group, Inc.*, 315 NLRB 1320

13 and Median Days from Petition to Election, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections>.

²¹ This is the case even when the issue addressed by the regional director is precisely the same one as, for example, when an eligibility issue is raised, litigated and decided pre-election and when the same issue is raised through a challenge and litigated and decided post-election.

²² See, e.g., *Manhattan Crowne Plaza*, 341 NLRB 619 (2004) (exceptions concerning alleged threat contained in single, written memorandum pending before the Board for almost three years).

²³ Casehandling Manual section 11009.1(e).

(1995), for example, the Board reversed the decision of an acting regional director to direct an election without a hearing when an incumbent union contended there was no question concerning representation because its collective-bargaining agreement with the employer barred an election. The Board stated, “We find that the language of Section 9(c)(1) of the Act and Section 102.63(a) of the Board’s Rules required the Acting Regional Director to provide ‘an appropriate hearing’ prior to finding that a question concerning representation existed and directing an election.” *Id.* at 1321. But the Board noted expressly, “[W]e find it unnecessary to decide in this case the type of hearing that would be necessary to satisfy the Act’s ‘appropriate hearing’ requirement.” *Id.* at 1321 n. 6.

c. Deferral of Litigation and Resolution of Issues Not Relevant to the Determination of Whether a Question Concerning Representation Exists

Section 9(c) of the Act provides that, after the filing of a petition,

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, it shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

The statutory purpose of a pre-election hearing is thus to determine if a question concerning representation exists. If such a question exists, the Board conducts an election in order to answer the question.

Whether individual employees are eligible to vote may or may not affect the outcome of an election, but it is not ordinarily relevant to the preliminary issue of whether a question concerning representation exists that an election is needed to answer. For that reason, the Board has consistently sustained regional directors’ decisions to defer resolving questions of individual employees’ eligibility to vote until after an election (in which the disputed employees may cast challenged ballots). In *Northeast Iowa Telephone Co.*, 341 NLRB 670, 671 (2004), the Board characterized this procedure as the “tried-and-true ‘vote under challenge procedure.’” See also *HeartShare Human Services of New York, Inc.*, 320 NLRB 1 (1995). The Eighth Circuit has stated that “deferring the question of voter eligibility until after an election is an accepted NLRB practice.” *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994). Even when a regional director resolves such a dispute pre-

election, the Board, when a request for review is filed, often defers review of the resolution, permitting the disputed individuals to vote subject to challenge. See, e.g., *Medlar Elec., Inc.*, 337 NLRB 796, 796 (2002); *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682, 682–83 (2001); *American Standard, Inc.*, 237 NLRB 45, 45 (1978).

In *Barre-National, Inc.*, 316 NLRB 877 (1995), however, the Board considered whether a regional director had acted properly when he deferred *both* litigation and a decision concerning the eligibility of 24 line and group leaders (constituting eight to nine percent of the unit) until after an election, over the objection of the employer contending that the leaders were supervisors. Quoting both section 102.66(a) and 101.20(c) of the existing regulations, the Board held that the two sections “entitle parties at [pre-election] hearings to present witnesses and documentary evidence in support of their positions.” *Id.* at 878. For that reason, the Board held that the regional director had erred by deferring the taking of the employer’s testimony until after the election. But the Board did not hold in *Barre-National* that the disputed issue had to be resolved before the regional director directed an election. In fact, the Board expressly noted, “[O]ur ruling concerns only the entitlement to a preelection hearing, which is distinct from any claim of entitlement to a final Agency decision on any issue raised in such a hearing.” *Id.* at 879 n. 9. The Board further noted that “reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election.” *Id.*

3. Provision of a List of Eligible Voters

In elections conducted under Section 9 of the Act, there is no list of employees or potentially eligible voters generally available to interested parties other than the employer and, typically, an incumbent representative. The Board addressed this issue in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239–40 (1966), where it held:

[W]ithin 7 days after the Regional Director has approved a consent-election agreement . . . or after the Regional Director or the Board has directed an election . . . , the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Although several Justices of the Supreme Court expressed the view that the requirement to produce what has become known as an “*Excelsior* list” should have been imposed through rulemaking rather than adjudication, the Court upheld the substantive requirement in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 768 (1969).

In *Excelsior*, the Board explained the primary rationale for requiring production of an eligibility list:

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters.

156 NLRB at 1240–41 (footnote omitted). The Supreme Court endorsed this rationale in *Wyman-Gordon*, 394 U.S. at 767, “The disclosure requirement furthers this objective [to ensure the fair and free choice of bargaining representatives] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses.”

The Board also articulated a second reason for requiring production of an eligibility list in *Excelsior*:

The [voter] list, when made available, not infrequently contains the names of employees unknown to the union and even to its employee supporters. The reasons for this are, in large part, the same as those that make it difficult for a union to obtain, other than from the employer, the names of all employees; i.e., large plants with many employees unknown to their fellows, employees on layoff status, sick leave, military leave, etc. With little time (and no home addresses) with which to satisfy itself as to the eligibility of the “unknowns,” the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring

investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, bona fide disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations. Thus the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.

156 NLRB at 1242–43.

Since *Excelsior* was decided, almost 50 years ago, the Board has not significantly altered its requirements despite significant changes in communications technology, including that used in representation election campaigns, and identification of avoidable problems in administering the requirement, for example, delays in the regional offices' transmission of the eligibility list to the parties.

B. Evolution of the Board's Electronic Filing and Service Requirements

The Board's effort to promote expeditious case processing under the NLRA by utilizing advances in communications technology is nearly a decade old. The Board first began a pilot project in 2003, permitting the electronic filing of documents with the Agency.²⁴ Thereafter, the use and scope of electronic filing by parties to NLRB proceedings expanded significantly. By January 2009, more than 12,000 documents had been filed electronically with the Board and its regional offices.²⁵ The number of electronic filings has steadily increased in recent years, reaching a high of 38,147 in Fiscal Year 2013. The Board currently permits most documents in both unfair labor practice and representation proceedings to be filed electronically with only a limited number of expressly specified exceptions.²⁶ The NLRB public Web site sets out instructions for the Agency's E-filing procedures in order to facilitate their use, and the instructions "strongly encourage parties or other persons to use the Agency's E-filing program."²⁷ However, included among documents

that may not currently be filed electronically are representation petitions.²⁸

In 2008, the Board initiated another pilot project to test the ability of the Agency to electronically issue its decisions and those of its administrative law judges.²⁹ Parties who register for electronic service of decisions in their cases receive an email constituting formal notice of the decision and an electronic link to the decision. The NLRB public Web site sets out instructions for signing up for the Agency's electronic issuance program.³⁰

In 2009, the Board revised its regulations to require that service of e-filed documents on other parties to a proceeding be effectuated by email whenever possible, which aligned Board service procedures more closely with those in the federal courts, and acknowledged the widely accepted use of email for legal and official communications.³¹

In 2010, the Board took further notice of the spread of electronic communications in its decision in *J. Piccini Flooring*, 356 NLRB No. 9 (2010), to require that respondents in unfair labor practice cases distribute remedial notices electronically when that is their customary means of communicating with employees. The Board recognized that the use of email, internal and external Web sites, and other electronic communication tools, is now the norm for the transaction of business in many workplaces, among unions, and by the government and the public it serves. The Board concluded that its "responsibility to adapt the Act to changing patterns of industrial life"³² required it to align its remedial requirements with "the revolution in communications technology that has reshaped our economy and society." *J. Piccini Flooring*, slip op. at 4.

C. Purposes of the Proposed Amendments

The Board now proposes to revise its rules and regulations to better insure "that employees' votes may be recorded accurately, efficiently and speedily" and to further "the Act's policy of expeditiously resolving questions concerning representation."³³

²⁸ See <http://www.nlr.gov>, under What Documents Can I E-file?

²⁹ See 74 FR at 5619.

³⁰ See <http://www.nlr.gov>, under What is E-Service?

³¹ See 74 FR 8214 (Feb. 24, 2009), correcting 74 FR 5618; NLRB Rules & Regulations § 102.114(a) and (i).

³² *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975).

³³ *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946); *Northeastern University*, 261 NLRB 1001, 1002 (1982).

The proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. In addition to making the Board processes more efficient, the proposed amendments are intended to simplify the procedures, to increase transparency and uniformity across regions, and to provide parties with clearer guidance concerning the representation case procedure.

The proposed amendments would provide for more timely and complete disclosure of information needed by both the Board and the parties to promptly resolve matters in dispute. The proposed amendments are also intended to eliminate unnecessary litigation concerning issues that may be, and often are, rendered moot by election results. In addition, the proposed amendments would consolidate Board review of regional directors' determinations in representation cases in a single, post-election proceeding and would make review discretionary after an election as it currently is before an election. The Board anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service. Finally, the proposed amendments are intended to modernize the Board's representation procedures, in particular, through use of electronic communications technology to speed communication among the parties, and between the parties and the Board, and to facilitate communication with voters.

Given the variation in the number and complexity of issues that may arise in a representation proceeding, the amendments do not establish inflexible time deadlines or mandate that elections be conducted a set number of days after the filing of a petition. Rather, the amendments seek to avoid unnecessary litigation and establish standard and fully transparent practices while leaving discretion with the regional directors to depart from those practices under special circumstances.

Consistent with Executive Order 13563, Improving Regulation and Regulatory Review, section 6(a) (January 18, 2011), the proposed amendments would eliminate redundant and outmoded regulations.³⁴ The proposed

³⁴ While the Executive Order is not binding on the Board as an independent agency, the Board has, as requested by the Office of Management and Budget, given "consideration to all of its provisions." Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, and of Independent

²⁴ See 74 FR 5618, 5619 (Jan. 30, 2009), revising § 102.114 of the Board's Rules and Regulations, corrected 74 FR 8214 (Feb. 24, 2009).

²⁵ *Id.*, 74 FR at 5619.

²⁶ See NLRB Rules and Regulations Section 102.114(i); <http://www.nlr.gov>, under Cases & Decisions/File Case Documents/E-file.

²⁷ See <http://www.nlr.gov>, under E-filing Rules.

amendments would eliminate one entire section of the Board's current regulations and consolidate the regulations setting forth procedures under section 9 of the Act, currently spread across three separate parts of the regulations, into a single part. The Board anticipates that, if the proposed amendments are adopted, the cost of invoking and participating in the Board's representation case procedures would be reduced for parties, and public expenditure in administering section 9 of the Act would be similarly reduced.

While the proposed amendments are designed to eliminate unnecessary barriers to the speedy processing of representation cases, the proposed amendments, like previous congressional and administrative reforms aimed at expediting the conduct of elections, do not in any manner alter existing regulation of parties' campaign conduct or restrict any party's freedom of speech.

The Board invites comments on each of the proposed rule changes described below.³⁵

D. Summary of Current Representation Case Procedures

Every year, thousands of election petitions are filed in NLRB regional offices by employees, unions, and employers to determine if employees wish to be represented by a labor organization for purposes of collective bargaining with their employer.³⁶ A

Regulatory Agencies: Executive Order 13563, "Improving Regulation and Regulatory Review" 11-12 (Feb. 2, 2011), www.whitehouse.gov/omb/memoranda. In regard to section 2(c) of the Order, concerning seeking the views of those who are likely to be affected prior to publication of a notice of proposed rulemaking, the Board determined that public participation would be more orderly and meaningful if it was based on the specific proposals described herein and thus the Board has provided for the comment and reply periods and public hearing described above. As noted, the Board has also incorporated into the docket for this NPRM all comments and oral testimony submitted in response to the June 22, 2011 NPRM.

³⁵ The Board has provided for an initial 60-day comment period followed by a 7-day reply comment period. In addition, the Board intends to issue a notice of public hearing to be held in Washington, DC, during the reply comment period in order to receive oral comments on the proposed amendments. As noted, the Board will also consider all comments and oral testimony submitted in response to the June 22, 2011 NPRM, in deciding whether to issue a final rule, and the comments and oral testimony have been incorporated into this docket. The Board believes that all persons interested in the proposed amendments—including those best able to provide informed comment on the details of the Board's representation case procedures, the attorneys and other practitioners who regularly participate in representation proceedings—will have ample time and opportunities to do so within the comment periods.

³⁶ In 2013, 2,035 such petitions were filed. See Representation Petitions—RC and Employer-Filed

lesser number are filed by employees to determine whether the Board should decertify an existing representative.³⁷ Under current procedures, the petitioner is not required to serve the petition on other interested parties. For example, a labor organization is not required to serve a petition through which it seeks to be certified as the representative of a unit of employees on the employees' employer. Rather, that task is imposed on the regional office. In addition, the petitioner is not required, at the time of filing, to supply evidence of the type customarily required by the Board to process the petition. For example, a labor organization is not required to file, along with its petition, evidence that a substantial number of employees support the petition (the "showing of interest"). Rather, the petitioner is permitted to file such evidence within 48 hours of the filing of the petition.

After a petition is filed, the regional director serves the petition on the parties and also submits additional requests to the employer. The regional director serves on the employer a generic notice of employees' rights,³⁸ with a request that the employer post the notice, and a commerce questionnaire, seeking information relevant to the Board's jurisdiction to process the petition,³⁹ which the employer is requested to complete. The regional director also asks the employer to provide a list of the names of employees in the unit described in the petition, together with their job classifications, for the payroll period immediately preceding the filing of the petition. Finally, the regional director solicits the employer's position on the appropriateness of the unit described in the petition.

After the filing of a petition, Board agents conduct an ex parte, administrative investigation to determine if the petition is supported by the required form of showing. In the case of a petition seeking representation or seeking to decertify an existing representative, for example, this showing would be that 30 percent of employees in the unit support the petition.

Shortly after a petition is filed, the regional director serves a notice on the parties named in the petition setting a pre-election hearing. In many cases, the parties, often with Board agent assistance, are able to reach agreement

regarding the composition of the unit and the date, time, place, and other mechanics of the election, thereby eliminating the need for a hearing and a formal decision and direction of election by the regional director.⁴⁰ Parties may enter into three types of pre-election agreements: a "consent-election agreement followed by a regional director's determination of representatives," providing for final resolution of post-election disputes by the regional director; a "stipulated election-agreement followed by a Board determination," providing for resolution of post-election disputes by the Board; and a "full consent-election agreement," providing for final resolution of both pre- and post-election disputes by the regional director.⁴¹ In cases in which parties are unable to reach agreement, a Board agent conducts a hearing at which the parties may introduce evidence on issues including: (1) Whether the Board has jurisdiction to conduct an election; (2) whether there are any bars to an election in the form of existing contracts or prior elections; (3) whether the election is sought in an appropriate unit of employees; and (4) the eligibility of particular employees in the unit to vote. Parties can file briefs with the regional director within one week after the close of the hearing.

After the hearing's close, the regional director will issue a decision either dismissing the petition or directing an election in an appropriate unit. The regional director may defer the resolution of whether certain employees are eligible to vote until after the election, and those employees will be permitted to vote under challenge.

Parties have a right to request Board review of a regional director's decision and direction of election within 14 days after it issues. Neither the filing nor grant of a request for review operates as a stay of the direction of election unless the Board orders otherwise. If the Board does not rule on the request before the election, the ballots are impounded pending a Board ruling. Consistent with the Board's current Statements of Procedures, the regional director "will normally not schedule an election until a date between the 25th and 30th day after the date of the decisions, to permit

Petitions—RM, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections>.

³⁷ In 2013, 472 such petitions were filed. See Decertification Petitions—RD, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections>.

³⁸ Form NLRB-5492, Notice to Employees.

³⁹ Form NLRB-5081.

⁴⁰ In the last decade, between 89 and 92 percent of representation elections have been conducted pursuant to either a consent agreement or stipulation. NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2004–2012); Percentage of Elections Conducted Pursuant to Election Agreements in FY 13, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections>.

⁴¹ See 29 CFR 101.19.

the Board to rule on any request for review which may be filed.”⁴²

Within seven days after the regional director's decision issues, the employer must file a list of employees in the bargaining unit and their home addresses with the regional director. The regional director, in turn, makes the list available to all other parties in order to allow all parties to communicate with eligible employees about the upcoming election and to reduce the necessity for election-day challenges based solely on the parties' lack of knowledge of voters' identities. The non-employer parties must have this list at least ten days before the date of the election unless they waive that right.

The regional director has discretion to set the dates, times, and location of the election. The regional director typically exercises that discretion after consultation with the parties and solicitation of their positions on the election details.

Once the regional director sets the dates, times, and locations of the election, the regional office prepares a notice of election to inform eligible voters of those details.⁴³ The regional director serves the notice on the employer, which is responsible for posting the notice in the workplace for at least three days before the election.

If a manual election is held, each party to the election may be represented at the polling site by an equal number of observers who are typically employees of the employer. Observers have the right to challenge the eligibility of any voter for cause, and the Board agent conducting the election must challenge any voter whose name is not on the eligibility list. Ballots of challenged voters, including any voters whose eligibility was disputed at the pre-election hearing but not resolved by the regional director, are segregated from the other ballots in a manner that will not disclose the voter's identity.

Representatives of all parties may choose to be present when ballots are counted. Elections are decided by a majority of votes cast. Challenges may be resolved by agreement before the tally. If the number of unresolved challenged ballots is insufficient to affect the results of an election in which employees voted to be represented, the unit placement of any individuals whose status was not resolved may be resolved by the parties in collective bargaining or determined by the Board if a petition for unit clarification is filed. If the number of unresolved challenged

ballots is insufficient to affect the results of an election in which employees voted not to be represented, the results are certified unless objections are filed.

Within one week after the tally of ballots has been prepared, parties may file with the regional director objections to the conduct of the election or to conduct affecting the results of the election. A party filing objections has an additional week to file a summary of the evidence supporting the objections.

The regional director may initiate an investigation of any such objections and unresolved, potentially outcome-determinative challenges, and notice a hearing only if they raise substantial and material factual issues. If they do not, the regional director will issue a supplemental decision or a report disposing of the challenges or objections. If there are material factual issues that must be resolved, the regional director will notice a post-election hearing before a hearing officer to give the parties an opportunity to present evidence concerning the objections or challenges. After the hearing's close, the hearing officer will issue a report resolving any credibility issues and containing findings of fact and recommendations. Depending upon the type of election, a party may file exceptions to the hearing officer's report either with the regional director or the Board, whereupon the regional director or the Board will issue a decision. If the right is not waived in a pre-election agreement, a party may appeal a regional director's disposition of election objections or challenges by filing exceptions with the Board.

III. Authority

Section 6 of the NLRA, 29 U.S.C. 156, provides, “The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act, 5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act.” The Board interprets Section 6 as authorizing the proposed amendments to its existing rules.

The Board believes that the proposed amendments relate almost entirely to “rules of agency organization, procedure or practice” and are therefore exempt from the Administrative Procedure Act's notice and comment requirements under 5 U.S.C. 553(b)(A), but the Board has decided nevertheless to issue this Notice of Proposed Rulemaking and seek public comments.

IV. Overview of the Amendments

Part 101, Subparts C–E

The Board's current regulations are divided into part 102, denominated Rules and Regulations, and part 101, denominated Statement of Procedures. Because the regulations in part 102 are procedural, however, the two sets of provisions governing representation proceedings in §§ 102.60–102.88 and 101.17–101.30 are almost entirely redundant. Describing the same representation procedures in two separate parts of the regulations may create confusion.

Section 101.1 states that part 101 is a statement of “the general course and method by which the Board's functions are channeled and determined” and is issued pursuant to 5 U.S.C. 552(a)(1)(B). The Board believes that such a description of procedures would better serve the statutory purpose of informing the public concerning Agency procedures and practices if it were incorporated into the Board's procedural rules in part 102. The proposed amendments would thus eliminate those sections of part 101 related to representation cases, §§ 101.17 through 101.30, and incorporate into part 102 the few provisions of current part 101 that are not redundant or superfluous.

A separate statement of “the general course and method by which the Board's functions are channeled and determined” in representation proceedings is also set forth in section I(D) above. To the extent any amendments are adopted by the Board, the preamble of the final rule will contain a statement of the general course and method by which the Board's functions will be channeled and determined under the amendments. Moreover, the Board will continue to publish and update its detailed Casehandling Manual, Part Two of which describes the Board's representation case procedures. The Manual is currently available on the Board's Web site.

Part 102, Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

Sec. 102.60 Petitions

The proposed amendments would permit parties to file petitions electronically. In conformity with ordinary judicial and administrative practice, the amendments also require

⁴² 29 CFR 101.21(d).

⁴³ Form NLRB-707 or Form NLRB-4910 (in the case of a mail ballot election).

that the petitioner serve a copy of the petition on all other interested parties. For example, a labor organization filing a petition seeking to become the representative of a unit of employees is required to serve the petition on the employer of the employees. This will insure that the earliest possible notice of the pendency of a petition is given to all parties.

The proposed amendments would also require service of two additional documents that would be available to petitioners in the regional offices and on the Board's public Web site. The first document, which would substitute for and be an expanded version of the Board's Form 4812, would inform interested parties of their rights and obligations in relation to the representation proceeding. The second document the petitioner would serve along with the petition would be a Statement of Position form, which would substitute for NLRB form 5081, the Questionnaire on Commerce Information. The contents and purpose of the proposed Statement of Position form is described further below in relation to § 102.63.

Sec. 102.61 Contents of Petition for Certification; Contents of Petition for Decertification; Contents of Petition for Clarification of Bargaining Unit; Contents of Petition for Amendment of Certification

Section 102.61 describes the contents of the various forms of petitions that may be filed to initiate a representation proceeding under section 9 of the Act. The Board would continue to make each form of petition available at the Board's regional offices and on its Web site. The proposed amendments would add to the contents of the petitions in two respects. First, the revised petition would contain the allegation required in section 9. In the case of a petition seeking representation, for example, the petition would contain a statement that "a substantial number of employees . . . wish to be represented for collective bargaining." 29 U.S.C. 159(c)(1)(a)(i). Second, the petitioner would be required to designate, in the revised petition, the individual who will serve as the petitioner's representative in the proceeding, including for purposes of service of papers.

The proposed amendments would also require that the petitioner file with the petition whatever form of evidence is an administrative predicate of the Board's processing of the petition rather than permitting an additional 48 hours after filing to supply the evidence. When filing a petition seeking to be certified as the representative of a unit

of employees, for example, petitioners would be required simultaneously to file the showing of interest supporting the petition. The Board's preliminary view is that parties should not file petitions without whatever form of evidence is ordinarily necessary for the Board to process the petition. However, the proposed amendments are not intended to prevent a petitioner from supplementing its showing of interest, consistent with existing practice, so long as the supplemental filing is timely. Also consistent with existing practice, the amendments do not require that such a showing be served on other parties. The amendments are not intended to change the Board's longstanding policy of not permitting the adequacy of the showing of interest to be litigated. See, e.g., *Plains Cooperative Oil Mill*, 123 NLRB 1709, 1711 (1959) ("[T]he Board has long held that the sufficiency of a petitioner's showing of interest is an administrative matter not subject to litigation."); *O.D. Jennings & Co.*, 68 NLRB 516 (1946). Nor are the proposed amendments intended to alter the Board's current internal standards for determining what constitutes an adequate showing of interest.⁴⁴

The proposed amendments are not intended to permit or proscribe the use of electronic signatures to support a showing of interest under § 102.61(a)(7) and (c)(8) as well as under § 102.84. The Board continues to study the use of such signatures for these purposes. See Government Paperwork Elimination Act, Public Law 105-277 section 1704(2) (1998) (providing that Office of Management and Budget shall ensure that, commencing not later than five years after the date of enactment of the Act, executive agencies provide "for the use and acceptance of electronic signatures, when practicable"); OMB, Implementation of the Government Paperwork Elimination Act, available at http://www.whitehouse.gov/omb/fedreg_gpea2/; Electronic Signatures in Global and National Commerce Act, Public Law 106-229 sections 104(b)(1) and (2) (2000). The Board specifically seeks comments on the question of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures for these purposes.

Sec. 102.62 Election Agreements; Voter List

Existing § 102.62 describes the three types of agreements parties may enter into following the filing of a petition. The proposed amendments would not

in any manner limit parties' ability to enter into such agreements, including the two forms of agreement that entirely eliminate the need for a pre-election hearing. In fact, the Board anticipates that the proposed amendments would facilitate parties' entry into these forms of election agreements through an earlier and more complete identification of disputes and disclosure of relevant information. The proposed amendments explain the common designations used to refer to each type of agreement in current § 101.19 in order to more clearly inform the public what each form of agreement provides. The proposed amendments would revise the second type of agreement, described in § 102.62(b) (the so-called stipulated election agreement), to eliminate parties' ability to agree to have post-election disputes resolved by the Board and to provide instead that the parties may agree that Board review of a regional director's resolution of such disputes may be sought through a request for review. This is consistent with the changes proposed in §§ 102.65 and 102.67 eliminating the authority of regional directors to transfer cases to the Board at any time and making Board review of regional directors' disposition of post-election disputes discretionary in cases where the parties have not addressed the matter in a pre-election agreement.

The proposed amendments (in § 102.62 as well as in § 102.67(j)) would codify and revise the requirement created in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), and approved by the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 768 (1969), for production and service of a list of eligible voters. The proposed amendments would require that both telephone numbers and, where available, email addresses be included along with each unit employee's name and address on the eligibility list. The proposed amendments would further require that the list include each employee's work location, shift, and classification. The changes in the existing requirement for provision of a list of eligible voters embodied in the proposed amendments are intended to better advance the two objectives articulated by the Board in *Excelsior*.

The provision of only a physical address no longer serves the primary purpose of the *Excelsior* list. Communications technology and campaign communications have evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior*. As Justice Kennedy observed in *Denver Area Educational Telecommunications*

⁴⁴ See Casehandling Manual section 11023.1.

Consortium, Inc. v. FTC, 518 U.S. 727, 802–803 (1996) (Kennedy, J., dissenting):

Minds are not changed in streets and parks as they once were. To an increasing degree, the most significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change.

Similarly, in *J. Picini Flooring*, 356 NLRB No. 9 at 2–3 (2010) (footnotes omitted), the Board recently observed,

While . . . traditional means of communication remain in use, email, postings on internal and external Web sites, and other electronic communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Electronic communications are now the norm in many workplaces, and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase. Indeed, the Board and most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees. In short, “[t]oday’s workplace is becoming increasingly electronic.”

The same evolution is taking place in pre-election campaign communication. The Board’s experience with campaigns preceding elections conducted under section 9 of the Act indicates that employers are, with increasing frequency, using email to communicate with employees about the vote. See, e.g., *Humane Society for Seattle*, 356 NLRB No. 13, slip op. at 4 (2010) (“On September 27, the Employer’s CEO, Brenda Barnette, sent an email to employees asking that they consider whether ACOG was the way to make changes at SHS. On September 29, HR Director Leader emailed employees a link to a third-party article regarding ‘KCACC Guild’s petition and reasons the Guild would be bad for SHS.’”); *Research Foundation of the State University of New York at Buffalo*, 355 NLRB No. 170, slip op. at 19 (2010) (“On January 12, Scuto sent the first in a series of email’s [sic] to all Employer postdoctoral associates concerning the Petitioner’s efforts to form a Union at the Employer[.] . . . explaining the Employer’s position on unionization”); *Black Entertainment Television*, 2009 WL 1574462, at *1 (NLRB Div. of Judges June 5, 2009) (employer notified several employees by email to attend a meeting in which senior vice-president spoke one-on-one with the employees regarding the election scheduled for the following day). For these reasons, the proposed rule would require that both

telephone numbers and, where available, email addresses be included on the *Excelsior* list.⁴⁵

In addition, the list currently required under *Excelsior* does little to further the second purpose for requiring its production—to identify issues concerning eligibility and, if possible, to resolve them without the necessity of a challenge. In many cases, the names on the list are unknown to the parties. The parties may not know where the listed individuals work or what they do. Only through further factual investigation, for example, consulting other employees who may work with the listed, unknown employees or contacting the unknown employees themselves at their home addresses, can the parties potentially discover the facts needed to assess eligibility. It would further the purpose of narrowing the issues in dispute—and thereby avoid unnecessary challenges and litigation—if the list also contained work location, shift, and classification.

The proposed amendments would further require that the eligibility list be provided in electronic form unless the employer certifies that it does not possess the capacity to produce the list in the required form. In 1966, most employers maintained employee lists only on paper. Today, many, if not most, employers maintain electronic records. Yet when producing an *Excelsior* list, employers are still permitted to print out a copy of their electronic records and provide a paper list to the regional office which, in turn, mails or faxes a copy to the other parties. Requiring production of the list in electronic form would further both purposes of the *Excelsior* requirement.

The proposed amendments would require that the employer serve the eligibility list on the other parties electronically at the same time it is filed with the regional office. The Board’s existing rule, as announced in *Excelsior*, requires only that the employer file the list with the regional director. 156 NLRB at 1240 (1966). *Excelsior* further provides that the regional director shall make the list available to all parties. It is the Board’s experience in administering elections that this two-step process has caused needless administrative burden, avoidable delay

⁴⁵ In *Trustees of Columbia University*, 350 NLRB 574, 576 (2007), the Board rejected an objection based on an employer’s refusal to include email addresses in the *Excelsior* list of employees on board a ship that was at sea for most of the pre-election period. In so doing, the Board held only that, “given the Employer’s undisputed compliance with its *Excelsior* obligations as they stood as of the date of the Union’s request, we are unwilling, on the facts of this case, to characterize that compliance as objectionable conduct.” *Id.* at 576.

in receipt of the list, and unnecessary litigation when the regional office, for a variety of reasons, has not promptly made the list available to all parties. See, e.g., *Special Citizens Futures Unlimited*, 331 NLRB 160, 160–62 (2000); *Alcohol & Drug Dependency Services*, 326 NLRB 519, 520 (1998); *Red Carpet Bldg. Maintenance Corp.*, 263 NLRB 1285, 1286 (1982); *Sprayking, Inc.*, 226 NLRB 1044, 1044 (1976). If adopted, the proposed amendments would eliminate this unnecessary administrative burden—as well as potential source of delay and resulting litigation—by providing for direct service of the list by the employer on all other parties. The regional office would make the list available upon request to the parties.

The proposed amendments would also shorten the time for production of the eligibility list from the current seven days to two days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction. The Board’s preliminary view is that advances in electronic recordkeeping and retrieval, combined with the provision of a preliminary list as described below in relation to § 102.63, render the full seven-day period unnecessary. This conclusion is also supported by the fact that the median size of units ranged between 23 and 28 employees from 2004 to 2013.⁴⁶

Finally, the Board recognizes that the voter list proposals may implicate concerns about individual privacy and the dissemination of personal information. Accordingly, it has proposed an amendment that would impose a restriction on use of the eligibility list, barring parties from using it for any purposes other than the representation and related proceedings. The Board specifically seeks comments regarding this restriction and whether other restrictions, either alternatively or in addition to the above, should be imposed. Comments are also invited concerning whether, and in what circumstances, employees should be afforded the opportunity to choose whether and how any personal information might be disclosed, and whether giving such an option to employees would be inconsistent with the *Excelsior* Board’s judgment that a fair election requires that all parties to a representation case proceeding have access to communicate with all the voters. Comments could discuss possible alternatives to disclosure, such

⁴⁶ See Median Size of Bargaining Units in Elections, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections>.

as the desirability and feasibility of the Agency hosting protected communications portals (e.g., sealed-off email systems) to facilitate electronic communication between the nonemployer parties and employees without those parties receiving employee email addresses. Any such comments should also consider the costs which might be imposed by these various possibilities, both on the agency and on private parties, and how the Agency should balance employees' privacy interests with the public interests in fair and free elections and in the expeditious resolution of questions concerning representation. In sum, the Board is interested in constructive suggestions on these matters.

Sec. 102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Initial Notice to Employees of Election; Statement of Position Form; Withdrawal of Notice

The proposed amendments provide that, absent special circumstances, the regional director would set the hearing to begin seven days after service of the notice of hearing. This provision reflects the current practice of some regions, but would make the practice explicit and uniform, thereby rendering Board procedures more transparent and predictable. Under the proposed amendments, parties served with a petition and description of representation procedures, as described above in relation to § 102.60, will thus be able to predict with a high degree of certainty when the hearing will commence even before service of the notice. The Board intends that the proposed amendments would be implemented consistent with the Board's decision in *Croft Metal, Inc.*, 337 NLRB 688, 688 (2002), requiring that, "absent unusual circumstances or clear waiver by the parties," parties "receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays." The proposed amendments would thus not require any party to prepare for a hearing in a shorter time than permitted under current law. Rather, as the Board held in *Croft Metal*, 337 NLRB at 688, "By providing parties with at least 5 working days' notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all." The Board specifically seeks comments on the feasibility and fairness of this time period and all other such periods proposed in this Notice as well as the wording and scope of the exceptions thereto.

The proposed amendments provide that, with the notice of hearing, the regional director would serve a revised version of the Board's Form 5492, currently headed Notice to Employees. Under the proposed amendments, the revised form would bear the heading Initial Notice to Employees of Election, would specify that a petition has been filed as well as the type of petition, the proposed unit, and the name of the petitioner, and would briefly describe the procedures that will follow. The Board anticipates that the Initial Notice would also provide employees with the regional office's Web site address, through which they can obtain further information about the processing of the petition, including obtaining a copy of any direction of election and Final Notice to Employees of Election as soon as they issue. Employers would be required to post the revised Initial Notice to Employees of Election unlike current Form 5492.

The proposed amendments further provide that the regional director would serve the petition, the description of procedures in representation cases, and the Statement of Position form on all non-petitioning parties.

The proposed amendments would further require that the regional director specify in the notice of hearing the due date for Statements of Position. The Statements of Position would be due no later than the date of the hearing. In relation to small units, the regional director may choose to make the Statements of Position due on the date of the hearing and they may be completed at that time with the assistance of the hearing officer.

The Statement of Position form would replace NLRB Form 5081, the Questionnaire on Commerce Information. Under the proposed rules, its completion would be mandatory only insofar as failure to state a position would preclude a party from raising certain issues and participating in their litigation. The statement of position requirement is modeled on the mandatory disclosures described in Fed. R. Civ. P. 26(a) as well as on contention interrogatories commonly propounded in civil litigation.

The Board anticipates that early receipt of the Statement of Position form will assist parties in identifying issues that must be resolved at a pre-election hearing and thereby facilitate entry into election agreements. Parties who enter into one of the forms of election agreement described in § 102.62 would not be required to complete a Statement of Position under the proposed amendments.

The Statement of Position form would solicit the parties' position on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate.⁴⁷ In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors. Finally, parallel to the amendment to the contents of petitions described in relation to § 102.61 above, the non-petitioning parties would be required to designate, in their Statement of Position, the individual who will serve as the party's representative in the proceeding, including for service of papers.

The Board believes that the Statement of Position form would ask parties to do no more than they currently do in preparing for a pre-election hearing. In addition, the Board's preliminary belief is that, by guiding such preparation, the proposed Statement of Position form would reduce the time and other resources expended in preparing to participate in representation proceedings.

In *Bennett Industries, Inc.*, 313 NLRB 1363, 1363 (1994), the Board observed, "[I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute." The Board's regional offices currently attempt to identify and narrow the issues through a number of procedures. In some cases, regions will conduct pre-hearing conferences either face-to-face or by telephone in an effort to identify and narrow the issues in dispute. Further, section 11217 of the Casehandling Manual provides, "Prior to the presentation of evidence or witnesses, parties to the hearing should

⁴⁷ This requirement would codify parties' existing practice where they contend that the petitioned-for unit is not appropriate because the smallest appropriate unit includes additional classifications or facilities. See, e.g., *Westinghouse Electric Corp.*, 137 NLRB 332 (1962).

succinctly state on the record their positions as to the issues to be heard.” The proposed amendments would incorporate the principles underlying these commendable practices, but would give all parties clear, advance notice of their obligations, both in the rules themselves and in the statement of procedures and Statement of Position form. The amendments are not intended to preclude any other formal or informal methods used by the regional offices to identify and narrow the issues in dispute prior to or at pre-election hearings.

The proposed amendments provide that, as part of its Statement of Position, the employer would be required to provide a list of all individuals employed by the employer in the petitioned-for unit. The list would include the same information described above in relation to § 102.62 except that the list served on other parties would not include contact information.

As explained above in section I(A)(3) and in relation to § 102.62, a central purpose of requiring the employer to prepare and file an eligibility list is to insure that all parties have access to the information they need to evaluate whether individuals should be in the unit and are otherwise eligible to vote, so that the parties can attempt to resolve disputes concerning eligibility rather than prolong them “based solely on lack of knowledge.” *Excelsior*, 156 NLRB at 1243. The Board further observed in *Excelsior* that “bona fide disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election.” But that purpose is not well served by provision of the list of eligible voters seven days after a decision and direction of election. It is prior to and during the hearing that the parties are most actively engaged in attempting to resolve such disputes. For this reason, the proposed amendments would require filing and service of a list of individuals providing services to the employer in the petitioned-for unit by a date no later than the opening of the pre-election hearing.

For the same reasons, the proposed amendments further provide that, if the employer contends that the petitioned-for unit is not appropriate, the employer also would be required to file and serve a similar list of individuals in the most similar unit that the employer concedes is appropriate.

Under the proposed amendments, the list filed with the regional office, but not the list served on other parties, would contain available email addresses, telephone numbers, and home addresses. The regional office could then use this additional information to begin preparing the electronic distribution of the Final Notice of Election discussed below in relation to § 102.67.

Sec. 102.64 Conduct of Hearing

The proposed amendments to § 102.64 are intended to insure that the hearing is conducted efficiently and is no longer than necessary to serve the statutory purpose of determining if there is a question concerning representation. Congress instructed the Board to conduct a pre-election hearing to determine if there is a question concerning representation that should be resolved through an election. But Congress did not intend the hearing to be used by any party to delay the conduct of such an election. The proposed amendments would make clear that, ordinarily, resolution of disputes concerning the eligibility or inclusion of individual employees is not necessary in order to determine if a question of representation exists and, therefore, that such disputes will be resolved, if necessary, post-election. The proposed amendments would also make clear that the duty of the hearing officers is to create an evidentiary record concerning only genuine disputes as to material facts. Finally, the proposed amendments would provide that the hearing shall continue from day to day until completed absent extraordinary circumstances.

Sec. 102.65 Motions; Interventions

Consistent with the effort to avoid piecemeal appeal to the Board, as discussed below in relation to § 102.67, the proposed amendments to § 102.65 would narrow the circumstances under which a request for special permission to appeal will be granted. The proposed amendments provide that such an appeal would only be granted under extraordinary circumstances when it appears that the issue will otherwise evade review. To further discourage piecemeal appeal, the amendments provide that a party need not seek special permission to appeal in order to preserve an issue for review post-election. Finally, consistent with current practice, the amendments provide that neither the filing of a request for special permission to appeal nor the grant of such a request will stay an election or any other action or

require impounding of ballots unless specifically ordered by the Board.

The proposed amendments provide that any intervenors, like the original non-petitioning parties, would be required to file or make a Statement of Position.

The proposed amendments also make clear that neither a regional director nor the Board will automatically delay any decision or action during the time permitted for filing motions for reconsideration, rehearing, and to reopen the record.

Sec. 102.66 Introduction of Evidence; Rights of Parties at Hearing; Subpoenas

The proposed amendments to § 102.66 are intended to limit the evidence offered at hearings to that evidence which is relevant to a genuine dispute as to a fact material to an issue in dispute. The amendments would thus give parties the right to introduce evidence “relevant to any genuine dispute as to any material fact.” This standard was derived from Rule 56 of the Federal Rules of Civil Procedure. The proposed amendments would not prevent any party from presenting evidence concerning any relevant issue if there is a genuine dispute as to any material fact. In other words, the proposed amendments would accord parties full due process of law consistent with that accorded in the federal courts.

The amendments would further describe a process to be followed by the hearing officer to identify issues in dispute and determine if there are genuine disputes as to facts material to those issues. The hearing officer would open the hearing by reviewing, or assisting the non-petitioning parties to make, Statements of Position. The petitioner would then be required to respond to any issues raised in the non-petitioning parties’ Statements of Position, thereby joining the issues. No party would be permitted to offer evidence or cross-examine witnesses concerning an issue it did not raise in its Statement of Position or did not join in response to another party’s Statement of Position. However, any party would be permitted to present evidence as to statutory jurisdiction,⁴⁸ and the petitioner would be permitted to present evidence as to the appropriateness of

⁴⁸ Under the proposed amendments, the Board will continue its longstanding practice of presuming that an employer satisfies the Board’s discretionary jurisdictional standards when the employer refuses to voluntarily provide information requested by the Board in order to apply those standards. See, e.g., *Seaboard Warehouse Terminals, Inc.*, 123 NLRB 378, 382–83 (1959); *Tropicana Products, Inc.*, 122 NLRB 121, 123–24 (1958).

the unit if the nonpetitioning parties decline to take a position on that issue. In addition, the hearing officer would retain discretion to permit parties to amend their Statements of Position and responses for good cause, such as newly discovered evidence.

Consistent with the amendment's intent to defer both litigation and consideration of disputes concerning the eligibility or inclusion of individual employees until after the election, no party would be precluded from challenging the eligibility or inclusion of any voter during the election on the grounds that no party raised the issue in a Statement of Position or response thereto.

The proposed amendments would implement the decision in *Bennett Industries, Inc.*, 313 NLRB 1363 (1994). The proposed amendments would also be consistent with *Allen Health Care Services*, 332 NLRB 1308 (2000), in which the Board held that even when an employer refuses to take a position on the appropriateness of a petitioned-for unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. The proposed amendments would thus permit the petitioner to offer evidence in such circumstances and merely preclude non-petitioners, which have refused to take a position on the issue, from offering evidence or cross-examining witnesses.

Consistent with both *Bennett Industries* and *Allen Health Care*, the proposed amendments would preclude any party from subsequently raising an issue or offering evidence or cross-examining witnesses at the pre-election hearing related to an issue (other than statutory jurisdiction) it did not raise or join in a Statement of Position or response thereto. In the case of exclusions from the proposed unit, for example, if no party timely asserts that an individual should be excluded, the Board would include the individual subject to challenge during the election, as explained above. If no party objects to a proposed exclusion, the Board would exclude the individual. In relation to the appropriateness of the unit, if all parties agree the unit is appropriate, the Board would so find unless it appears on its face to be a statutorily inappropriate unit or to be inconsistent with settled Board policy. If any party refuses to take a position on the appropriateness of the unit, that party would be precluded from contesting the appropriateness and offering evidence relating to the appropriateness of the unit. Such preclusion is consistent with existing

precedent and clarifies parties' rights under *Allen Health Care*.

Under the proposed amendments, after the issues are properly joined, the hearing officer would require the parties to make an offer of proof concerning any relevant issue in dispute and would not proceed to take evidence unless the parties' offers create a genuine issue of material fact. An offer of proof may take the form of an oral or written statement of the party or its counsel identifying the witnesses it would call to testify and summarizing their testimony. The requirement of an offer of proof is thus similar to that which exists under current procedures for a party filing objections post-election.⁴⁹ The requirement is also consistent with existing practice in relation to a presumptively appropriate unit. See, e.g., *Laurel Associates, Inc.*, 325 NLRB 603 (1998); *Mariah, Inc.*, 322 NLRB 586, 587 (1996). The proposed amendments thus adopt standard practice in the federal and state courts and before other agencies. See, e.g., Fed. R. Civ. P. 56. The proposed amendments rest on the proposition that, if no disputed issues are identified or there are no disputed facts material to such issues, there is no need for an evidentiary hearing.

The Board's preliminary view is that "an appropriate hearing" does not mean an evidentiary hearing when either no issues are in dispute or no party has been able to make an offer of proof creating a genuine dispute as to any material fact. As Judge Learned Hand observed in 1949,

Neither the statute, nor the Constitution, gives a hearing where there is no issue to decide. . . . The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests. Every summary judgment denies a trial upon issues formally valid. Where, as here, the evidence on one side is unanswerable, and the other side offers nothing to match or qualify it, the denial of a trial invades no constitutional privilege. These considerations are particularly appropriate when we consider that the Board must conduct its duties in a summary way; not, we hasten to add, without observing all the essentials of fair administration, but with as much dispatch as is consistent with those. *Fay v. Douds*, 172 F.2d 720, 725 (2d Cir. 1949).⁵⁰

⁴⁹ See Casehandling Manual section 1132.6 ("In addition to identifying the nature of the misconduct on which the objections are based, this submission should include a list of the witnesses and a brief description of the testimony of each.")

⁵⁰ Although Judge Hand's analysis of the issue discussed in the text remains sound, the jurisdictional basis for *Fay* being heard in federal court prior to a final order in an unfair labor practice case has been "effectively discarded by all circuits" in subsequent decisions. Robert A. Gorman & Matthew W. Finkin, *Labor Law:*

The common type of joinder of issues and offer-of-proof procedures set forth in the proposed amendments, which parallel even more common pleading and summary judgment procedures in the federal and state courts, are fully consistent with the statutory requirement of "an appropriate hearing" and all parties' rights to due process of law.

The proposed amendments would make clear that, although the Statement of Position form asks the non-petitioning parties to state their positions on the type, dates, times, and location of the election, and the eligibility period, and that the hearing officer should solicit all parties' positions on these issues, consistent with existing practice, the resolution of these issues remains within the discretion of the regional director, and the hearing officer shall not permit them to be litigated.

The proposed amendments would provide that, if, at any time during the hearing, the hearing officer determines that the only genuine issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer will close the hearing.

Congress specified that a hearing take place before an election in order to insure that the Board determine that a question concerning representation exists prior to directing that an election be held in order to resolve the question. Thus, Section 9(c) provides that, after the filing of a petition,

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, it shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Congress did not, however, direct that every disputed issue related to the conduct of an election be litigated in the pre-election hearing or resolved prior to the conduct of the election.

Litigation and resolution of individual eligibility issues prior to elections is not the norm within our political system. In Board-supervised elections, it often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated

Unionization and Collective Bargaining § 4.11 (2d ed. 2004). See, e.g., *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 107 (3d Cir. 1979); *Squillacote v. International Bhd. of Teamsters, Local 344*, 561 F.2d 31, 39 (7th Cir. 1977) (collecting cases).

and decided even when their votes end up not affecting the outcome of the election. If a majority of employees vote against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become moot. If, on the other hand, a majority of employees choose to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board.⁵¹ As the Eighth Circuit observed, "The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue." *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994). The Sixth Circuit similarly found that "[s]uch a practice enables the Board to conduct an immediate election." *Medical Center at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir. 1983).

The proposed revision of this section of the rules together with the elimination of section 101.20(c) removes the basis for the Board's holding in *Barre-National, Inc.*, 316 NLRB 877 (1995), that the hearing officer must permit full litigation of all eligibility issues in dispute prior to the direction of an election, absent consent of all parties to defer litigation of the issues. Congress specified that a hearing must be held to determine if "a question concerning representation exists." Adjudication of the eligibility of the 24 individuals at issue in *Barre-National* was not necessary to determine whether a question concerning representation existed. Moreover, the Board did not hold in *Barre-National* that the disputed issue had to be resolved before the regional director directed and conducted an election. In fact, the Board expressly noted, "our ruling concerns only the entitlement to a preelection hearing, which is distinct from any claim of entitlement to a final agency decision on any issue raised in such a hearing." *Id.* at 878 n. 9. The Board further noted that "reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election." *Id.* As observed above, the

Board has frequently deferred final adjudication of such issues until after election, permitting disputed individuals to vote subject to challenge. Thus, the Board's holding in *Barre-National* required that an evidentiary hearing be held on the eligibility issue, potentially delaying the conduct of the election for a significant period of time, but the Board both in that case and in many others has permitted resolution of the issue to be deferred until after the election. Such an outcome serves no apparent purpose. Therefore, the proposed amendments would revise the regulations that formed the basis of the holding in *Barre-National* to permit deferral of both litigation and resolution of disputes that need not be resolved in order to determine that a question of representation exists.

The unit's scope must be established and found to be appropriate prior to the election. But the Board is not required to and should not decide all questions concerning the eligibility or inclusion of individual employees prior to an election. The Board's preliminary view is that deferring both the litigation and resolution of eligibility and inclusion questions affecting no more than 20 percent of eligible voters represents a reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and employees' interest in knowing precisely who will be in the unit should they choose to be represented.

The proposed amendments are consistent with, but seek to improve, the Board's current practice concerning post-election rulings on eligibility and inclusion. In a variety of circumstances, most typically when the Board has granted a pre-election request for review concerning the scope of the unit or employee eligibility, but not ruled on the merits until after the election, the Board has addressed the question of when a post-election change in the unit described in the notice of election requires a new election. The Board has uniformly held that a change representing no more than 20 percent of the unit does not require a new election. See, e.g., *Morgan Manor Nursing and Rehabilitation Center*, 319 NLRB 552 (1995) (20 percent); *Toledo Hospital*, 315 NLRB 594 (1994) (19.5 percent). In *Morgan Manor*, the Board stated that "the exclusion of one classification from a facilitywide service and maintenance unit comprised of employees in nine other specifically named classifications, represents a numerical change which we . . . do not view as signifying a sufficient change in unit size to warrant setting aside of the election." 319 NLRB at 553. Similarly, in *Toledo Hospital*,

the Board found, "We do not view the change in the size of the unit here (19.5 percent . . .) as signifying a sufficiently significant change in character and scope to warrant setting aside the election." 315 NLRB at 594. In a small number of cases,⁵² courts of appeals have reversed the Board's conclusion that a new election was not necessary when the size of the unit was altered by less than 20 percent.⁵³ These courts have based their holdings on the particular nature of the change in the unit, concluding that it significantly altered the scope or character of the original unit. More importantly, these courts found that, by informing employees that they were voting to be represented in one unit and then changing the scope and character of the unit after the election, the Board was "misleading the voters as to the scope of the unit." *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (involving approximately 35 percent reduction in size of unit); see also *NLRB v. Beverly Health and Rehabilitation Services*, 120 F.3d 262 (4th Cir. 1997) (per curiam) (unpublished) ("Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character . . ., the employees have effectively been denied the right to make an informed choice in the representation election.")

The Board's preliminary view is that adoption of a bright-line numerical rule requiring that questions concerning the eligibility or inclusion of individuals constituting no more than 20 percent of all potentially eligible voters be litigated and resolved, if necessary, post-election, best serves the interests of the parties and employees as well as the public interest in efficient administration of the representation case process.⁵⁴ In order

⁵² The Board has identified only two such cases, cited in the following footnote.

⁵³ See *NLRB v. Beverly Health and Rehabilitation Services*, 120 F.3d 262 (4th Cir. 1997) (per curiam) (unpublished) (reversing *Morgan Manor*, cited in text, involving a 20 percent reduction in size of unit); *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986) (involving a less than 10 percent reduction in size of unit).

⁵⁴ The Board has permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters. See, e.g., *Northeast Iowa Telephone*, 341 NLRB 670, 671 (2004) ("While we recognize that allowing 25 percent of the electorate to vote subject to challenge is not optimal, the Employer's opportunity to raise its supervisory issues remains preserved through appropriate challenges and objections to the election or through a subsequent unit clarification petition.")

⁵¹ See *New York Law Publishing Co.*, 326 NLRB No. 93, slip op. at 2 (2001) ("The parties may agree through the course of collective bargaining on whether the classification should be included or excluded. Alternatively, in the absence of such an agreement, the matter can be resolved in a timely invoked unit clarification petition.")

to insure that prospective voters are in no way misled as to the scope of the unit, under the proposed amendments, if resolution of eligibility or inclusion disputes is deferred, the Final Notice to Employees of Election would so inform employees (including an explanation of how the dispute will be resolved) and the disputed employees would be permitted to vote subject to challenge as explained below in relation to § 102.67.

Consistent with existing practice, the proposed amendments also provide that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the five days provided in section 11(1) of the Act. Both the Board and federal courts have construed the five days provided in the Act as a maximum, not a minimum. The Casehandling Manual provides:

There is case authority which holds that the 5-day period is a maximum and not a minimum. Absent a showing of prejudice, the subpoenaed party may be required to file and argue its petition to revoke and, if ordered by the Administrative Law Judge or hearing officer, produce subpoenaed testimony and documents at hearing in less than 5 days from receipt of the subpoena. See *Packaging Techniques, Inc.*, 317 NLRB 1252, 1253–54 (1995) and *NLRB v. Strickland*, 220 F.Supp. 661, 665–66 (DCW. Tenn., 1962), affd. 321 F.2d 811, 813 (6th Cir. 1963).

Section 11782.4; see also *Brennan's French Restaurant*, 129 NLRB 52, 54 n.2 (1960) (judge's ruling found moot by Board). The proposed amendments would codify existing practice vesting discretion in the hearing office to determine how much time a party served with a subpoena should be accorded to move to quash up to the statutory maximum of five days. As the judge reasoned in *Packaging Techniques*, 317 NLRB at 1254, "the case law suggests a common sense application of the rule."

Finally, the proposed amendments provide that at the close of the hearing, parties would be permitted to make oral arguments on the record. Parties would be permitted to file briefs only with the permission of the hearing officer and within the time permitted by and subject to any other limitations imposed by the hearing officer. Given the recurring and often uncomplicated legal and factual issues arising in pre-election hearings, it is the Board's preliminary view that briefs are not needed in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions.

Sec. 102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Review of Action by the Regional Director; Statement in Opposition to Appeal; Final Notice of Election; Voter List

Consistent with the proposed amendment to § 102.66, the proposed amendments to § 102.67 would provide that if the regional director finds at any time that the only issues remaining in dispute concern the eligibility or inclusion of employees who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the regional director shall direct that those individuals be permitted to vote subject to challenge. The proposed amendments would further provide that the Final Notice to Employees of Election shall explain that such individuals are being permitted to vote subject to challenge and the procedures through which their eligibility will be resolved.

The proposed amendments would give the regional director discretion to issue a direction of election with a decision to follow no later than the time of the tally of votes. Because the proposed amendments would defer the parties' right to request Board review of pre-election rulings until after the election, in order to avoid delaying the conduct of the election, regional directors may exercise their discretion to defer issuance of the decision up to the time of the tally without prejudice to any party.

Because the parties will have fully stated their positions on the type, dates, times, and locations of the election either in their Statements of Position or at the hearing, under the proposed amendments the regional director would address these election details in the direction of election and issue the Final Notice to Employees of Election with the direction. Consistent with both the statutory purpose for conducting elections and existing practice, the proposed amendments would provide that the regional director shall set the election for the earliest date practicable.

Both the decision and direction of election and the Final Notice to Employees of Election would be electronically transmitted to all parties when they have provided email addresses to the regional office. When the parties have provided email addresses of affected employees, the regional office would also transmit the notice electronically to those employees.⁵⁵ In addition, the employer

would be required to post the Final Notice to Employees of Election in those places where it customarily posts notices to employees as well as electronically if the employer customarily uses electronic means to communicate with its employees. Because of the potential unfairness of conclusively presuming that the employer received the notice if it does not inform the region to the contrary within five work days, the proposed amendments would also eliminate the provision in § 103.20 creating such a conclusive presumption.

Because of the provision of a mandatory and more detailed initial notice of election, as described in relation to § 102.60 above, for manual and electronic posting of the final notice by employers, and for electronic transmission of the final notice of election to individual, eligible voters, in all cases where such notice is feasible, the proposed rules would also reduce the minimum time between the posting of the final notice and the election from three to two work days.

The Board anticipates that continuing advances in electronic communications and continuing expanded use of email may, in the near future, enable regional offices in virtually all cases to transmit the final notice of election directly to all eligible voters, rendering employer posting of the final notice of election unnecessary. The Board similarly anticipates that the proposed amendments' adoption of dual notice procedures will be an interim measure. During this interim period, while the employer remains obligated to post the final notice of election, the Board does not intend that the failure of a regional office to provide electronic notice to any eligible voter would be the basis for overturning the results of an election under the proposed amendments.

The proposed amendments would make the same changes in the form, content, and service of the list of eligible voters that the employer must file after a direction of election as were described above in relation to § 102.62 after entry into any form of consent or stipulated election agreement. In addition, because of advances in recordkeeping technology and because in most cases the employer will have provided a preliminary list of employees in the proposed or alternative units as described in relation to § 102.63 above, the proposed amendments would also

well as email addresses (when available) both to facilitate use of the final list for the purposes described in *Excelsior* and to permit the regions potentially to test the use of automated phone calls for the purpose of providing prompt notice of the election to each eligible voter.

⁵⁵ The proposed rules provide in §§ 102.62, 102.63, and 102.67 that both the preliminary and final eligibility lists include telephone numbers as

reduce the time during which the list must be filed and served from seven days to two work days. Consistent with existing practice, reflected in *Mod Interiors, Inc.*, 324 NLRB 164 (1997), and Casehandling Manual section 11302.1, an election shall not be scheduled for a date earlier than ten days after the date by which the eligibility list must be filed and served, unless this requirement is waived by the petitioner and any other parties whose names will appear on the ballot.

The proposed amendments would eliminate the regional director's authority to transfer a case at any time to the Board for decision. This authority has rarely been used and, when it has been used, has led to extended delays in the disposition of petitions. See, e.g., *Centurion Auto Transport, Inc.*, 329 NLRB 394 (1999) (transferred December 1994, decided September 1999); *Roadway Package System, Inc.*, 326 NLRB 842 (1998) (transferred May 1995, decided August 1998); *PECO Energy Co.*, 322 NLRB 1074 (1997) (transferred Sept 1995, decided February 1997); *Johnson Controls, Inc.*, 322 NLRB 669 (1996) (transferred June 1994, decided December 1996).

As under the current rules, if the regional director dismisses the petition, parties would be permitted to file a request for review with the Board. If the regional director directs an election, however, the proposed amendments would defer all parties' right to request Board review until after the election. The proposed amendments would retain the provisions for a request for special permission to appeal a determination by the regional director, modified as described above in relation to § 102.65 above.

The Board's current Statements of Procedures provide that elections "normally" are delayed for a period of at least 25 days after the regional director directs that an election should be conducted, in order to provide the parties an opportunity to request Board review of the regional director's determinations.

The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary

arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed.

29 CFR 101.21(d).

Thus, while the rules provide for discretionary review and expressly provide that requesting such review shall not operate as a stay of the election, the Statements of Procedures suggest that there should normally be a waiting period of 25–30 days. This is the case even though such requests are filed in a small percentage of cases, are granted in an even smaller percentage,⁵⁶ and result in orders staying the conduct of elections in virtually no cases at all. For these reasons, such a waiting period appears to serve little purpose even under the existing rules permitting a pre-election request for review.

The proposed amendments would eliminate the pre-election request for review and the accompanying waiting period. All pre-election rulings would remain subject to review post-election if they have not been rendered moot.

The Board anticipates that the proposed amendments would eliminate unnecessary litigation concerning issues that may be and often are rendered moot by the election results and thereby reduce the expense of participating in representation proceedings for the parties as well as the government. Similarly, by consolidating all Board review post-election, the proposed rules would relieve parties of the burden of petitioning for pre-election review in order to preserve issues that may be rendered moot by the election results and, even if that is not the case, would allow parties to raise all issues in a single petition and thereby preserve both private and public resources. In other words, the Board anticipates that the proposed amendments would not simply shift litigation from before to after elections, but would significantly reduce the total amount of litigation.

⁵⁶ A comparison of the total number of elections to the total number of grants of review (including grants of review after petitions were dismissed) during the period 2004 to 2013 reveals that review was granted in less than 1 percent of all representation cases in which an election was conducted and in approximately 15 percent of those cases in which a request was filed. See NLRB Annual Reports (Fiscal Years 2004–2009) and NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2004–2012). Data for 2010–2013, after publication of the Annual Reports was discontinued, was produced from the NLRB's electronic filing system.

Sec. 102.68 Record; What Constitutes; Transmission to Board

The proposed amendments to this section would conform its contents to the amendments to other sections.

Sec. 102.69 Election Procedure; Tally of Ballots; Objections; Requests for Review of Directions of Elections, Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Requests for Review of Regional Director Reports or Decisions in Stipulated or Directed Elections

The proposed amendments to § 102.69 would maintain the current time period (seven days after the tally) for the filing of objections to the conduct of the election or to conduct affecting the results of the election. The current rules provide a filing party with an additional seven days to file an offer of proof. The proposed amendments would require that a party filing objections simultaneously file a written offer of proof supporting the objections as described above in relation to § 102.66(b). The proposed change is based on the view that objections to a secret-ballot election should not be filed by any party lacking factual support for the objections and, therefore, that a filing party should be able to describe the facts supporting its objections at the time of filing. The proposed amendments codify existing practice permitting parties to file, but not serve, evidence in support of objections.

The proposed amendments would also codify existing practice permitting the regional director to investigate the objections by examining evidence offered in support thereof to determine if a hearing is warranted. Thus, if there are potentially determinative challenges or the regional director determines that objections together with an accompanying offer of proof raise a genuine issue of material fact, the proposed amendments would require that the regional director serve a notice of hearing setting the matters for hearing within 14 days of the tally or as soon thereafter as practicable. If the resolution of questions concerning the eligibility of individuals in the unit was deferred by the hearing officer, as described in § 102.66 above, and the votes of such individuals are potentially outcome determinative, the deferred questions would be addressed in the post-election hearing. The proposed amendments would further provide that any such hearing would open with the parties stating their positions on any challenges and objections, followed by

offers of proof as described above in relation to § 102.66.

The proposed amendments would provide that if no potentially determinative challenges exist and no objections are filed, any party may file a request for review of the regional director's decision and direction of election within 14 days of the tally. If there are potentially determinative challenges or objections, a request for review of the regional director's decision and direction of election may be filed within 14 days of the regional director's disposition of the post-election disputes and may be consolidated with any request for review of post-election rulings.

The proposed amendments would create a uniform procedure in those cases in which there are potentially outcome determinative challenges or the regional director determines that objections together with an accompanying offer of proof raise genuine issues of material fact that must be resolved. Adopting the procedure currently contained in §§ 102.69(d) and (e), the proposed amendments would provide that, in such cases, the regional director shall provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations as to the disposition of the issues. Within 14 days after issuance of such a report, any party may file exceptions with the regional director. Finally, consistent with the proposed changes described above in relation to § 102.62, the proposed amendments would make Board review of a regional director's resolution of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections.⁵⁷ The Board anticipates that this proposed change would leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the

⁵⁷ The Board anticipates that permitting it to deny review of regional directors' resolution of post-election disputes—when a party's request raises no compelling grounds for granting such review—would eliminate the most significant source of administrative delay in the finality of election results. Together with simultaneous filing of objections and offers of proof and prompt scheduling of post-election hearings, when they are necessary, the Board anticipates that the proposed amendments would reduce the period of time between the tally of votes and certification of the results. Such an outcome would reduce the time during which employers are uncertain about their legal obligations because, after a tally showing a majority vote in favor of representation, employers violate the duty to bargain by unilaterally changing the status quo only if a representative is ultimately certified. See *Mike O'Conner Chevrolet*, 209 NLRB 701, 703 (1974).

Board's regional directors who are members of the career civil service.

Subparts D and E, §§ 102.73 Through 102.88, Procedures for Unfair Labor Practice and Representation Cases Under Section 8(b)(7) and 9(c) of the Act and Procedures for Referendum Under Section 9(e) of the Act

The proposed amendments in these two subparts are intended solely to conform their provisions to the amendments in Subpart C described above.

Subpart I—Service and Filing of Papers

Sec. 102.112 Date of Service; Date of Filing

The proposed amendments would correct an omission concerning the effective date of service by electronic mail.

Sec. 102.113 Methods of Service of Process and Papers by the Agency; Proof of Service

The proposed amendments would add electronic mail as an approved method of service of Board papers other than complaints, compliance specifications, final decisions and orders in unfair labor practice cases, and subpoenas. The existing rules include regular mail, private delivery service and facsimile transmission (with consent), along with personal service and certified and registered mail. Section 102.114 has provided for service of parties' papers by electronic mail since 2009.

Sec. 102.114 Filing and Service of Papers; Form of Papers; Manner and Proof of Filing and Service; Electronic Filings

The proposed amendments to this section are intended solely to conform its provisions to the amendments in Subpart C described above.

Part 103, Subpart B—Election Procedures

Sec. 103.20 Posting of Election Notices

The proposed amendments eliminate this section, the only section of part 103 of the regulations governing procedures in representation proceedings, and integrate its contents into part 102, modified as explained above in relation to § 102.67.

Request for Comment Regarding Blocking Charges

Just as the Board seeks through the proposed amendments to prevent any party from using the hearing process established under section 9 of the Act to delay the conduct of an election though

unnecessary litigation, the Board also believes that no party should use the unfair labor practice procedures established under sections 8 and 10 to unnecessarily delay the conduct of an election. As set forth in the Casehandling Manual, "The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted." Section 11730. This "blocking charge" policy is not set forth or implemented in the current rules, but it has been applied by the Board in the course of adjudication.⁵⁸

The Board therefore specifically invites comment on whether any final amendments should include changes in the current blocking charge policy as described in sections 11730 to 11734 of the Casehandling Manual or whether any changes in that policy should be made by the Board through means other than amendment of the rules. The Board further specifically invites interested parties to comment on whether the Board should provide that (1) any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition shall simultaneously file an offer of proof of the type described in relation to §§ 102.66(b) and 102.69(a); (2) if the regional director finds that the party's offer of proof does not describe evidence that, if introduced at a hearing, would require that the processing of the petition be held in abeyance, the regional director shall continue to process the petition; (3) the party seeking to block the processing of a petition shall immediately make the witnesses identified in its offer of proof available to the regional director so that the regional director can promptly investigate the charge as required by section 11740.2(c) of the Casehandling Manual; (4) unless the regional director finds that there is probable cause to believe that an unfair labor practice was committed that requires that the processing of the petition be held in abeyance, the regional director shall continue to process the petition; (5) if the Regional Director is unable to make such a determination prior to the date of the election, the election shall be conducted and the ballots impounded; (6) if the regional director finds that

⁵⁸ See, e.g., *Bally's Atlantic City*, 338 NLRB 443 (2002). See generally Berton B. Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?*, 39 LAB. L.J. 651 (1988).

there is probable cause to believe that an unfair labor practice was committed that would require that the processing of the petition be held in abeyance under current policy, the regional director shall instead conduct the election and impound the ballots; (7) if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the petition be dismissed under section 11730.3 of the Casehandling Manual, the regional director shall instead conduct the election and impound the ballots; (8) the blocking charge policy is eliminated, but the parties may continue to object to conduct that was previously grounds for holding the processing of a petition in abeyance and the objections may be grounds for both overturning the elections results and dismissing the petition when appropriate; or (9) the blocking charge policy should be altered in any other respect.

V. Response to Dissent

The comments of our dissenting colleagues, set forth below, make clear that the Board is unanimous in its goal to improve the Board's representation case procedures. We acknowledge, and share, our colleagues' commitment to a constructive dialogue about the important issues involved in this rulemaking. The dissent presents arguments concerning both the process followed by the Board in issuing this NPRM and the content of the proposed amendments. We address here the process-related points, and some of the broader issues raised by the dissent concerning the substance of the proposals. These latter issues, along with the more specific points made in the dissent concerning particular aspects of the proposed reforms, will be examined carefully in the course of the Board's consideration of the NPRM. We look forward to further exchanges of ideas among the Board members on these issues, especially in light of the public comments.

First, our decision to issue the NPRM in its original form, which the dissent specifically criticizes, reflects our judgment that such re-issuance is the most efficient and effective rulemaking process to follow at this time. The NPRM presents a range of possible changes to the Board's representation case procedures aimed at more effectively administering the Act. We believe that the original NPRM still frames the issues well and raises the appropriate concerns and questions for public comment; that relevant circumstances have not changed in any significant way since the NPRM first

issued in June of 2011; and that its re-issuance is the most efficient and fair mechanism to elicit broad and detailed public input. All Board Members have had the opportunity to consider the matters presented, and a majority has decided that the proposal issued in 2011 deserves full consideration by the Board at this time.

Contrary to the dissent's implication, the proposal does not in any way suggest the Board's prejudgment of the merits of the proposals and, likewise, does not imply rejection of any of the matters raised in prior comments. The NPRM is simply a mechanism for examining possible changes to the Board's election procedures and soliciting public participation, not a declaration that the Board has committed itself to adopting all the proposals. In our view, the function of a *proposed* rule is to raise—not resolve—issues that should be considered. This is consistent with the APA's notice-and-comment process, which is fundamentally predicated on the rulemaking agency's open mind: We are in no way "unduly tether[ed]" to the proposal.

Indeed, the NPRM is being re-issued precisely for the purpose of providing a legally appropriate, administratively efficient, and demonstrably fair process for considering all the issues and comments raised in the prior proceeding, while giving an opportunity for any additional commentary. This allows all the material submitted to be carefully considered in a single consolidated proceeding. Over 65,000 comments were filed in response to the original NPRM, and over 400 pages of transcript were added to the record from the public hearing held in July, 2011. Reissuing the proposal is a procedurally appropriate mechanism for the Board to consider all of the previous submissions while also inviting comments regarding any new issues that may have arisen, so that all may be considered when making a determination whether or how to change the representation case procedures. Many members of the public devoted a substantial amount of time to addressing these issues in response to the original NPRM, and we believe they should not be required to duplicate prior efforts in order to have their views considered by the Board.

We also believe that circumstances have not significantly changed since June 22, 2011, when the NPRM was initially issued. While the Board adopted a limited set of the proposed amendments on December 22, 2011, those changes were effective for less than a month before the United States District Court for the District of

Columbia struck down the rule and held that "representation elections will have to continue under the old procedures." The Board then immediately suspended processing cases under the December 2011 amendments and returned to its previously existing rules.

Likewise, neither the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), *affd sub. nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), nor the General Counsel's Section 10(j) initiative against discriminatory discharges during election campaigns has had, or is likely to have, a significant impact on representation case processing by the Board. Accordingly, neither development undermines the premises of the NPRM. *Specialty Healthcare* held (slip op. 14) in relevant part that "the traditional community of interest test . . . will apply as the starting point for unit determinations in all cases not governed by the Board's Health Care Rule," and sets forth a clear test—using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit—for those cases in which an employer contends that a proposed bargaining unit is inappropriate because additional groups of employees are excluded from the bargaining unit. These issues are not addressed by the NPRM, which does not affect the appropriateness of bargaining units. Likewise, *Specialty Healthcare* does not implicate representation-case procedures, which are addressed by the NPRM. Before *Specialty Healthcare*, regional directors were required to determine whether the petitioned-for unit was appropriate prior to directing an election but were not required to resolve all individual eligibility issues in the pre-election decision, and both remain true after *Specialty Healthcare*.

As for the General Counsel's 2010 Section 10(j) initiative, the proposals contained in the NPRM are not designed to deter, minimize, or counteract unfair labor practices by either employers or unions during representation campaigns. Rather, the NPRM proposals concern representation case procedures. Limiting unfair labor practices is beyond the scope of this rulemaking, and, contrary to the dissent's implication, the NPRM is not designed to shorten the time it takes to conduct an election in order to reduce the opportunity for unlawful restraint and coercion of employees. The extensive

commentary by the dissent on this issue is beside the point.⁵⁹

Secondly, the NPRM does not “contradict specific provisions in the Act” as the dissent claims in arguing that all voter eligibility issues must be litigated and resolved in a pre-election hearing. The only issue required by Section 9(c)(1) to be resolved at the pre-election hearing is “whether a question of representation exists.” The proposed rule requires that such a hearing be conducted and provides an orderly and efficient process for resolving this issue, absent the parties voluntarily entering into an election agreement. It ensures that a pre-election hearing will provide a record upon which the regional director can determine the scope and appropriateness of the voting unit. This determination would be made prior to the election, and a written unit description would be provided to the employees in the notice of election. The dissent does not claim otherwise. As to voter eligibility issues, Section 9 of the Act neither grants parties the right to litigate all individual eligibility issues at a pre-election evidentiary hearing, nor does it mandate the pre-election resolution of all voter eligibility issues. Current practice already defers resolution of voter eligibility issues in certain circumstances. Indeed, the traditional election-day challenge procedure results in the resolution of eligibility issues after the election has taken place. These long-standing procedures are not inconsistent with the Act and do not violate any congressional command. Under the NPRM, the resolution of issues affecting voter eligibility would be deferred until after the election in those circumstances where the issues do not affect enough voters to justify delaying the election, and the resolution of the issues is unnecessary to determine whether the proposed unit is appropriate or to ensure compliance with other statutory provisions, such as Section 9(b)(1). Nothing in the NPRM would alter the fact that other voter eligibility issues can and will be resolved prior to the election.

The only remaining question is what purpose it serves to take evidence at the pre-election hearing on issues which will not be resolved before the election. The dissent urges that ALL eligibility issues—even those whose resolution has historically been deferred until after the election—be litigated in the pre-election hearing. It serves no statutory purpose

⁵⁹ Nevertheless, we agree with the dissent that the Act deserves to be enforced vigorously in all contexts, and look forward to working with our colleagues on ways we can enforce the unfair labor practice provisions of the Act more effectively.

to litigate every individual eligibility issue at the pre-election hearing, and we do not believe, at least at this preliminary stage of the rulemaking process, that the Board should oblige the parties and the regional offices to incur the cost of litigating issues that are likely to be mooted by the results of the election itself. In like manner, the hearing process is further managed in the NPRM through procedures designed to avoid the litigation of issues which are irrelevant to whether there is a question of representation or as to which the parties are not in dispute—changes which would be consistent with the statute for the same reasons. The NPRM presents this weighing of the relative costs, delays, burdens, and benefits of the proposed procedural changes for comment.

The legislative history cited by the dissent does not preclude the proposed rule changes. The dissent argues that the 1947 Congress intended to foreclose the Board from deferring voter eligibility issues until after the election. But the Act clearly says nothing of the kind. Indeed, Congress knew about the Board’s challenge procedure—which expressly deferred decision of voter eligibility until after the election—and chose not to forbid this procedure. Still more significantly, though it changed the timing of the hearing, the crucial language defining the *scope* of the hearing—the terms “appropriate hearing” and “question of representation”—were left entirely unchanged in 1947. These terms are all original to the 1935 Act. Thus, the dissent errs in relying on Senator Taft’s statements twelve years later, in 1947, about how he viewed statutory language that was *not being changed*; these statements are “in no sense a part of the legislative history.” *Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001), and cases discussed therein. For the same reason the 1947 amendments could not “repudiat[e]” Supreme Court caselaw definitively interpreting unamended statutory terms. See discussion of the Supreme Court’s *Inland Empire* decision at note 97 of the dissent. Similarly, the legislative history cited by the dissent regarding changes to the statute which were rejected by Congress cannot be read into the statute. Failed enactments, also raised by the dissent, are just that—failed. They do not make law. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169–70 (2001).

The proposed rule would not change the role of the hearing officer at the pre-election hearing in any way contrary to the statutory requirement that the

hearing officer “not make any recommendations” with respect to the existence of a question of representation. Indeed, § 102.66(i) of the proposed rule specifically provides that the hearing officer “shall make no recommendations,” precisely the same language in § 102.66(e) of the current rules. Nor, contrary to the dissent, does the NPRM direct hearing officers to exclude “most evidence” from the pre-election hearing. Proposed § 102.64 provides that it is the duty of the hearing officer at the pre-election hearing to “obtain a full and complete record” so that the regional director can discharge his duties under Section 9(c) and determine whether a question of representation exists. The hearing officer would not be given an improper role under the amendments and the NPRM does not suggest any changes inconsistent with Section 9(c)(1).

Likewise, the NPRM does not deny Regional Director or Board review of representation issues. Appeal to *both* remains available under the proposed rule. See §§ 102.65, 102.67, 102.69. Nor does the proposed rule conflict with Section 3(b) of the Act. Nothing in the proposal would change a party’s right to seek a *stay* of regional proceedings—which has always required special permission—and pre-election Board review would similarly be obtainable by special permission under the proposals. As the Supreme Court has stated in a related context: “One who is aggrieved by the ruling of the regional director or hearing officer can get the Board’s ruling. The fact that special permission of the Board is required for the appeal is not important.” *NLRB v. Duval Jewelry Co. of Miami, Inc.*, 357 U.S. 1, 6–7 (1958). This is consistent with the plain language of Section 3(b), by which “Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.” *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971).

Contrary to the dissent’s assertions, the primary purpose of the rule is *not* “to shorten the timeframe applicable to all elections,” either to “limit unlawful restraint and coercion” or to diminish freedom of speech. Instead, the NPRM attempts to focus on identifying and minimizing unnecessary barriers to the fair and expeditious resolution of questions concerning representation. Unnecessary litigation, even when not accompanied by delay, can and should be eliminated. It is costly and wasteful to employees, to employers, to unions, to the Agency, and ultimately to the

public. Indeed, the mere *threat* of unnecessary litigation is unfair as parties can be unjustly compelled to enter stipulations on unreasonable terms or on terms they cannot intelligently evaluate, simply to avoid the costs and delays inherent in litigation. Reducing unnecessary delay is therefore an important purpose of the proposed changes. And, notwithstanding the dissent's expressed "disappoint[ment] . . . that the NPRM fails to squarely state that it is designed to accelerate representation elections," in fact, the NPRM clearly regards more timely elections as a natural and salutary effect of eliminating unnecessary and duplicative litigation procedures. But reducing unnecessary delay is by no means the sole purpose of the proposed changes. As the NPRM explains, the proposals are not only designed to remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation, but also to simplify representation-case procedures and render them more transparent and uniform across regions, to reduce the cost of representation proceedings to the public and the agency by eliminating unnecessary litigation, and to modernize the Board's representation procedures.

The dissent observes that the median time for conducting elections in *all* cases is 38 days (which it asserts means that most elections are conducted promptly) and thus that the NPRM should focus not on the election process as a whole, but only on the relatively rare instances where elections are delayed—as the dissent interprets delay. The dissent's position is mistaken. Many of the proposed changes to our representation-case procedure will impact only cases which currently involve a pre-election hearing. The current median time for conducting elections in *those* cases is much longer than 38 days. For most of the past decade, when a pre-election hearing was conducted, the median number of days from petition to election has hovered in the mid-60s. This undeniably significant difference highlights the flawed factual predicate for the dissent's position.

The dissent also argues that the Board's ability to meet current agency time targets for elections undercuts the need for rulemaking. But those time targets have never been intended to establish an ideal standard. Rather, they reflect judgments about what, as a practical matter, could be achieved based on the Agency's then-current procedures—including, of course, any built-in inefficiencies. The history of congressional and administrative efforts in the representation-case area

represents a progression of reforms aimed at reducing the amount of time required to ultimately resolve questions concerning representation, which, as Congress has found, can disrupt the workplace. With each reform, the waiting time before employees have an opportunity to vote has been reduced. The result has been widely viewed as progress, and the achievement of the full measure of time savings by agency employees has been lauded as success. The Board conceives of the proposed amendments as the next step for the agency in improving its performance of this critical part of its statutory mission. In sum, that the Board seeks to, and does, meet its current time targets in most instances may be commendable, but it is also irrelevant to whether additional improvements may be made by amending the rules.⁶⁰

The dissent faults the NPRM for failing to propose a minimum time period between the petition and election, to preserve the parties' opportunity to campaign. Notably, the Act itself does not set forth any such minimum time period to campaign; Congress has rejected proposals that would have set forth a minimum time period; and the Board's current rules and regulations do not set forth any such time periods. Contrary to the dissent's suggestion, the General Counsel's time targets for representation case processing do *not* reflect any judgment by this or any other Board that any particular time is a necessary minimum for campaigning. Even the dissent disclaims knowledge of the "precise point in time when shortening the timetable applicable to all Board-conducted elections impermissibly denies employers, unions and employees the right to engage in speech protected by the Act and the First Amendment." Our tentative conclusion at this point is that these matters are likely not amenable to resolution in this rulemaking. If, as applied in particular cases, there is an apparent lack of adequate time to campaign, this can be addressed by the Board in the context of the particular case. Again, the proposed rules themselves do not compel any particular number of days or time periods for holding or not holding elections.⁶¹

⁶⁰ Thus, it is only under the dissent's faulty reasoning that our colleagues can claim that there is "no election delay" in cases where the agency is meeting its time targets.

⁶¹ Relatedly, the Board does not anticipate that employees will have to face "vote now, understand later" dilemmas under the proposed rules. The Board recognizes that there is value to providing employees with greater guidance than they receive under the current representation case procedures. It

Finally, the dissent faults the Board for failing to address specific issues responsible for delaying elections. However, the dissent itself fails to identify any such issues other than blocking charges, as to which, as the dissent acknowledges, the NPRM already invites comments. The proposals also address delay in conducting elections that may be attributable to the Board in cases where no blocking charges have been filed. The dissent recommends in addition that the Board consider unspecified reforms of the Board's internal procedures concerning election-related issues. We agree that internal Board case-management practices, which are not addressed by the Board in rulemaking, can affect the timeliness of representation-case processing. While efforts have been made in this area over the past several years, we welcome discussions among the members of the Board concerning further improvements that might be possible.

VI. Dissenting Views of Members Philip A. Miscimarra and Harry I. Johnson III

Members Philip A. Miscimarra and Harry I. Johnson III, dissenting.

We dissent from this Notice of Proposed Rulemaking ("NPRM"). Like our colleagues, we believe the Board should do everything within its power to ensure that representation elections give effect to employee free choice consistent with the National Labor Relations Act ("NLRA" or "Act"). We support rulemaking if it is necessary to address relevant issues consistent with the Board's authority and the Act's requirements. We are not irrevocably committed to the status quo, nor do we criticize our colleagues for their desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We share the same desire, and remain committed to work as a full Board to further our responsibilities to everyone covered by the Act.

Our points of departure relate to important considerations about this NPRM that, in our view, make it contrary to the Act and ill-advised.

First, the *process* governing Board-conducted elections is compelled by the statute to a significant degree. The Act

is for that very reason that the Board is proposing in §§ 102.63 and 102.67 that the initial notice that must be posted before any pre-election hearing is held will notify employees of their rights and of the filing of the petition, and that the final notice of election will notify employees if the regional director directs that certain employees be permitted to vote subject to challenge and what that means. In short, the NPRM proposals are designed to give employees more, not less, information, than they currently enjoy.

gives the Board a single-minded responsibility “in *each* case” regarding elections, which is to “assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act.”⁶² The Act protects the right of employees to “engage in” protected concerted activities and “to refrain from any or all of such activities.”⁶³ The Board’s conduct of elections may not be tilted against or in favor of any party or outcome.⁶⁴ Finally, the rules governing union representation and collective bargaining are complicated and unknown to many or most employees and employers in the United States. The NPRM does not adequately take into account these considerations, and it contradicts specific provisions in the Act. Among other things, the NPRM would impermissibly conduct expedited elections before a hearing is held regarding fundamental questions such as who is actually eligible to vote, thereby resulting in an “election now, hearing later.” The NPRM would improperly shorten the time needed for employees to understand relevant issues, compelling them to “vote now, understand later.” It would also curtail the right of employers, unions *and* employees to engage in protected speech.

Second, the *substance* of the NLRA includes rights, obligations and restrictions affecting how employers, unions and employees may conduct themselves during election campaigns. Most important, the Act prohibits employers and unions from restraining or coercing employees in the exercise of protected rights.⁶⁵ To the extent the NPRM treats the substantive issue of unlawful restraint and coercion as a reason to shorten the timeframe applicable to all elections, the NPRM advocates a “cure” that is not rationally related to the disease. Nothing in the NPRM directly addresses unlawful election conduct by employers or

unions, nor does the NPRM invite public comment regarding different or better remedies in these situations. The same disconnect exists between the proposed revisions and the NPRM’s claim of unacceptable delay. If some elections involve excessive delay—and objective evidence shows this occurs at most in only a very small percentage of Board-conducted elections—this is not a rational basis for rewriting the procedures governing *all* elections. This deficiency warrants particular scrutiny because the proposed changes, in other respects, accomplish what Congress has indicated the Board may *not* do regarding important election issues, which is to conduct the “election now, hearing later,” and to cause employees to “vote now, understand later.”

Third, the new NPRM does not reflect a *de novo* examination of important election-related issues. The NPRM is identical in substance to the 2011 proposed rule regarding representation elections published on June 22, 2011 (hereinafter “2011 election proposal”), after which the Board received more than 65,000 sets of public comments, supplemented by oral presentations by 66 individuals during two days of hearing in July of that year. The NPRM updates some election statistics from the 2011 election proposal but attempts no significant qualitative evaluation of that information. There is no collection of other new data relevant to assess whether the NPRM is necessary at this time or whether alternative measures might more effectively address whatever election issues might be genuine reasons for concern. Likewise, the NPRM fails to consider the potential impact of more recent Board initiatives such as the General Counsel’s increased emphasis on “nip-in-the-bud” lawsuits to obtain injunctions against discriminatory discharges or the Board’s *Specialty Healthcare* standard⁶⁶ regarding whether particular employees should be excluded from a petitioned-for bargaining unit. In substance and structure, the new NPRM—like the Board’s 2011 election proposal—advocates an array of changes that are difficult to understand, especially in the aggregate, while changing existing procedures that reflect decades of real world experience balancing rights under

the Act. Although the NLRA authorizes the Board to adopt “such rules and regulations as may be necessary to carry out the provisions of [the] Act,”⁶⁷ no reasons articulated in the NPRM warrant a wholesale rewrite, in one stroke, of the procedures governing every representation election conducted by the Board.⁶⁸

Fourth, we are receptive to potential regulatory reforms that improve Board procedures and enhance our enforcement of the law regarding representation elections. In Part D of this dissent, we outline an alternative path that, if pursued, would permit the full Board to consider different potential rulemaking regarding election reforms that would advance the interests of employees, unions and employers. We also believe that our approach, if backed by the full Board, would receive substantial support within all three of these groups. Our suggested approach would bolster the Board’s long track record of conducting elections with an extremely high degree of integrity and transparency. The most important threshold question to address, in any event, would be whether and why further rulemaking of any kind is necessary.

To repeat, we are not reflexively committed to the status quo. We do not fault our colleagues for their desire to advance the Board’s enforcement of the Act. We have the same desire, but we hope the full Board—after a *de novo* review of all public comments regarding this NPRM and its 2011 predecessor—will refrain from implementing the current NPRM. If further review supports a conclusion by the Board that

⁶⁷ NLRA Sec. 6, 29 U.S.C. 156.

⁶⁸ The broad-ranging nature and complexity of the NPRM—and the extent of public interest as reflected in more than 65,000 comments on the 2011 proposed election rule—contrasts sharply with the Board’s 1989 rule governing acute care hospital bargaining unit determinations. The 1989 rule, though much more limited in scope than the NPRM, involved a much longer rulemaking process with more extensive opportunities for public comment. Former Member Hayes described as follows the 1989 rulemaking regarding acute care hospital bargaining unit determinations: “The need for this effort was obvious, based on years of litigation highlighting specific problems and differences among the Board, the courts of appeals, and health care industry constituents. The initial July 2, 1987 notice of proposed rulemaking was followed by a series of four public hearings, the last one held over a 7-day period, in October 1987. Thereafter, the written comment period was extended. Another rulemaking notice followed on September 1, 1988. It reviewed the massive amount of oral testimony (3545 pages and 144 witnesses) and written comments (1500 pages filed by 315 individuals and organizations) received during the prior year and announced a revised rule with another 6-week period for written comment. The final rule was published on April 21, 1989, almost 2 years after the initial notice.” 76 FR 36812, 36830 (June 22, 2011) (Member Hayes, dissenting).

⁶² NLRA Sec. 9(b), 29 U.S.C. 159(b) (emphasis added).

⁶³ *Id.* Sec. 7, 29 U.S.C. 157.

⁶⁴ See, e.g., *NLRB v. Action Automotive*, 469 U.S. 490, 498 (1985) (the Act “mandate[s] that the Board remain wholly neutral as between the contending parties in representation elections”) (internal quotation omitted). See also note 80, *infra*.

⁶⁵ See NLRA Sec. 8(a)(1) and 8(b)(1)(A), 29 U.S.C. 158(a)(1), 158(b)(1)(A). Pre-election conduct found unlawful under these provisions can invalidate a representation election’s outcome. In the event of violations, the Board is empowered to fashion remedies effectuating the policies of the Act. Moreover, Section 10(j) authorizes the Board, even *before* a violation is proven in an unfair labor practice proceeding, to seek a federal court injunction that can require an unlawfully discharged employee’s reinstatement with backpay and benefits, the rescission of unlawful changes, and other measures.

⁶⁶ *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). *Specialty Healthcare* and its progeny demonstrate the importance of determining whether certain employees should be included in or excluded from whatever bargaining units may result from representation elections. However, this dissent should not be regarded as passing judgment on the merits of the *Specialty Healthcare* standard.

new proposed rulemaking is necessary, we advocate the approach outlined in Part D.

A. The NPRM's Procedures Contradict Requirements in the Act and Are Ill-Advised

1. *Background: What the NPRM Would Change.* It is difficult to summarize the changes reflected in the NPRM because they are so numerous and implicate so many disparate aspects of the Board's longstanding election procedures. However, the uniform thrust of the proposed changes is to greatly reduce the time between a representation petition's filing and the election. The NPRM does not directly articulate an objective to conduct elections as quickly as possible, but this is the inevitable consequence of the NPRM's changes, as is implicit in the many references to efficiency, promptness, and the avoidance of unnecessary proceedings and needless delay.⁶⁹

The NPRM's keystone concept is to have elections occur *before* addressing important election-related issues, and the NPRM would relegate these issues to a post-election hearing. Ironically, among the issues subject to this "election now, hearing later" approach would be questions about voter eligibility. Yes, this means the election would take place first, and only later would there be a hearing regarding issues as fundamental as: (i) Who can actually vote, (ii) which employees who cast votes would, in the end, be excluded from the bargaining unit and would *not* even have their votes counted, (iii) whether people who represent themselves as employee-voters during the campaign may actually be supervisors (*i.e.*, representatives of one of the campaigning parties), (iv) whether other people who appear to be supervisors may actually be employee-voters, and (v) whether the union-represented workforce, if the union prevails, will ultimately exclude important employee groups whose absence would adversely affect the outcome of resulting negotiations.

⁶⁹ The NPRM clearly subordinates important Board procedures in the interest of having elections occur more quickly. The Proposed Rule refers, for example, to the "expeditious resolution of questions concerning representation," to allowing the Board "to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election," to the "expeditious processing of representation petitions," to "delays in the regional offices' transmission of the eligibility list to the parties," to "shorten[ing] the time for production of the eligibility list," and to a "progression of reforms to reduce the amount of time required to ultimately resolve questions concerning representation."

These are indisputably important issues. They are not only relevant to the election campaign, they can profoundly affect what type of bargaining relationship would exist after the election if the union prevails, and the inclusion or exclusion of certain groups may positively or negatively affect employee bargaining leverage. For employees, the "election now, hearing later" approach would create a new norm where essential issues do not even receive potential pre-election *consideration* by the Board. This exacerbates the NPRM's shortening of the period between petition-filing and the election which, as noted previously, creates a situation where employees will be forced to "vote now, understand later."⁷⁰

The NPRM would also change who decides election issues within the NLRB's agency structure, mostly by cutting the Board out of the process. Ironically, the statute makes the Board responsible for representation elections,⁷¹ with two caveats: (1) Pre-election hearings are presided over by hearing officers, although Congress in 1947 severely limited their authority by prohibiting hearing officers even from making "recommendations" about election issues;⁷² and (2) in 1959, Congress permitted the delegation of

⁷⁰ It is true, as our colleagues point out, that the NPRM does not completely eliminate the pre-election hearing, nor does the NPRM rule out the possibility that a particular hearing officer might permit the introduction of evidence regarding voter eligibility or supervisory status, for example. However, the NPRM expressly states that it dramatically narrows the scope and duration of pre-election hearings, and it relegates all but the most basic issues to post-election proceedings. Therefore the NPRM clearly will not result in pre-election hearings where voter eligibility and other fundamental issues continue to be addressed. The NPRM explicitly states otherwise. Further, the inclusion or exclusion of such evidence would be determined by hearing officers who, under Section 9(c)(1), 29 U.S.C. 159(c)(1), are not even permitted to make "recommendations" about relevant issues. See note 109, *infra*.

We also recognize that, under existing Board procedures, elections may take place while some questions remain unresolved, and some employees may cast votes that, if challenged, are ruled upon in post-election proceedings. In all such cases, however, the Act gives parties the right to present evidence regarding these issues at a pre-election hearing. And based upon such evidence, the Act requires that the Regional Director *and* the Board consider requests to stay the election until such issues are resolved. See text accompanying note 108, *infra*. In addition to dramatically shortening the time period between petition-filing and the election, the NPRM would impermissibly curtail the right to present any evidence at the pre-election hearing regarding many fundamental issues, which in turn would prevent the Regional Director and the Board even from considering whether the resolution of such issues is important enough to warrant staying the election. *Id.*

⁷¹ NLRA Sec. 9(c)(1), 29 U.S.C. 159(c)(1).

⁷² *Id.* See also note 109, *infra*.

election responsibilities to Regional Directors, but conditioned this on a statutory right to seek Board review regarding "any action" by Regional Directors, including pre-election requests to "stay" the election.⁷³ The NPRM essentially turns this arrangement upside down. Hearing officers—who the NPRM directs to exclude most evidence from the pre-election hearing—become the sole judge and jury regarding such matters, and the absence from the record of that evidence precludes *any* review of those matters by Regional Directors and the Board. In contrast to the statutory mandate making "any action" by Regional Directors subject to requests for Board review, the NPRM *eliminates* the existing pre-election right to seek Board review, and adopts a "new narrower standard" governing "extraordinary" situations where parties have been able to request "special permission" for an appeal to the Board. Finally, the NPRM provides that post-election Board review—currently a guaranteed option—would become discretionary in all cases. Under the NPRM, therefore, many or most election issues would never be decided by Board members.

The NPRM proposes equally dramatic changes in other election procedures. It would require all employers to submit a near-immediate binding, comprehensive, written response to the petition (where the employer *forever* waives available arguments and defenses not set forth in this position statement); it would require employers to disclose employee email addresses and phone numbers in an expanded "Excelsior" list to be transmitted electronically to the union; it would make many other time deadlines much shorter; and it would implement other changes too numerous to summarize here.

The NPRM acknowledges the importance of transparency in public policymaking. This makes it most disappointing, then, that the NPRM fails to squarely state that it is designed to accelerate representation elections, although our colleagues acknowledge it will have that effect. Here, the NPRM, like the Board's 2011 election proposal, leaves critical questions unanswered:

(1) As a result of the NPRM, precisely how short will election periods be?

(2) How short is too short to assure employees the "fullest freedom" of choice as required by the Act?

(3) Conversely, on what basis has the Board ruled out the possibility that employees need *more* time than presently available to understand

⁷³ NLRA Sec. 3(b), 29 U.S.C. 153(b).

relevant issues and to make an informed free choice about union representation?

(4) To the extent that the NPRM promotes efficiency or conserves the Board's resources, why are these objectives more important than (i) the right of employees to have sufficient time and information to understand relevant issues before voting, and (ii) the right of employees, unions and employers to engage in protected speech regarding election issues?

(5) Why doesn't the NPRM propose a mandatory minimum time period between petition-filing and an election, which could permit the adoption of procedural improvements *without* impairing the protected employee, union, and employer rights referenced above?

We do not know the answers to these important questions, and we hope they will be the subject of public comment as part of this rulemaking and then receive careful consideration by our colleagues.

2. *The NLRA's Requirements.* In contrast to the complicated array of changes advocated in the NPRM, the National Labor Relations Act is straightforward: Its fundamental purpose is to guarantee employee free choice when employees vote in elections regarding union representation. Sections 1 and 7 refer to "the exercise by workers of *full freedom* of association" encompassing the right of employees to have "representatives of *their own choosing*."⁷⁴ Section 7 protects the right of employees to "engage in" protected activities and "to refrain from any or all of such activities."⁷⁵ Sections 8(a) and 8(b) prohibit actions by employers and unions that "restrain" or "coerce" employees in the exercise of protected rights.⁷⁶ Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers and unions, consistent with similar guarantees afforded by the First Amendment.⁷⁷ Section 9(a) provides for

unions to represent employees in an appropriate unit to the extent they are "*designated or selected* . . . by the majority of the employees in [the] unit."⁷⁸ And Section 9(b)—specifically pertaining to elections—refers to the Board's obligation "in each case" to "assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."⁷⁹

When it comes to preserving the "fullest freedom" of employees to exercise their protected rights in an NLRB-conducted election, the Act makes additional considerations extremely important:

- Congress has mandated that the Board remain neutral while preserving employee choice, which is consistent with the Act's protection of employee rights to "engage in" concerted activities and to "refrain from any or all of such activities."⁸⁰

Board."); see also *Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.") (internal quotation omitted); *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 98–99 (2d Cir. 2006) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present."); *United Rentals, Inc.*, 349 NLRB 190, 191 (2007) ("[T]ruthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)."). Section 7 of the Act has been interpreted as broadly protecting the right of employees to engage in speech regarding election issues. *Letter Carriers v. Austin*, 418 U.S. 264, 277 (1974) ("The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights 'to form, join, or assist labor organizations.'").

The First Amendment is clearly implicated in Board regulations that impermissibly curtail free speech guarantees since federal regulation constitutes quintessential state action for purposes of the United States Constitution. See *Chamber of Commerce v. Brown*, *supra* at 68 (noting that the Court recognized "the First Amendment right of employers to engage in noncoercive speech about unionization" even before Section 8(c) was enacted).

⁷⁴ *Id.* Sec. 159(a) (emphasis added).

⁷⁵ *Id.* Sec. 159(b) (emphasis added).

⁸⁰ NLRA Sec. 7, 29 U.S.C. 157. The need for neutrality in the Board's procedures exists to the same degree applicable to the Board's case adjudications. In fact, concern that the Board's procedures detracted from the agency's neutrality were among the reasons Congress adopted the Taft-Hartley amendments in 1947. See S. Rep. 80–105, 80th Cong., at 3, reprinted in 1 Comm. on Lab. and Pub. Welfare, Subcomm. on Lab., 93d Cong., Legislative History Of The Labor Management Relations Act, 1947 (hereinafter "LMRA Hist."), at 407 (Senate report stating that "as a result of certain administrative practices which developed in the early period of the act, the Board has acquired a reputation for partisanship, which the committee seeks to overcome, by insisting on certain procedural reforms"). The "procedural reforms" insisted upon by Congress in 1947, and reaffirmed in 1959, included a repudiation of precisely the

- The great majority of employees in the United States lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.⁸¹ In 2011, the Board found that "*nonunion* employees are *especially* unlikely to be aware of their NLRA rights,"⁸² and the Board acknowledged that "to the extent that lack of contact with unions contributed to lack of knowledge of NLRA rights 20 years ago, it probably is *even more of a factor today*."⁸³

- The Board has found that many *employers*—and even some *union officials*—lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.⁸⁴

- Employers and unions have protected rights to engage in protected speech prior to an election. As noted, the Supreme Court has characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited,

type of arrangement incorporated into the NPRM. See notes 93 and 97, *infra*, and accompanying text. See also note 64, *supra*.

⁸¹ The Board based this finding on "several factors," including "the comparatively small percentage of private sector employees who are represented by unions and thus have ready access to information about the NLRA; the high percentage of immigrants in the labor force, who are likely to be unfamiliar with workplace rights in the United States; studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights." 76 FR 54006, 54014–15 (2011). As a result, the Board has attempted to expand its outreach efforts, including distribution of a mobile app regarding the NLRB and the Act, which we fully support. See "National Labor Relations Board Launches Mobile App," Aug. 30, 2013 (<http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app>). 76 Fed. Reg. at 54,014–15. In fact, we favor having Agency resources directed to a higher profile public relations campaign regarding the NLRB mobile app and other outreach efforts.

In 2011, the Board attempted to increase familiarity with the Act's requirements by adopting a rule requiring employers to post notices advising employees about the Act (*id.*), but this rule has been permanently suspended after appellate courts ruled that it exceeded the Board's authority. *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013); *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

⁸² 76 FR at 54016 (emphasis added).

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* at 54017 (emphasis added). In the words of a union official cited by the Board with approval in 2011: "Having been active in labor relations for 30 years I can assure you that *both employees and employers are confused about their respective rights under the NLRA*. Even *union officers* often do not understand their rights. *Members and non-members rarely understand their rights*. Often labor management disputes arise because one or *both sides are misinformed about their rights*." *Id.* at 54017 n.88 (emphasis added).

⁷⁴ NLRA Sec. 1, 7, 29 U.S.C. 151, 157 (emphasis added).

⁷⁵ *Id.* Sec. 7, 29 U.S.C. 157 (emphasis added).

⁷⁶ 29 U.S.C. 158(a)(1), 158(b)(1)(A).

⁷⁷ Section 8(c) of the Act reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Although Section 8(c) does not directly address representation elections, it has long been recognized by the Board and the courts as protecting speech generally, consistent with the First Amendment. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations

robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" ⁸⁵

3. *The NPRM's Problems and Deficiencies.* Unfortunately, the NPRM does not adequately take into account the above considerations and it is contrary to the Act.⁸⁶ This is especially evident in the following respects.

First, we do not understand the reasons for embarking on the path outlined in the NPRM, because it describes the Board's very successful track record conducting timely elections. Casehandling statistics since 2011 indicate no significant variation from those described in the 2011 proposed election rule. See 76 FR at 36813–36814. In 1960, the median time from petition to a direction of election was 82 days, with more time obviously elapsing before the elections occurred (*id.* at 36814 n.16). By 1975, only 20.1 percent of all elections occurred more than 60 days after the filing of a petition, and this percentage decreased to 16.5 percent by 1985 (*id.* at 36814 n.19). Since at least 2001, the Board has applied a well-known target to have elections conducted within a median of 42 days after the petition-filing.⁸⁷ Over the past decade, elections have occurred within a median of approximately 38 days after the filing of a petition, and in fiscal 2010, the average time from petition to an election was 31 days.⁸⁸ Another significant Board target is to hold 90% of all elections within 56 days

of the filing of the petition. The Board has consistently done better than that standard.⁸⁹ In fact, in 2013, 94.3% of elections were held within that 56-day period.⁹⁰ Thus, it is fair to conclude that in 2013, by the Board's own measures, less than 6% of elections were unduly "delayed." Some elections take too long to resolve, but in recent years these cases have been few in number.⁹¹ We are not saying the Board's work here is done. However, the available data do not provide a rational basis for engaging in a wholesale reformulation of the Board's election procedures.⁹²

⁸⁹ NLRB Summaries of Operations, fiscal years 2007–2012, and Performance Accountability Reports, 2004–2013, www.nlr.gov/reports-guidance/reports. See GC–11–09, *supra* note 88, at 18–19.

⁹⁰ NLRB Performance Accountability Report, fiscal year 2013, www.nlr.gov/reports-guidance/reports.

⁹¹ As indicated in the Appendix to this dissent, our initial review of internal case-processing statistics indicates that pre-election issues do not cause an overall delay in case processing except for a tiny fraction of cases. Case-processing statistics also indicate that the regional offices' processing of representation petitions from filing to election, including the holding of pre-election hearings, is a highly efficient and effective operation. We provide a very preliminary analysis in an Appendix to foster discussion about the scope and nature of the purported problems with representation case processing. We encourage commenters to provide their own evaluation of the specific reasons for delay in particular cases based on relevant statistics that are publicly available or disclosable under the Freedom of Information Act.

The majority discounts the Board's excellent track record (for example, the fact that elections have occurred within a median of 38 days after petition-filing over the past decade) by focusing only on cases involving pre-election hearings. For example, they indicate that for these cases, the median time from petition-filing to an election has been about 64–65 days in recent years (and only 59 days in fiscal year 2013). Any criticism of the 38-day median does not detract from our preliminary case-processing analysis in the Appendix because that analysis does not even reference the 38-day median. Moreover, the pre-election hearing statistics do not depict a problem that warrants an overhaul of the procedures governing all elections. Just looking at pre-election hearing cases, the conducting of elections within a median of 59–65 days means that the hearing and related processes (i.e., the writing and consideration of briefs, issuance of a decision and direction of election, and the processing of potential requests for Board review) only required three or four weeks beyond the overall 38-day median. These hearing statistics are indicative of efficient and timely case-handling, not a lack of efficiency, especially given the importance of relevant issues and the statutory mandate that the Board hold an "appropriate hearing" in all contested representation cases.

⁹² In many other contexts—which the NPRM does not propose to change—the Board routinely imposes lengthy delays, ranging up to three years, before employee sentiments about union representation are given effect. For example, under the Board's longstanding contract bar rule, the Board refrains from conducting any election for up to three years while a collective-bargaining agreement is in effect (during which a petition will be accepted only during a 30-day open period occurring between 60 and 90 days prior to contract expiration or the three-year anniversary date of the

Second, Congress at least twice rejected the "election now, hearing later" and "vote now, understand later" approaches reflected in the NPRM. In particular, Congress has repudiated the notion that the Board may conduct elections *before* important issues such as voter eligibility are the subject of an "appropriate hearing," where such issues would be deferred to a post-election hearing. In 1947, after the Board actually conducted such "pre-hearing elections" for a brief period, Congress explicitly prohibited this practice in language added to Sections 9(c)(1) and (4) of the Act.⁹³ In 1959, the "election now, hearing later" and "vote now, understand later" approaches received renewed consideration to the point of being *adopted* in the Senate-passed version of the Landrum-Griffin Act amendments.⁹⁴ Significantly, though authorizing the Board to conduct elections on an expedited basis while deferring important issues to a post-election hearing, the Senate-passed bill explicitly prohibited elections from occurring fewer than 30 days after the filing of a petition. Then-Senator John F. Kennedy—who chaired the Conference Committee—stated that at least 30 days were required between the petition's filing and the election to "safeguard *against rushing employees into an election where they are unfamiliar with*

contract). *Absorbent Cotton Co.*, 137 NLRB 908, 909 (1962); *Gen. Cable Corp.*, 139 NLRB 1123, 1128 (1962). The Act also imposes a statutory election bar that prevents any election from being directed for a 12-month period following any other valid election. NLR Act. Sec. 9(c)(3), 29 U.S.C. 159(c)(3). Recent Board decisions also routinely impose delays of six months to a year in successorship situations where employees change their sentiments regarding union representation. *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011).

⁹³ For a short time before the Taft-Hartley amendments were adopted in 1947, the Board permitted pre-hearing elections, and Congress repudiated this practice by adding language in Sections 9(c)(1) and (4) requiring the Board to conduct an "appropriate hearing" *before* any election, and permitting "the waiving of hearings" *only* "by stipulation" of all parties. 29 U.S.C. 159(c)(1), (4); 61 Stat. 136 (1947), 29 U.S.C. 141 *et seq.*, reprinted in 1 LMRDA Hist. 1 *et seq.* (1974); *NLRB v. SW. Evans & Son*, 181 F.2d 427, 429–30 (3d Cir. 1950); H.R. Rep. 86–741, at 24 (1959), reprinted in 1 NLRB, Legislative History Of The Labor-Management Reporting And Disclosure Act, 1959, 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act . . . a form of prehearing election was used by the NLRB."); S. Rep. 86–187, at 30 (1959), reprinted in 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [Act]"). In 1959, Congress rejected a proposal to permit pre-hearing elections that was part of the Senate-passed version of the LMRDA. See note 97, *infra*, and accompanying text.

⁹⁴ See S. 1555, 86th Cong. § 705 (as passed by the Senate on April 25, 1959), reprinted in 1 LMRDA Hist. 581.

⁸⁵ *Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008) (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272–73 (1974)). See also *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); *Thornhill v. Alabama*, 310 U.S. 88, 102–103 (1940) ("[I]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

⁸⁶ See *NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmation of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.")

⁸⁷ NLRB's 2004 Performance and Accountability Report: Protecting Workplace Democracy, 15–17 and 67 (undated), www.nlr.gov/reports-guidance/reports/performance-and-accountability. In the early 1990s, the Agency's articulated goal was to hold elections within a median of 50 days after the filing of the petition. See General Counsel's Memorandum, GC 93–16, "Major Accomplishments of the Office of the General Counsel for Fiscal Years (1990–1993)," 3 (Nov. 24, 1993), www.nlr.gov/reports-guidance/general-counsel-memos.

⁸⁸ General Counsel's Memorandum, GC–11–09, "Report on Midwinter ABA PP Committee," 19 (March 16, 2011), www.nlr.gov/reports-guidance/general-counsel-memos.

the issues.”⁹⁵ Ultimately, Congress still refused to adopt the Senate-passed arrangement because *elections would take place too quickly*,⁹⁶ and Congress reaffirmed the requirement that the Board conduct an “appropriate hearing” before any contested election, and precluded the Board from deferring voter eligibility and other issues to post-election hearings.⁹⁷

⁹⁵ 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (emphasis added). To the same effect, Senator Kennedy stated “there should be at least a 30-day interval between the request for an election and the holding of the election,” and he opposed proposals that, in his words, failed to provide “at least 30 days in which both parties can present their viewpoints.” 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy); see also H.R. Rep. 86–741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to “guard [] against ‘quickie’ elections”).

⁹⁶ Representative Graham Barden, when describing the Senate-passed bill’s abandonment, explained that pre-election “hearings have not been dispensed with. There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification.” 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714. Cf. H.R. Rep. 86–741, at 76 (1959), reprinted in 1 LMRDA Hist. 834 (indicating that Representative Barden was Chairman of the House Committee on Education and Labor; H.R. Rep. 86–1147, at 42 (1959), reprinted in 1 LMRDA Hist. 946 (indicating that Representative Barden was the ranking House Conference Committee Manager). See also 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (opposing “pre-hearing or so-called quickie election” with indication that “right to a hearing is a sacred right”); H.R. Rep. 86–741, at 24–25 (1959), reprinted in 1 LMRDA Hist. 782–83 (mandatory period between petition-filing and election “guards against ‘quickie’ elections”); 105 Cong. Rec. A8522 (1959), reprinted in 2 LMRDA Hist. 1856 (referencing opposition to pre-hearing election proposal).

⁹⁷ The core concepts underlying the NPRM (“election now, hearing later” and “vote now, understand later”) were not simply matters of peripheral concern when Congress—in 1947 and again in 1959—rejected the notion of having expedited elections without a hearing regarding fundamental election issues like voter eligibility and supervisor status. Based on the original Wagner Act (which did not require elections but provided for an “appropriate hearing” if an election was conducted), the Supreme Court decided in 1945 that the “appropriate hearing” requirement could be satisfied by a post-election hearing. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). As noted above, the Board then conducted a number of prehearing elections prior to 1947, which relegated important election-related issues to a post-election hearing. See note 93, *supra*, and accompanying text. Thus, when the Taft-Hartley amendments explicitly prohibited elections without an “appropriate hearing” before the election, this not only repudiated a practice that had been adopted by the Board, it repudiated the Supreme Court’s *Inland Empire* decision. *Id.*

In 1959, the resurrected concept of having expedited elections, followed by the consideration of important issues in post-election hearings, was part of President Eisenhower’s original “20-point program” that prompted Congress to adopt the Landrum-Griffin Act. See S. Rep. 86–10, at 3 (1959), reprinted in 1 LMRDA Hist. 82 (“In order to speed

Third, it is especially objectionable for the NPRM to exclude from pre-election hearings⁹⁸ evidence regarding *who is eligible to vote*. To state the obvious, when people participate in an election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election’s outcome will even affect them.⁹⁹ In this respect, the NPRM’s

up the orderly processes of election procedures, to permit the Board under proper safeguards to conduct representation elections without holding a prior hearing where no substantial objection to an election is made.”). Not only was this “election first, hearing later” concept considered throughout the 1959 legislative debates, it was *adopted* in the Senate version of the Landrum-Griffin amendments, with a requirement that there be no fewer than 30 days between a petition’s filing and an election. In the words of then-Senator John F. Kennedy, a minimum 30-day period was required in all cases to prevent employees from being forced to vote while they were “unfamiliar with the issues.” See note 95, *supra*, and accompanying text. One version of the Senate approach even provided for a minimum period of 45 days between a petition’s filing and the Board-conducted election. See S. 1555, 86th Cong. § 705 (as passed by the Senate on April 25, 1959), reprinted in 1 LMRDA Hist. 581. Ultimately, the Senate bill’s “election first, hearing later” approach was consciously abandoned, and Congress thus decided, for a second time, that it was *not* permissible for the Board to conduct representation elections unless they were preceded by an “appropriate hearing” that included evidence regarding bargaining unit and voter eligibility issues, among other things. See note 96, *supra*, and accompanying text.

Congress’ failure to pass electoral initiatives in the Labor Law Reform Act of 1977–1978 represented yet another rejection of the “vote now, understand later” approach. See Cong. Res. Serv., Digest of Public General Bills and Resolutions, Final Issue, Part 1, 501–02 (95th Cong. 2d Sess. 1979) (recounting passage of bill in House on Oct. 6, 1977; failure of four cloture motions in Senate from June 13–22, 1978; closest votes 58–41 on June 14 and 58–39 on June 15).

⁹⁸ Under the NPRM, hearing officers ostensibly have the right—in their discretion—to permit certain excluded issues to be considered in particular cases. As noted previously, however, this is another area in which the NPRM is contrary to the Act, because Section 9(c)(1), 29 U.S.C. 159(c)(1), precludes hearing officers from having the authority even to make “recommendations” regarding such issues, *much less conclusively determine*, by excluding any creation of a record regarding such issues, that they will not be considered by the Board or Regional Directors prior to the election.

⁹⁹ An array of problems and incongruities stem from the broad exclusion of voter eligibility issues from pre-election hearings. Under the NPRM, there will be more situations where many employees cast votes in NLRB-conducted elections where, based on the post-election resolution of eligibility issues, the employees learn their votes were not even counted and, even if the union prevailed, the ineligible employees are excluded from any bargaining. Without a pre-election hearing regarding whether certain individuals are eligible voters versus statutory supervisors, many employees will not know there is even a question about whether fellow voters—with whom they may have discussed many issues—will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the

approach would be intolerable in every other voting context, whether it involved a national political election or high school class president. Thus, for good reason, the “appropriate hearing” requirement has consistently been deemed to require that pre-election hearings encompass evidence regarding fundamental questions including voter eligibility.¹⁰⁰ The Board’s recent

employer—could later become grounds for overturning the election. Also, employees ultimately included in the bargaining unit will not know—at the time they voted—whether they will have the support of other employees who, after the election, end up being excluded from the bargaining unit. Congress clearly intended that parties would have the right to present evidence regarding such issues in the “appropriate hearing” required before any non-stipulated election. As noted previously, the point here is not that such issues require resolution before every election; the NPRM adopts the broad-based position that these issues *should not even be the subject of evidence* in the pre-election hearing. This is all the more perplexing given that Congress repeatedly reaffirmed the need for a pre-election hearing to permit evidence regarding such important issues and, in every case, potential pre-election Board review of “any action” by Regional Directors. NLR Act Sec. 3(b), 29 U.S.C. 153(b).

¹⁰⁰ Regarding the NPRM’s provisions for Board-conducted elections without even permitting a pre-election hearing about who is eligible to vote, the NPRM is on the wrong side of history and common sense. See NLR Act Sec. 9(c)(1), (4), 29 U.S.C. 159(c)(1), (4) (requiring an “appropriate hearing upon due notice” before an election, unless there is a “waiver . . . for the purpose of a consent election”). The Senate Report on S. 1958, 74th Cong. (1935), which became the Wagner Act, stated that “the units must be determined before it can be known *what employees are eligible to participate in a choice of any kind*,” and NLR Act Section 9(b) was described as “similar” to the Section 2 of the Railway Labor Act amendments, enacted in 1934, providing that “the Board shall designate *who may participate in the election* and establish the rules to govern the election.” S. Rep. 74–573, at 14 (1935), reprinted in 2 NLRB, Legislative History Of The National Labor Relations Act, 1935, at 2313 (hereinafter “NLR Act Hist.”) (emphasis added). Regarding the Taft-Hartley Act’s rejection of the “election first, hearing later” concept, Senator Taft—cosponsor of the legislation—stated, “It is the *function of hearings in representation cases* to determine whether an election may properly be held at the time; and if so, to decide questions of *unit and eligibility to vote*.” 93 Cong. Rec. 7002 (1947), reprinted in 2 LMRA Hist. 1625 (supplemental analysis of LMRA by Senator Taft) (emphasis added). Regarding the Landrum-Griffin amendments adopted in 1959, Representative Graham Barden—Chairman of the House Committee on Education and Labor, and the ranking House conferee—stated that “[t]he right to a *formal hearing before an election can be directed* is preserved *without limitation or qualification*.” 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714 (emphasis added), describing H.R. Rep. 86–1147, at 1 (1959), reprinted in 1 LMRDA Hist. 934 (conference report). Chairman Barden stated: “The right to a hearing *is a sacred right*. . . .” 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (emphasis added). Consistent with these requirements, the Board itself has repeatedly held that Section 9(c)(1) *requires* that pre-election hearings provide the opportunity to present evidence regarding who is eligible to vote and questions regarding supervisor status, among other things. See, e.g., *Barre-National, Inc.*, 316 NLRB 877 (1995) (finding that hearing officer’s refusal to

decisions have highlighted the importance of determining what employees may be excluded from petitioned-for bargaining units, which prompted a Board majority in *Specialty Healthcare* to change the legal standard governing such determinations.¹⁰¹ In any event, by accelerating elections and especially by deferring an appropriate hearing about important issues like supervisor status and other voter eligibility, the NPRM will be “rushing employees into an election where they are unfamiliar with the issues.”¹⁰²

Fourth, the NPRM reflects an incorrect premise that, when adopting and amending the NLRA, Congress placed primary emphasis on speed, efficiency, and the need to minimize NLRB litigation. We agree it is desirable to avoid inefficiency and protracted delays in the electoral process.¹⁰³ However, the Act’s detailed provisions require that NLRB proceedings consider evidence regarding important issues. Indeed, in addition to at least twice rejecting the “election now, hearing later” and “vote now, understand later” approaches reflected in the NPRM, Congress enacted other amendments requiring the Board to abandon procedures—ostensibly justified by administrative efficiency—because Congress placed primary importance on having issues resolved without

permit evidence regarding supervisory status “did not meet the requirements of the Act” even though the hearing officer—like the NPRM—would have permitted the individual to vote under challenge, subject to post-election proceedings to determine supervisory status). See also *Angelica Healthcare Services Group*, 315 NLRB 1320 (1995); *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999); *Avon Prods., Inc.*, 262 NLRB 46, 48–49 (1982).

¹⁰¹ *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, *supra* note 66.

¹⁰² 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (statement of Sen. John F. Kennedy). See also 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. John F. Kennedy) (election timetable must be long enough so “both parties can present their viewpoints”); H.R. Rep. 86–741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to “guard [] against ‘quickie’ elections”).

¹⁰³ Understandably, Board and court cases speak favorably about having “employees’ votes . . . recorded accurately, efficiently and speedily.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). See also *AFL v. NLRB*, 308 U.S. 401, 409 (1940) (the Wagner Act was designed in part to avoid “long delays in the procedure . . . for review of orders for elections”); *Northeastern Univ.*, 261 NLRB 1001, 1002 (1982) (referring to “expeditiously resolving questions concerning representation”); *Tropicana Prods., Inc.*, 122 NLRB 121, 123 (1958) (“[T]ime is of the essence if Board processes are to be effective.”). Yet, nothing in these cases suggests speed or efficiency should be pursued at the expense of the Act’s principal purpose, which is to safeguard the “fullest freedom” of employees to vote in elections that determine whether or not they will be union-represented. NLRA Sec. 9(b), 29 U.S.C. 159(b).

administrative shortcuts, so that Board members would do the “deciding” to ensure that *all* decisions would reflect “the considered opinions of the Board members.”¹⁰⁴

Fifth, we do not know the precise point in time when shortening the timetable applicable to all Board-conducted elections impermissibly denies employers, unions, and employees the right to engage in speech protected by the Act and the First Amendment.¹⁰⁵ However, by further reducing the time between petition-filing and the election, the NPRM curtails the ability of parties to exercise their right to engage in protected speech. Particularly because the consequences of an election can be long-lasting—regardless of whether employees vote for or against union representation—the NPRM limits the right of *all* parties to engage in protected speech at precisely the time when their free speech rights are most important.

Sixth, the NPRM—though making elections occur more quickly—will significantly lengthen the period it takes to completely resolve election questions, with significantly greater confusion and potential adverse consequences for everyone. Under established Board law, the election date marks the commencement of the statutory obligation to bargain and the duty to refrain from making any unilateral changes regarding wages, hours, benefits, and working conditions.¹⁰⁶ Yet, by having elections take place first, with fundamental issues that have not even been the subject of

¹⁰⁴ H.R. Rep. No. 80–245, at 25 (1947), reprinted in 1 LMRDA Hist. 316; S. Rep. 80–105, 80th Cong., at 8–9, 1 LMRDA Hist. 415. After the Wagner Act’s adoption, the Board created a “Review Section” of attorneys to review transcripts and draft decisions, which a Senate report characterized as disposing of cases “in an institutional fashion.” *Id.* Congress amended the Act to prohibit the Board even from employing attorneys for the purpose of reviewing transcripts, apart from each Board member’s own legal assistants. *Id.* Thus, NLRA Section 4, 29 U.S.C. 154, added to the Act in 1947, states: “The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts.” Congress also amended Section 9(c)(1) by adding language prohibiting hearing officers from even formulating “recommendations” apart from presiding over the hearing to produce a record for Board review. See note 109, *infra*, and accompanying text. In 1959, Congress permitted the Board to delegate responsibility to Regional Directors regarding representation-election issues, but the Act explicitly conditioned this delegation on each party’s right to have the Board review “any action” by Regional Directors. *Id.* This delegation did not expand or modify the authority of hearing officers.

¹⁰⁵ See note 77, *supra*, and accompanying text.

¹⁰⁶ See, e.g., *Mike O’Connor Chevrolet*, 209 NLRB 701 (1974).

a hearing, employers and unions will not even definitively know what employees are even covered by any bargaining that takes place. This will create greater uncertainty and much less predictability for everyone, not the least of whom will be the employees who have already voted, contrary to another of the Board’s primary mandates, which is to foster greater labor relations stability, not less.¹⁰⁷

Seventh, other aspects of the NPRM deviate from the Act’s requirements or are ill-advised.

- The NPRM purports to eliminate a party’s right, *before* any election, to seek review from the full Board regarding Regional Director decisions. This is directly contrary to Section 3(b) of the Act, added by Congress in 1959, which permitted the Board to delegate to Regional Directors the responsibility to decide representation election issues, subject to the explicit condition that parties must have the right to seek Board review of “any action of a Regional Director,” including requests to “stay” the election.¹⁰⁸

- The NPRM authorizes hearing officers to exclude *all* evidence from pre-election hearings regarding fundamental election issues such as (i) what employees are part of the bargaining unit, and what employees are not; and (ii) whether certain individuals qualify as statutory “supervisors” (who are excluded from collective bargaining, who can lawfully speak for the employer with employees regarding election issues, and whose misconduct is attributable to the employer) rather than non-supervisory employees (who are eligible to vote in the election). The NPRM deprives parties of the right to file post-hearing briefs in all cases unless there is “special permission of

¹⁰⁷ *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–63 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.”); *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 678–79 (1981) (management “must have some degree of certainty beforehand . . . without fear of later evaluations labeling its conduct an unfair labor practice”); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (recognizing that a “basic policy of the Act [is] to achieve stability of labor relations”).

¹⁰⁸ NLRA Sec. 3(b), 29 U.S.C. 153(b). The NPRM eliminates the right to seek pre-election Board review, but it purports to leave open the possibility that parties in an “extraordinary” situation may still seek “special permission” to appeal a Regional Director’s ruling to the Board, and even this would also be subject to a “new, narrower standard.” This extremely limited opportunity to seek “special permission” to appeal an “extraordinary” issue to the Board—which the NPRM clearly states would be highly disfavored—is qualitatively different from what Section 3(b) requires, which is the right to seek Board review regarding “any action” taken by Regional Directors including every ruling (or refusal to rule) on all issues.

the hearing officer,” and even then parties may only address “subjects permitted by the hearing officer.” These provisions are contrary to Section 9(c)(1) of the Act, added by Congress in 1947, which prohibits hearing officers even from making “recommendations” about issues raised in pre-election hearings.¹⁰⁹ Under the NPRM, the hearing officer does not merely make recommendations, the hearing officer impermissibly becomes the sole judge and jury regarding all issues that the hearing officer is directed to exclude from the pre-election hearing.

- Although the NPRM delays the consideration of fundamental issues until after the election, it accelerates and expands the hearing requirements applicable to employers. In particular, the NPRM *requires a near-immediate submission by every employer regarding virtually everything that may relate to the election*. This comprehensive, written response is required “no later than the date of the hearing,” which would require its submission within 7 days after petition-filing (assuming the notice of hearing were served on that date), absent special circumstances, and

¹⁰⁹ 29 U.S.C. 159(c)(1). The Act’s legislative history reveals that, in 1947, Congress specifically amended the Act to divest hearing officers of the authority even to make “recommendations” because Congress intended to require every Board member—and nobody else—to do the “deciding” regarding all hearing issues. See also S. Rep. No. 80–105, at 8–9 (1947), reprinted in 1 LMRA Hist. 414–15 (“One of the major criticisms of the Board’s performance . . . has been that the members themselves . . . have fallen into the habit of delegating the reviewing of the transcripts of the hearings and findings” resulting in decisions that fail to reflect the “considered opinions of the Board members.”); *id.* at 25, reprinted in 1 LMRA Hist. 431 (“By the amendment, [the] hearing officer’s duties are confined to presiding at the hearing.”); H.R. Rep. No. 80–245, at 25 (1947), reprinted in 1 LMRA Hist. 316 (“[T]he members of the Board will be expected to do their own deciding.”) (describing H.R. 3020, 80th Cong. (1935)); S. Rep. No. 80–105, at 3 (1947), reprinted in 1 LMRA Hist. 409 (“The amendments reorganize the Board’s structure “by placing upon the members individual responsibility in performing their judicial functions.”); 93 Cong. Rec. 3953 (1947), reprinted in 2 LMRA Hist. 1011 (“[T]he hearing officer . . . shall make no recommendations; he shall simply pass on the hearing to the Board, and the Board itself shall pass on the question of representation, and shall do so on the basis of the facts that are shown in the hearing.”).

In 1959, Congress authorized the Board to delegate the running of hearings to Regional Directors, but this delegation did not change limitations on the authority of hearing officers, and it was explicitly conditioned on giving parties the right to seek Board review of “any action of a regional director,” including pre-election rulings or refusals to rule on voter eligibility issues, supervisor status, and requests to “stay” the election, among other things. NLRA Sec. 3(b), 29 U.S.C. 153(b). As noted in the text, apart from vesting improper authority in hearing officers, the NPRM also improperly purports to eliminate the parties’ right to seek any pre-election Board review of Regional Director decisions and actions.

the NPRM provides that the employer forever waives every argument and defense not set forth in this position statement.

- The NPRM would impose new disclosure requirements affecting personal employee information. Within 7 days after a petition’s filing, the employer is required to electronically transmit a list of employee names (even though evidence regarding individual voter eligibility would be deferred until after the election). As part of the “*Excelsior* list” disclosures, employers would be required to electronically transmit employee names, telephone numbers, and possibly email addresses no later than 2 days after the Regional Director schedules the election. The NPRM does not specify whether the required disclosures encompass personal and/or work information, and it does not consider the fundamental question of whether and to what extent “*Excelsior*” disclosure requirements should be changed by the widespread use of social media and alternative vehicles for communication.¹¹⁰

- The NPRM would eliminate pre-election hearings as to important issues at the discretion of the hearing officer, and this would be compounded by making any post-election review by the Board discretionary. Thus, the NPRM contemplates the Board may never review pre- or post-election decisions of the hearing officer or the Regional Director. Again, this is contrary to Section 9(c)(1) of the Act (which precludes hearing officers even from making “recommendations” regarding pre-election issues) and Section 3(b) of the Act (which gives parties the pre- and post-election right to have the Board consider pre- and post-election requests for review of “any action of a Regional Director,” including pre-election requests to “stay” the election.)

Finally, the NPRM stands in marked contrast to other contexts in which Congress, courts, and federal agencies have emphasized the need to ensure that individuals exercising free choice regarding representation or other

¹¹⁰ For example, constitutional principles regarding privacy and technology have both come a long way since 1969, when the Supreme Court affirmed the *Excelsior* rule in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). As described in the NPRM and Part D of this dissent, we invite public comment regarding existing and alternative vehicles for potential election-related communications, including the option of providing for employees to consent regarding any disclosure of personal information, or the possibility that giving employees their own Agency-sponsored and -protected email accounts could avoid having an automatic surrender (with no means to register disagreement) of employees’ home addresses and personal phone numbers, and businesses’ own proprietary email accounts.

significant matters in a group setting have *more time*, not less, to receive information and to evaluate their options:

(a) Employers in union and nonunion work settings are required to give employees (or their unions) a minimum of *60 days’* written notice in advance of any plant closing or mass layoff¹¹¹ so they can have the “information necessary for each of them to take responsible action.”¹¹² The 60-day period is a minimum, and is “not intended to discourage . . . longer periods of advance notice.”¹¹³

(b) Congress has required that employees be given at least *45 days* before being required to sign a one-time waiver of age discrimination claims in exchange for severance pay or other benefits.¹¹⁴ The 45-day period begins running only *after* employees have received complete written information regarding members of the “class, unit, or group of individuals covered,” including the positions and ages of people being retained versus separated, among other things, and they must be given 7 additional days to revoke any waiver agreement.

(c) In order to give class action plaintiffs enough time to decide whether to opt-out of a Rule 23 class action, the Federal Judicial Center states that a minimum notice period of *30 days* is necessary, and it recommends *60–90 days*.¹¹⁵

(d) For Fair Labor Standards Act collective actions, courts generally allow *at least 30 days*—and a median of 60 days—for potential plaintiffs to opt into the action.¹¹⁶

(e) Department of Labor guidelines implementing the requirements of LMRDA Title IV for conducting

¹¹¹ Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.* (“WARN”).

¹¹² 54 FR 16059 (1989) (preamble accompanying Department of Labor regulations interpreting WARN).

¹¹³ 20 CFR 639.2.

¹¹⁴ This requirement is part of the Older Workers Benefit Protection Act (“OWBPA”), Pub. L. No. 101–433, 104 Stat. 978 (1990). OWBPA added Section 7(f) to the federal Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. 626(f), which articulates the minimum requirements for a waiver of ADEA rights to be considered enforceable as a “knowing and voluntary” agreement. The 45-day period is a prerequisite to enforceability of any age discrimination waiver requested in connection with “an exit incentive or other employment termination program offered to a group or class of employees.” ADEA Sec. 7(f)(1)(F)(ii), 29 U.S.C. 626(f)(1)(F)(ii).

¹¹⁵ Federal Judicial Center, *Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide*, 4 (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf).

¹¹⁶ See Charlotte Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 Miss. L.J. 443, 489–91 (2010).

elections of local union officials refer to a timeline providing 4 to 6 weeks from the nomination of candidates to the election date.¹¹⁷

(f) In addition to applying its own 56-day and 42-day targets regarding representation elections,¹¹⁸ the Board has established a 30-day open period for the filing of a rival union or decertification election petition during the term of a collective bargaining agreement. Such petitions must be given to the Board between 60 and 90 days prior to the agreement's expiration.¹¹⁹ This means that, even in situations involving multi-year collective-bargaining agreements where employees may have had nearly three years to assess the merits of collective-bargaining representation by the incumbent union, they are still afforded 30 days to decide whether to take the formal step of filing a petition seeking to oust the incumbent.

(g) It is particularly relevant to recognize a substantial body of judicial precedent that governs campaigning in political elections.¹²⁰ Numerous courts have ruled that all but the most narrowly drawn durational limitations on political electioneering are impermissible government restrictions of free speech.¹²¹ Further, the Supreme

Court has declared: "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign."¹²² Neither should it be the Board's function to curtail opportunities for discussion and debate in representation elections.

In short, a substantial universe of laws, regulations, and legal decisions specifically address the time needed for people to review and understand important issues before casting a vote or signing on the dotted line. All of these have one thing in common: They require *more* time, not less. Against the backdrop of these examples, we have difficulty believing that federal labor law works in reverse. The thrust of the NPRM—unintended or not—is that employees make better choices when they vote first, and understand later. Congress and other state and federal regulators have rejected such reasoning. Given that the Board's primary responsibility is to safeguard employee free choice, especially in elections, the NPRM is deficient in its failure to carefully evaluate these other available sources of information. These are additional issues that deserve careful consideration and will hopefully be the subject of public comment in this rulemaking.

B. The NPRM Does Not Address Substantive Election Misconduct or Target Election Cases That Involve Too Much Delay

The NLRA involves more than procedures in representation cases. The Act's *substance* consists of important election-related rights, obligations, and constraints, including the prohibition against restraint or coercion by employers or unions regarding any employee's exercise of protected rights.¹²³ As noted previously, the reasons for reissuing this NPRM are far from clear, and no overt justification involves unlawful conduct during election campaigns. However, it is well known that many union advocates have argued for greatly expedited representation elections based on

alleged employer misconduct that, it is claimed, adversely affects the outcome.¹²⁴ To the extent that unlawful election-related conduct is the problem, the NPRM leaves this virtually unaddressed. The NPRM proposes no changes regarding the Board's treatment of unlawful election conduct by employers or unions, nor does the NPRM invite public comment regarding better ways to remedy these situations.

Moreover, to the extent that the NPRM seeks to address unacceptable election delay, the objective evidence shows such delay occurs, at most, in only a very small percentage of Board-conducted elections. These relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections.

Thus, the graph below, based on a breakdown of all NLRB initial elections conducted between 2008 and 2010, illustrates this point. In more than 90 percent of those cases, elections occurred within 56 days after the filing of the petitions (these cases are reflected in the graph area appearing in white, marked "A"). As noted previously, this represents a dramatic improvement over the Board's track record since the early 1960s. Conversely, less than 10 percent of the cases identified in the graph involved elections that occurred more than 56 days after petition-filing (these delayed cases are reflected in the graph area shaded in black, which is barely visible, to the right of the 56-day line).

¹²⁴ These arguments were referenced in the preamble accompanying the final election rule adopted by the Board in 2011 (which has now been rescinded). See 76 FR 80138 (2011) (prior final rule regarding representation case procedures with explanatory preamble). The preamble noted that many labor organizations cited research studies indicating that shorter election periods would result in "fewer unfair labor practices," although the preamble also acknowledged that various management-side organizations "question[ed] the validity of such studies." *Id.* at 80149 n.33. For present purposes, we find it unnecessary to comment on this debate. However, it is predictable in contested elections that the union will favor representation, the employer will oppose it, and advocacy by both sides is entirely permissible under the Act. Indeed, election campaigns are intended to provide the opportunity for such advocacy. Conversely, unlawful conduct by any party should not be countenanced, and the Board already has authority to address such misconduct. As noted in Part D below, if the Board determines that future rulemaking is necessary, we would support directly addressing whether and how the Board could devise more effective ways to deal with election-related misconduct by employers and unions.

¹¹⁷ Office of Labor-Management Standards, *Conducting Local Union Officer Elections: A Guide for Election Officials*, 4 (2010), <http://www.dol.gov/olms/regs/compliance/localelec/localelec.pdf>.

¹¹⁸ See notes 88–90, *supra*, and accompanying text.

¹¹⁹ *Leonard Wholesale Meats*, 136 NLRB 1000 (1962) (petition must be filed more than 60 days but less than 90 days before the expiration of the contract), modifying in relevant part *Deluxe Metal Furniture Company*, 121 NLRB 995, 999, 1000 (1958).

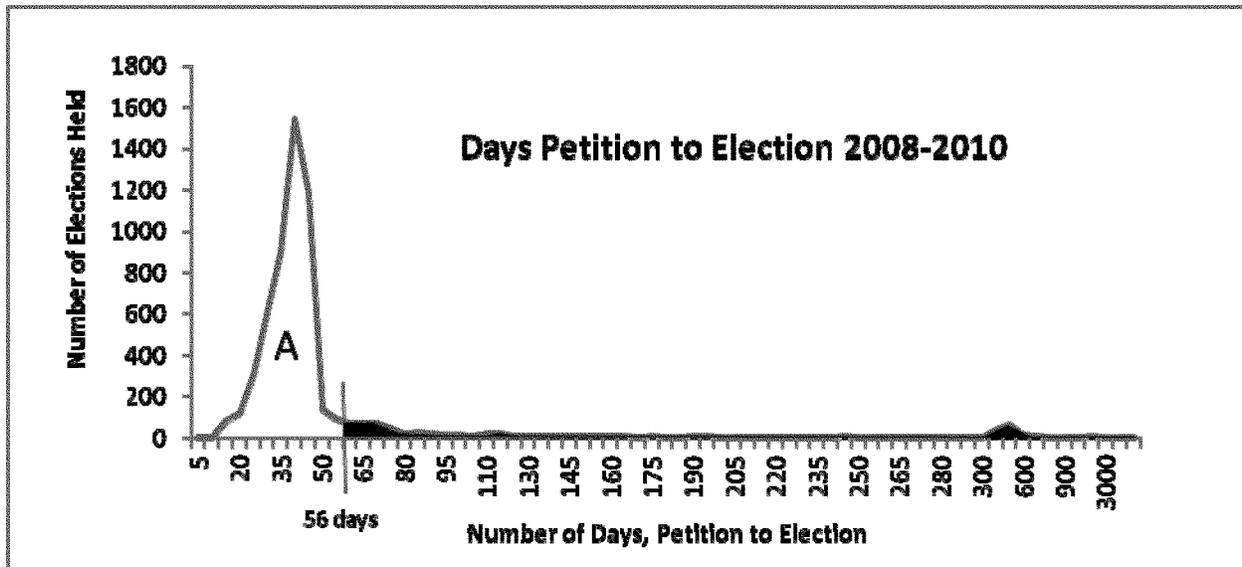
¹²⁰ Courts have long recognized the similarities between representation elections and political elections. See *Wirtz v. Hotel, Motel & Club Emp. Union, Local 6*, 391 U.S. 492, 504 (1968) (when creating representation elections, "Congress' model of democratic elections was political elections in this country"); *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 733 (9th Cir. 1985) ("Congress intended representation elections to follow the model of elections for political office."). See also *NLRB v. A.J. Tower Co.*, *supra* at 332 (rationale for opposing post-election challenges in political elections also applies to representation elections). Therefore, the courts' regulation of conduct in political elections may be particularly instructive in the Board's regulation of representation elections and provide support for the assertion that individual free choice in representation elections requires more time and information, not less.

¹²¹ See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012) (enjoining state ban

on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454–55 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election).

¹²² *Republican Party of Minnesota v. White*, 536 U.S. 765, 782 (2002), citing *Brown v. Hartlage*, 456 U.S. 46, 60 (1982).

¹²³ See note 65, *supra*, and accompanying text.



The case distribution in the graph shows there is no evidence of delay evenly apportioned across the universe of Board-conducted elections, i.e., delay affecting a large group of cases to a significant degree. In fact, the graph is far from a standard bell curve; it does not show *any kind of significant distribution of cases greater than 56 days* between petition-filing and election.¹²⁵ We are not the first to note this wildly uneven statistical distribution in the context of an asserted “systemwide delay” problem. An earlier study addressing the same distribution findings accurately described the scattering of cases along the extended time continuum beyond 56 days as the “long tail” of election cases.¹²⁶ In other words, empirical data seem to disprove the existence of a systemwide delay problem, and instead demonstrate that delay is only an issue confined to a discrete minority of cases, possibly for issues unique to those cases.

The NPRM contains many references to increased speed and efficiency, but fails here by making no differentiation between the overwhelming majority of elections that already take place quickly and the relatively small number that do not. Instead, the NPRM rewrites the procedures that govern *all cases*, the overwhelming number of which *already* take place quickly.

Suppose, for instance, that the U.S. Fish and Wildlife Service had a

mandate to stop the poaching of manatees which reside almost exclusively in Florida.¹²⁷ It would defy logic and common sense to deploy anti-poaching rangers in all 50 states, when most states do not even have bodies of water where manatees live. This is precisely the approach reflected in the NPRM. It applies almost entirely to elections that do *not* involve significant delay, while failing to target the specific causes of delay in those few cases where employees are denied the opportunity to vote in a timely manner.

Every federal agency has a responsibility to take action that bears a rational relation to relevant facts and the matters being addressed.¹²⁸ In this respect, the NPRM involves poor public policy and is not rational, even putting aside the many ways in which it is contrary to statutory mandates (see Part A above). At a minimum, there needs to be a better fit between rulemaking in this important area and any problems that ostensibly warrant Agency action.

C. The NPRM Does Not Reflect a *De Novo* Examination of Important Election Issues

We recognize and appreciate that our colleagues have afforded the opportunity for renewed public comment on this NPRM. However, the NPRM does not reflect a *de novo* examination of relevant issues.

Although the Board has four new members and the year is 2014, the NPRM is essentially the same document that the Board issued in 2011. We have three problems with this approach.

First, it is disappointing that the current Board has not undertaken a *de novo* examination of relevant issues *before* conceiving and issuing yet another comprehensive set of proposed election regulations. The Board is an independent agency first and foremost. We would serve the public better by “listening first, formulating later” instead of “formulating first, listening later.” Once the NPRM has issued, it necessarily reflects a conscious set of public policy choices or preferences. It follows that the NPRM’s issuance may unduly tether the Board majority to the proposed regulations. Just as the exchange of views during bargaining leads to improved outcomes and furthers industrial peace, so does engagement with the public. The Act itself disfavors the assumption that there is a “perfect initial offer” leaving nothing to discuss. See *General Electric*, 150 NLRB 192 (1964), *enf’d* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970). It would be a good practice if the Board took this lesson to heart before it formulates any regulatory proposal.

Second, the NPRM does not evaluate more recent Agency initiatives relevant in assessing whether the NPRM is necessary now or whether alternative measures might more effectively address whatever underlying issues motivate the NPRM. The Act’s election process is a dynamic system, with its inherent fairness dependent on factors beyond the simple passage of time between petition and election. Indeed, many of

¹²⁵ As noted previously, 56 days is the Board’s own traditional target for conducting at least 90 percent of elections, a target that the Board has surpassed in recent years. See notes 88–90, *supra*, and accompanying text.

¹²⁶ See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 Indus. & Lab. Rel. Rev. 3, 10 n.9 (Oct. 2008).

¹²⁷ Manatees, sometimes known as “sea cows,” are large aquatic marine mammals considered to be relatives of the elephant. See <http://en.wikipedia.org/wiki/Manatee>; <http://www.defenders.org/florida-manatee/basic-facts>. The Florida manatee is Florida’s state marine mammal. *Id.*

¹²⁸ *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

these factors are under the Board's control, such as internal Board initiatives, General Counsel initiatives and the underlying representation case law. For example, the NPRM does not specifically address measures that the Board itself might take to speed up its own decisions in representation cases, rather than shortening election timeframes by forcing a regulatory mandate on the parties. The NPRM does not reflect any changes based on the General Counsel's new initiative to promote "nip-in-the-bud" injunctions against discriminatory discharges during election campaigns. One might easily consider this approach more protective of employee rights than simply decreasing the time employees have to listen to all sides, exchange views with one another, and make up their minds. Similarly, the NPRM does not recognize the impact of *Specialty Healthcare*,¹²⁹ which makes smaller units easier to organize more quickly and highlights the importance of questions regarding the inclusion or exclusion of certain employee groups from the bargaining unit.

Third, the Board majority's "reboot" of the 2011 election proposal does not inspire confidence in the current Board's issuance of a new election NPRM. The NPRM proposal published on June 22, 2011 generated more than 65,000 sets of written public comments, with a further 66 individuals representing nearly as many different organizations making oral presentations to the Board. We commend our colleagues for incorporating by reference the entire administrative record of the 2011 rulemaking, including "numerous arguments both for and against the proposals," rather than requiring the public to resubmit the same comments. It is also important to recognize that the NPRM states "[a]ll of this material will be fully considered by the Board in deciding *whether* to issue any final rule" (emphasis added). However, we regret that the current Board has not fully considered this voluminous material *before* determining the contours of the new NPRM issued today.

The conduct of elections lies at the heart of the Board's statutory responsibilities, and the current Board's rulemaking regarding these issues should not involve an examination that commences after a new proposed rule has already been published. It would be far better to take a different approach—if an NPRM is deemed necessary—based on *de novo* review of relevant issues by the current Board.

D. The Board Should Consider an Alternative Path Regarding Potential Election Reforms

We fully agree that the Board should do everything within its power to conduct representation elections in a way that gives effect to employee free choice. We also support rulemaking to the extent necessary to address relevant issues consistent with the Board's authority and the Act, and we agree that the Board should work aggressively in carrying out its statutory responsibilities to everyone covered by the Act.

Our opposition to the NPRM stems from its variance from choices already made by Congress, in addition to provisions that predictably will cause unfairness and adverse consequences for many parties. The most important threshold question to address, of course, is whether and why rulemaking is necessary. Regarding the substance of any rulemaking, we strongly believe the Board should consider a different approach which, if pursued in the future, would focus on the following issues. We believe the Board will benefit from public comment regarding each of these suggestions.

1. *Address the "Speed" Issue.* The Board should acknowledge that freedom of choice requires a reasonable minimum time period, *before* the election, to avoid "rushing employees into an election where they are unfamiliar with the issues."¹³⁰ As noted previously, the Board has applied a target time period of 42 days for the scheduling of contested elections,¹³¹ which constitutes—at least implicitly—an indication that 42 days is more appropriate than a shorter standard period. The Act's legislative history—especially the extensive consideration of potential "election first, hearing later" arrangements in 1959—reflected an across-the-board consensus that fewer than 30 days was too short. Congress has adopted 60- and 45-day time period requirements governing WARN notification and age discrimination waivers regarding a "group" or class of employees, and other minimum time periods have been deemed appropriate in other contexts. Consistent with these minimum time periods, the Board should consider public comments regarding the creation of a minimum time period between a petition's filing and any contested election. The establishment of a guaranteed minimum period would permit everyone to

consider other election-related proposals on their own merit, and there would also be greater consistency in assuring employees their "fullest freedom" of choice in representation elections.¹³²

2. *Address the Specific Issues Responsible for Delayed Elections.* The Board has an excellent overall track record when conducting prompt elections. Yet, as noted above, there have been particular cases—few in number—where elections and related issues have taken too long to resolve. Rather than engaging in a wholesale revision of the procedures applicable to all elections, the Board should closely examine the particular reasons that have contributed to those relatively few elections that have involved unacceptable delay (depicted as the statistical long "tail" in the above graph and described in the Appendix accompanying this dissent). Here, we agree with the majority that a prime candidate for potential change is the Board's "blocking charge" doctrine (which permits parties to indefinitely delay an election by filing certain unfair labor practice charges). More generally, however, given that the Board's history of conducting elections now spans nearly 80 years, there is no lack of data regarding factors that have contributed to the relatively small number of cases involving too much time. This data should be carefully examined, with a view towards targeting the problem cases, rather than reformulating the procedures governing all elections.

3. *Consider Reforms to the Board's Internal Procedures So Election Issues Are Addressed More Quickly.* One of the biggest contributors to the delays associated with resolving election-related issues is the time that particular cases are pending before the Board, rather than in regional offices. Many Board procedures are mandated by the Act. However, we firmly believe that the Board has not exhausted the available avenues to expedite the internal processing of election cases so they can be decided more quickly by the Board. This is an area uniquely suited for the Board to take the initiative and formulate changes since the Board is most familiar with its own procedures. In any election-related rulemaking, the Board should propose and solicit public input regarding a variety of different ways it could "fast track" its own role in reviewing and resolving election issues.

4. *Aggressively Pursue Measures to Prevent and Remedy Unlawful Election Conduct.* To the extent that unlawful

¹³⁰ 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (statement of Sen. John F. Kennedy). See also note 97, *supra*, and accompanying text.

¹³¹ See note 88, *supra*, and accompanying text.

¹³² NLR Sec. 9(a), 29 U.S.C. 159(a).

¹²⁹ *Supra* note 66.

employer or union conduct occurs during any election, this is already prohibited by the Act, and warrants aggressive Board enforcement and the formulation of effective remedies. As noted above, one of the greatest deficiencies in the NPRM is its failure to address these substantive issues in any meaningful way. The Act deserves to be enforced by the Board, and to be respected by the parties, as much as any other federal or state legal requirements. The Board should propose ways in which the Board can more effectively handle litigation regarding alleged substantive misconduct, which can include injunctions and other interim remedies pursued under Section 10(j) of the Act. The Board should also consider more aggressive use of potential civil and criminal contempt sanctions to the extent available under the Act and federal law. Of course, the Board may not presume the existence of unlawful conduct, and much of the Board's statutory responsibility involves the adjudication of unfair labor practices if they are alleged. However, when violations of the Act occur, including instances where they affect elections, they should be dealt with promptly and aggressively by the Board, and we support further consideration of ways in which employer or union violations can be more effectively remedied.

5. *Deal More Directly with the Need to Preserve and Enhance Privacy.* As noted above, we live in an age where advanced technology is available to nearly all the workers that the Board strives to serve. Current discourse regarding such technology involves concerns about preserving privacy and restricting the broad-based dissemination of personal information. We support the NPRM's solicitation of public input concerning the safeguarding of privacy interests regarding personal information, and the possibility of giving employees the opportunity to choose whether and how any personal information might be disclosed.

Like our colleagues, we are interested in public comment regarding a possible Agency-sponsored protected communications portal (e.g., a sealed-off email system) for use by petitioners and employees rather than the forced surrender of private information by employees and employers, and whether such an approach could reduce Board litigation regarding ancillary issues implicated in the involuntary disclosure of email addresses, phone numbers, and other personal information.¹³³ We join

¹³³ For example, reliance by the Board on an Agency-sponsored communications portal or

in our colleagues' request for constructive input regarding this option and any alternative views or related concerns in this important area.

Summary. We believe that these types of initiatives, if backed by the full Board, could receive substantial support from unions, employees, and employers, among others. Our approach would bolster the Board's enviable track record of conducting elections with integrity and transparency. In any event, the most important starting point is to have a *de novo* examination of whether and why there should be further rulemaking. This would provide an essential foundation by identifying issues to be addressed, and it would instill greater public confidence in any resulting Board initiatives.

E. Conclusion

As noted above, we do not fault our colleagues for endeavoring to improve the Board's handling of representation elections. We acknowledge that the Board shoulders the "special function of applying the general provisions of the Act to the complexities of industrial life."¹³⁴ Neither the Act nor Board members are frozen in time. We hope it will be possible to reach agreement regarding these important issues.

However, the Board lacks the authority to adopt changes that are contrary to legislative choices made by Congress. And putting aside this issue, it would be far better to have rulemaking regarding a more manageable set of potential changes, which could provide a much more orderly process for evaluating and explaining necessity, consistency with the Act, and potential better alternatives. The scope and magnitude of the complex technical changes proposed in the NPRM span virtually every stage of the election process, and this makes it extremely difficult even to conduct a meaningful appraisal of particular changes or the NPRM as a whole.

Our colleagues and many others strongly believe that policy adjustments

currently existing vehicles for communication could eliminate the need for Board litigation regarding an array of issues otherwise implicated in forced employer or employee disclosure of personal or business email addresses and phone numbers, including alleged surveillance of communications on employer email systems, the potential invalidation of lawful policies stating that employees and others can have no expectation of privacy when using employer-provided technological resources, alleged discriminatory employer restrictions on non-business computer use, alleged misuse of personal information by unions, and the potential "spamming" of personal or business email accounts, among other things.

¹³⁴ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (citation omitted).

regarding the Act are long overdue. We believe representation elections must be conducted fairly, and there are some changes that we support. But the NPRM directly implicates the Act's cornerstone requirement, vested exclusively in the Board, which is to safeguard employee freedom of choice. As to this issue, the Board is not permitted to write from a clean slate. Indeed, more than 50 years ago, arguments were raised that "the time has come for a reevaluation of the basic content of collective bargaining," and the Supreme Court stated: "[T]hat is for Congress. . . . [W]e do not see how the Board can do so on its own."¹³⁵ The same admonition applies with equal force here.

For these reasons, we dissent from this NPRM.

Appendix to Dissenting Opinion: How many representation cases involve delays based on pre-election issues the NPRM would remove from the pre-election hearing?

As noted in Part A of our dissent, we believe the NPRM fails to adequately target the causes responsible for delayed representation cases. In the hope of providing a starting point for further analysis in public comments, we conducted an extremely preliminary examination of available case-processing statistics during the relatively short time available for the current Board's consideration of this NPRM. We have relied on the Board's own operational and performance standards looking at all representation cases involving initial elections in a three-year period (fiscal years 2008–2010).¹³⁶ Over this three-year period, the Board handled a total of 5664 representation cases involving initial elections.

This preliminary examination reinforces our view that the NPRM does not effectively identify or address the reasons for delays in the resolution of some representation cases. Our review focused on the following variables and

¹³⁵ *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 500 (1960).

¹³⁶ In the Board's published Final Election Rule, now withdrawn, the prior Board majority criticized former Member Hayes' consideration of the Agency's case processing goals as measures of the timely processing of cases, essentially asserting that these goals have no independent normative value. The majority also dismissed as irrelevant public comments that raise the question whether delay in case processing is demonstrable. See Final Rule, 76 FR at 80155. However, the operational goals applied by the Board for decades, that were created and relied upon by bipartisan Board majorities, certainly provide an appropriate starting point for evaluating the Board's track record handling representation cases. We also invite public comment regarding alternative methods and metrics.

produced several observations as summarized below.

First, we identified representation cases involving initial elections where there was an unacceptable overall delay (from petition-filing until the final resolution of the case, regardless of whether there was a hearing and how quickly the election occurred). Using the Board’s internal benchmark, we regard cases as involving an unacceptable overall “delay” if they were closed more than 100 days after petition-filing. During the three-year period, approximately 85 percent of the cases were closed within 100 days, and only 15 percent involved an overall delay.¹³⁷

Second, 5,185 cases—91 percent of the total—were stipulated elections or consent elections that did not even

involve contested pre-election proceedings. The NPRM’s changes would be applicable to all of these cases even though pre-election hearing issues were not even in dispute and, therefore, could not have contributed to any delay.

Third, over the three-year period, contested issues required pre-election hearings in 479 cases, amounting to nine percent of the total. A majority of these cases involving pre-election hearings—269 cases or five percent of the total—did not involve any overall delay (i.e., they were closed within 100 days after petition-filing).

Fourth, 210 cases involving pre-election hearings and an overall delay—roughly four percent of the total—also had a pre-election delay (i.e., between petition-filing and the election).¹³⁸ However, only 16 percent of these cases

involved a delay based on disputed issues that the NPRM would remove from the pre-election hearing, and this constitutes less than 1 percent of the total number of representation cases over the three-year period.¹³⁹ By comparison, as noted in Part B of our dissent, the NPRM would change the timetable and procedures applicable to all representation elections.

The following breakdown summarizes all representation cases involving pre-election hearings and an overall delay (more than 100 days between petition-filing and the Board’s closing of the case) and indicates how many involved delayed elections (more than 56 days between petition-filing and the election) attributable to disputed pre-election issues that would be changed by the NPRM:

REPRESENTATION CASES INVOLVING PRE-ELECTION HEARINGS AND OVERALL DELAYS
[More than 100 days between petition-filing and being closed), fiscal years 2008–2010]

Description	Number of cases	Percent of total hearing cases involving overall delay	Percent of total representation cases
Elections occurred within 56 days (i.e., no election delay)	56	27	1.1
Election delays attributable to issues unaffected by NPRM	120	57	2.3
Election delays caused by issues the NPRM would remove from pre-election hearings	34	16	.6
Totals	210	100	4

VII. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601 *et seq.*, requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives, wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].” E.O. 13272, Sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”). An agency is not required to prepare an initial regulatory

flexibility analysis for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

As explained below, the Board concludes that the proposed amendments will not affect a substantial number of small entities. In any event, the Board further concludes that the proposed amendments will not have a significant economic impact on such small entities. Accordingly, the Agency Chairman has certified to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”) that the proposed amendments will not have a significant economic impact on a substantial number of small entities.

The RFA does not define either “significant economic impact” or

“substantial” as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, “what is ‘significant’ or ‘substantial’ will vary depending on the problem that needs to be addressed, the rule’s requirements, and the preliminary assessment of the rule’s impact.” See *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, Office of Advocacy, U.S. Small Business Administration at 17 (available at www.sba.gov) (“SBA Guide”).

The Board has determined that the proposed amendments would not affect a substantial number of small entities within the meaning of 5 U.S.C. 605(b). There are approximately six million private employers in the United States, the vast majority of which are classified as small entities under the Small Business Administration’s standards.¹⁴⁰

¹³⁷ The proportion of representation cases involving initial elections where an overall delay occurred was 16.5 percent in fiscal year 2008, 15.6 percent in fiscal year 2009, and 13.7 percent in fiscal year 2010.

¹³⁸ For purposes of this review, consistent with the Board’s own benchmarks, we considered elections to have been “delayed” if they occurred more than 56 days after the filing of the petition.

¹³⁹ The “overall delay” cases that also had delayed elections, based on pre-election hearing issues that the NPRM purports to address, involved questions like supervisor status or voter eligibility which, under the NPRM, would be relegated to post-election proceedings. Delayed elections in other cases were attributable to hearing issues or other factors that would be unaffected by the NPRM (e.g., questions regarding statutory coverage, blocking charges).

¹⁴⁰ The Small Business Administration estimates that of the roughly six million private sector employers in 2007, all but about 18,300 were small businesses with fewer than 500 employees. *Source*: SBA Office of Advocacy estimates based on data from the U.S. Department of Commerce, Bureau of the Census, and trends from the U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics.

Nearly all of those employers are subject to the Board's jurisdiction.¹⁴¹ Because, under section 9 of the Act, parties have filed fewer than 3,300 petitions per year for the past five years and the Board has conducted fewer than 1,800 elections per year for the past five years,¹⁴² the number of small employers participating in representation proceedings each year is less than one-tenth of one percent of the small employers in this country. Moreover, the employers that would be affected by the proposed amendments are not concentrated in one or a few sectors, but are found in every sector and industry subject to the Board's jurisdiction. Accordingly, the Board finds that the proposed amendments would not affect a substantial number of small entities within the meaning of 5 U.S.C. 601.

In any event, the Board estimates that the net effect of the proposed amendments could be to decrease costs for small entities. While certain of the proposed amendments—when viewed in isolation—could result in small cost increases, those costs should be more than offset by the many efficiencies in the Board's representation procedures created by the proposed amendments. For example, by permitting electronic filing, providing greater transparency and compliance assistance, reducing the length of evidentiary hearings, deferring litigation of issues that may be rendered moot by elections, deferring requests for review that may be rendered moot by elections, consolidating requests for review into a single proceeding, and making such review discretionary, the proposed amendments should help small entities conserve resources that they might otherwise expend when they are involved in a representation case under the Board's current rules and regulations.

To the extent that any individual requirements—isolated from the proposed amendments' overall efficiencies—could impose additional costs on small entities, those added

¹⁴¹ The principal private sector employers exempt from the Board's jurisdiction are employers of agricultural laborers and firms covered by the Railway Labor Act, 45 U.S.C. 151. See section 2 of the National Labor Relations Act, 29 U.S.C. 152 (2), (3). Employers whose connection to interstate commerce is so slight that they do not satisfy the Board's discretionary jurisdictional standards are also treated as exempt. See 29 U.S.C. 164(c); An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board's Web site, www.nlr.gov.

¹⁴² See NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2009–2012); Number of Petitions Filed in FY13 and Number of Elections Held in FY13, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections> (reporting that the annual number of representation elections conducted decreased from 1,790 to 1,594).

costs would be de minimus. Indeed, even when aggregated, the potential additional costs that a small entity could face in a given representation proceeding would still be minimal. For example, four new requirements in the proposed amendments might impose a cost on small employers: (1) Posting and electronic distribution of the Board's preliminary election notice and electronic distribution of the final notice; (2) completing the substantive portions of the Statement of Position form at or before any pre-election hearing; (3) providing the petitioner and the regional director with a list of the names and job information, and providing the regional director with contact information, for the employees at issue at or before any pre-election hearing; and (4) providing the petitioner and the regional director with additional job and contact information concerning employees eligible to vote following approval of an election agreement or issuance of a direction of election.

The proposed amendments' new notice requirements would involve merely posting paper copies of notices that will be sent to the employer by the regional director, as well as taking the few minutes to electronically distribute electronic versions of those notices, also supplied by the regional director, if the employer already regularly communicates with its employees over email or via a Web site. The substantive portions of the Statement of Position form would only require a small employer to reduce to writing the positions on several issues that it would need to formulate, in any event, to effectively prepare for a pre-election hearing and which parties largely must already articulate at such a hearing under the current rules. And by entering into an election agreement, as do the vast majority of employers under the Board's current rules, a small employer would not have to complete the Statement of Position at all. The additional information to be supplied regarding voting employees should already be contained in employers' records, increasingly in readily retrievable electronic form, thereby allowing small employers to assemble such electronic lists without expending significant resources. Moreover, the typically small sizes of bargaining units at issue in Board elections (with medians ranging from 23 to 26 employees over the last decade) suggests that small employers will not be significantly burdened by having to provide the additional information.

For these reasons, the Board concludes that several of the proposed

amendments would result in little to no adverse economic impact on the relatively few small entities who participate in representation proceedings each year, while the proposed amendments as a whole should actually reduce the costs incurred in connection with representation proceedings. Accordingly, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

These proposed amendments would not impose any information collection requirements. Accordingly, they are not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.

The NLRB is an agency covered by the PRA, 44 U.S.C. 3502(1) and (5). The PRA establishes rules for such agencies' "collection of information." 44 U.S.C. 3507.

The Board has considered whether any of the provisions of the proposed amendments provide for a "collection of information" covered by the PRA. Specifically, the Board has considered the following proposed provisions that contain petition and response requirements, posting requirements, and requirements that lists of employees or eligible voters be filed:

(1) Under the proposed amendments, as under the current rules, parties seeking to initiate the Board's representation procedures are required to file a petition with the Board containing specified information relevant to the Board's adjudication of the specific question raised by the filing of the petition. Under the proposed amendments, non-petitioning parties to such representation proceedings are required to file a Statement of Position setting forth the parties' positions and specified information relevant to the Board's adjudication of the question raised by the petition. Employers are currently asked to supply the portion of the information specified in the proposed amendments relating to their participation in interstate commerce.

(2) Under the proposed amendments, employers are required to post an initial and final notice to employees of an election. The second posting requirement exists currently. Employers are currently asked but not required to post the first notice (in a different form).

(3) Finally, under the proposed amendments, as under current case law, employers are required to file a list of eligible voters prior to an election. Under the proposed amendments, a preliminary list of employees is required at or before the pre-election

hearing. For the reasons given below, the Board believes that none of these actions constitutes a collection of information covered by the PRA.

The PRA exempts from the definition of “collection of information” “a collection of information described under section 3518(c)(1)” of the Act. 44 U.S.C. 3502(3)(B).

Section 3518(c) provides:

- Except as provided in paragraph (2), this subchapter shall not apply to the collection of information—

- During the conduct of—

- An administrative action or investigation involving an agency against specific individuals or entities;

- This subchapter applies to the collection of information during the conduct of general investigations . . . undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

44 U.S.C. 3518(c). The legislative history of this provision makes clear that it is not limited to prosecutorial proceedings. The Senate Report on the PRA states, “Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties.” S. Rep. No. 96–930, at 56 (1980).

The Board believes that all of the above-described provisions of the proposed amendments fall within the exemption created by sections 3502(3)(B) and 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the NLRA is “an administrative action or investigation involving an agency.” A representation proceeding is also “against specific individuals or entities” within the meaning of section 3518(c)(1)(B)(ii). The Board’s decisions in representation proceedings are binding on and thereby alter the legal rights of the parties to the proceedings. For example, the employer of any employees who are the subject of a petition is a party to the resulting representation proceeding.¹⁴³ If the Board finds in a representation proceeding that a petition has been filed concerning an appropriate unit and that employees in that unit have voted to be represented, the Board will thereafter certify the petitioner as the employees’ representative for purposes of collective bargaining with the employer. As a direct and automatic consequence of the Board’s certification, the employer is legally bound to recognize and bargain with the certified representative. If the employer refuses to do so, it commits an

unfair labor practice.¹⁴⁴ If such an employer is charged with a refusal to bargain, it is precluded from relitigating in the unfair labor practice proceeding any issues that were or could have been raised in the representation proceeding.¹⁴⁵ Finally, if such an employer seeks review of the Board’s order in the unfair labor practice proceeding or the Board seeks to enforce its order in a court of appeals, the record from the representation proceeding must be filed with the court and “the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.” 29 U.S.C. 159(d); see also *Boire v. Greyhound Corp.* 376 U.S. 473, 477–79 (1964).¹⁴⁶

Three limitations on the filing and posting requirements in the proposed amendments lead to the conclusion that they fall within the statutory exemption. First, the amendments impose requirements only on parties to the representation case proceeding, an administrative action or investigation against specific individuals or entities within the scope of section 3518(c)(1)(B)(ii). Second, any adverse consequences for failing to provide the requested information are imposed only on persons and entities that are party to the representation proceeding. Third, the possible adverse consequences that may result from noncompliance do not reach beyond the representation case proceeding. The proposed amendments impose no consequences on any party based on its failure to file or provide information requested in a petition or statement of position form other than to prevent the party from initiating a representation proceeding or to restrict a party’s rights to raise issues or participate in the adjudication of issues in the specific representation

¹⁴⁴ See, e.g., *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882, 886 (D.C. Cir. 1988).

¹⁴⁵ See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

¹⁴⁶ Similarly, a union that has been certified or recognized as the representative of employees in an appropriate unit has a legal right to continue to be recognized as the exclusive representative of such employees. See *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1056 (D.C. Cir. 2002). However, if a petition is filed under section 9 seeking to decertify such a union, which is a party to the resulting representation proceeding, see *Brom Mach. & Foundry Co. v. NLRB*, 569 F.2d 1042, 1044 (8th Cir. 1978), and at the conclusion of the proceeding the Board certifies the results of an election finding that less than a majority of the voters cast ballots in favor of continued representation by the union, the union loses its legal right to represent the employees. *Retail Clerks Int’l Ass’n v. Montgomery Ward & Co.*, 316 F.2d 754, 756–57 (7th Cir. 1963).

proceeding and any related unfair labor practice proceeding. Similarly, as is the case currently,¹⁴⁷ no consequences attach to a failure to post either notice or to file the eligibility list beyond the overturning of an election conducted as part of the specific proceeding.

Sections 102.62(e), 102.63(a) and 102.67(i) of the proposed amendments require that an employer which is party to a representation proceeding post an Initial Notice to Employees of Election subsequent to the filing of a petition and, if an election is agreed to or directed, a Final Notice to Employees of Election. The Board will make available both notices to the employer in paper and electronic form, and employers will be permitted to post exact duplicate copies of the notices. The Board does not believe these posting requirements are subject to the PRA for the reasons explained above. Moreover, the Board does not believe that the notice posting requirements constitute a “collection of information” as defined in section 3502(3) of the PRA for an additional, independent reason. The notice posting requirements do not involve answers to questions or any form of reporting. Nor do they involve a “recordkeeping requirement” as that term is defined in section 3502(13) of the PRA. The proposed notice posting requirements do not require any party to “maintain specified records.” The Board notes that this construction is consistent with the Office of Management and Budget’s regulations construing and implementing the PRA, which provide that “[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public” is not considered a “collection of information” under the Act. See 5 CFR 1320.3(c)(2). For all of these reasons, the Board concludes that the posting requirements are not subject to the PRA.

Accordingly, the proposed amendments do not contain information collection requirements that require approval of the Office of Management and Budget under the Paperwork Reduction Act.

List of Subjects

29 CFR Part 101

Administrative practice and procedure, Labor management relations.

29 CFR Part 102

Administrative practice and procedure, Labor management relations.

¹⁴⁷ See John E. Higgins, Jr., *The Developing Labor Law* 595, 607 (5th ed. 2006) (noting that failure to provide *Excelsior* list or post notice of election constitutes grounds for setting aside election).

¹⁴³ See, e.g., *Pace University v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008); *Kearney & Trecker Corp. v. NLRB*, 209 F.2d 782, 786–88 (7th Cir. 1953).

29 CFR Part 103

Labor management relations.

In consideration of the foregoing, the National Labor Relations Board proposes to amend chapter I of title 29, Code of Federal Regulations, as follows:

PART 101—STATEMENTS OF PROCEDURES

- 1. The authority citation for part 101 continues to read as follows:

Authority: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section 101.14 also issued under sec. 2112(a)(1) of Pub. L. 100–236, 28 U.S.C. 2112(a)(1).

Subpart C—[Removed and Reserved]

- 2. Remove and reserve subpart C, consisting of §§ 101.17 through 101.21.

Subpart D—[Removed and Reserved]

- 3. Remove and reserve subpart D, consisting of §§ 101.22 through 101.25.

Subpart E—[Removed and Reserved]

- 4. Remove and reserve subpart E, consisting of §§ 101.26 through 101.30.

PART 102—RULES AND REGULATIONS, SERIES 8

- 5. The authority citation for part 102 continues to read as follows:

Authority: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees² And for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

- 6. Revise § 102.60 to read as follows:

§ 102.60 Petitions.

(a) *Petition for certification or decertification.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a petition for certification) may be filed by

an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed. A person filing a petition by facsimile or electronically pursuant to § 102.114(f) or (i) of this part shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile or electronically, if otherwise proper. Except as provided in § 102.72 of this subpart, such petitions shall be filed with the regional director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions with a certificate of service on all parties named in the petition. Along with the petition, the petitioner shall serve a description of procedures in representation cases and a Statement of Position form. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) *Petition for clarification of bargaining unit or petition for amendment of certification.* A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

- 7. Revise § 102.61 to read as follows:

§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) *RC Petitions.* A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

- (1) The name of the employer.
- (2) The address of the establishments involved.
- (3) The general nature of the employer's business.
- (4) A description of the bargaining unit which the petitioner claims to be appropriate.
- (5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.
- (6) The number of employees in the alleged appropriate unit.
- (7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any other party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(b) *RM Petitions.* A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor

²Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D of this part.

organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date.

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(8) Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any other party. However, no proof of representation on the part of the labor organization claiming a majority is required and the regional director shall proceed with the case if other factors require it unless the labor organization withdraws its claim to majority representation.

(c) *RD Petitions.* Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(5) The name or names and addresses of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by

the employer are no longer the representative in the appropriate unit as defined in section 9(a) of the Act.

(7) The number of employees in the unit.

(8) A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any other party.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(d) *UC Petitions.* A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(11) Any other relevant facts.

(e) *AC Petitions.* A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(8) Any other relevant facts.

(f) *Provision of original signatures.*

Evidence filed pursuant to § 102.61(a)(7), (b)(8), or (c)(8) of this subpart together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than two days after the facsimile or electronic filing.

■ 8. Revise § 102.62 to read as follows:

§ 102.62 Election agreements; voter list.

(a) *Consent election agreements with final regional director determinations of post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 of this subpart except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with

the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) *Stipulated election agreements with discretionary board review.* Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the regional director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 of this subpart.

(c) *Full consent election agreements with final regional director determinations of pre- and post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66 and 102.67 of this subpart to determine if a question concerning representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 of this subpart, except that the rulings and

determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(d) *Voter lists.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction, within two days after approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, home addresses, available telephone numbers, available email addresses, work locations, shifts, and job classifications of all eligible voters. In order to be timely filed, the list must be received by the regional director and the parties named in the agreement or direction within two days after the approval of the agreement or issuance of the direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the petition. Failure to file or serve the list within the specified time and in proper format shall be grounds for setting aside the election whenever proper objections are filed. The regional director shall make the list available upon request to all parties in the case on the same day or as soon as practicable after the director receives the list from the employer. The parties shall use the list exclusively for purposes related to the representation proceeding and related Board proceedings.

(e) *Final notices to employees of election.* Upon approval of the election agreement pursuant to paragraphs (a) or (b) or with the direction of election pursuant to paragraph (c), the regional director shall promptly transmit the Board's Final Notice to Employees of Election to the parties by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The regional director shall also electronically

transmit the Final Notice to Employees of Election to affected employees to the extent practicable. The Final Notice to Employees of Election shall be posted in accordance with § 102.67(i) of this subpart.

■ 9. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; Initial Notice to Employees of Election; Statement of Position form; withdrawal of notice.

(a) *Investigations and notices.* (1) After a petition has been filed under § 102.61(a), (b), or (c) of this subpart, if no agreement such as that provided in § 102.62 of this subpart is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall set the hearing for a date 7 days from the date of service of the notice absent special circumstances. A copy of the petition, a description of procedures in representation cases, an "Initial Notice to Employees of Election", and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(2) The employer shall immediately post the Initial Notice to Employees of Election, where notices to employees are customarily posted, and shall also distribute it electronically if the employer customarily communicates with its employees electronically. The employer shall maintain the posting until the petition is dismissed or the Initial Notice is replaced by the Final Notice to Employees of Election. Failure to properly post and distribute the Initial Notice to Employees of Election shall be grounds for setting aside the results of the election whenever proper objections are filed.

(b)(1) *Statement of Position in RC cases.* After a petition has been filed under § 102.61(a) of this subpart and the regional director has issued a notice of hearing, the employer shall file and serve on the parties named in the

petition its Statement of Position by the date and in the manner specified in the notice unless that date is the same as the hearing date. If the Statement of Position is due on the date of the hearing, its completion shall be the first order of business at the hearing before any further evidence is received, and its completion may be accomplished with the assistance of the hearing officer.

(i) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over the petition and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis of the contention that the proposed unit is inappropriate, and describe the most similar unit that the employer concedes is appropriate; identify any individuals occupying classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the employer's position concerning the type, dates, times, and location of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(ii) The Statement of Position shall also state the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(iii) The Statement of Position shall further state the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall also state the full names, work locations, shifts, and job classifications of all employees in the most similar unit that the employer concedes is appropriate. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(iv) In addition to the information described in paragraph (b)(1)(iii) of this section, the lists filed with the regional director, but not served on any other party, shall contain available telephone

numbers, available email addresses, and home addresses of all individuals referred to in paragraph (b)(1)(iii) of this section.

(v) The employer shall be precluded from contesting the appropriateness of the petitioned-for unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described in paragraphs (b)(1)(iii) and (iv) of this section.

(2) *Statement of Position in RM cases.* If a petition has been filed under § 102.61(b) of this subpart, the individual or labor organization which is alleged to have presented to the petitioner a claim to be recognized shall file and serve on the regional director and the parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition on the date specified in the notice unless that date is the same as the hearing date. If the Statement of Position is due on the date of the hearing, its completion shall be the first order of business at the hearing before any further evidence is received, and its completion may be accomplished with the assistance of the hearing officer.

(i) *Individual or labor organization's Statement of Position.* The individual or labor organization's Statement of Position shall describe all issues the party intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* The Statement of Position shall also state the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the individual or labor organization and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* Within the time permitted for filing the Statement of Position, the employer shall file with the regional director, and serve on the individual or labor organization, a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(iv) *Contact information for individuals in proposed unit.* In addition to the information described in paragraph (b)(2)(iii) of this section, the lists filed with the regional director, but not served on any other party, shall contain the full names, available telephone numbers, available email addresses, and home addresses of all individuals referred to in paragraph (b)(2)(iii) of this section.

(v) *Preclusion.* The employer shall be precluded from contesting the appropriateness of the unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described in paragraphs (b)(2)(iii) and (iv) of this section.

(3) *Statement of Position in RD cases.* If a petition has been filed under § 102.61(c) of this subpart, the employer and the certified or recognized representative of employees shall file and serve on the regional director and the parties named in the petition their respective Statements of Position such that they are received by the regional director and the parties named in the petition on the date specified in the notice unless that date is the same as the hearing date. If the Statements of Position are due on the date of the hearing, their completion shall be the first order of business at the hearing before any further evidence is received, and their completion may be accomplished with the assistance of the hearing officer.

(i) The Statements of Position of the employer and the certified or recognized representative shall describe all issues each party intends to raise at the hearing.

(ii) The Statements of Position shall also state the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(iii) The employer's Statement of Position shall also state the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall also state the full names,

work locations, shifts, and job classifications of all individuals in the certified or recognized unit. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(iv) In addition to the information described in paragraph (b)(3)(iii) of this section, the lists filed with the regional director, but not served on any other party, shall contain the full names, available telephone numbers, available email addresses, and home addresses of all individuals referred to in paragraph (b)(3)(iii) of this section.

(v) The employer shall be precluded from contesting the appropriateness of the petitioned-for unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described in paragraphs (b)(3)(iii) and (b)(3)(iv) of this section.

(c) *UC or AC cases.* After a petition has been filed under § 102.61(d) or (e) of this subpart, the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under paragraph (c) of this section shall be in conformance with §§ 102.64 through 102.69 of this subpart whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a) of this subpart, the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71 of this subpart. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67 of this subpart, except where an agreement

under § 102.62(a) of this subpart is involved.

■ 10. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a petition as described in section 9(c) of the Act has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a petition filed under section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. If, upon the record of the hearing, the regional director finds that such a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question and, subsequent to that election, unless specifically provided otherwise in these rules, resolve any disputes concerning the eligibility or inclusion of voters that might affect the results of the election.

(b) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all genuine disputes as to material facts in order to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act.

(c) The hearing officer shall continue the hearing from day to day until completed absent extraordinary circumstances.

■ 11. Revise § 102.65 to read as follows:

§ 102.65 Motions; interventions.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the record to the Board, all motions shall be filed with the

Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served on the parties, or he may refer the motion to the hearing officer:

Provided, That if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71 of this subpart. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be.

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding. Any person desiring to intervene in any such proceeding shall also complete a Statement of Position form.

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(g) of this subpart. Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate request for review pursuant to § 102.67 (b), (c), and (d) or § 102.69 of this subpart. Nor shall rulings by the hearing officer be appealed directly to the regional director unless expressly authorized by the Rules and Regulations, except by special permission of the regional director, but shall be considered by the regional director when he reviews the entire record. Requests to the regional director, or to the Board in appropriate cases, for special permission to appeal from a ruling of the hearing officer or the regional director, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission

should be granted, including why the issue will otherwise evade review, and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the regional director. Neither the Board nor the regional director will grant a request for special permission to appeal except in extraordinary circumstances where it appears that the issue will otherwise evade review. No party shall be precluded from raising an issue at a later time based on its failure to seek special permission to appeal. If the Board or the regional director, as the case may be, grants the request for special permission to appeal, the Board or the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall, unless otherwise ordered by the Board, operate as a stay of an election or any action taken or directed by the regional director. Notwithstanding a pending request for special permission to appeal, the regional director shall not impound ballots cast in an election unless otherwise ordered by the Board.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules: *Provided, however*, That the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo*, the prejudice to the movant alleged to result from such error, the

additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to this paragraph (e) shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

■ 12. Revise § 102.66 to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; subpoenas.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence relevant to any genuine dispute as to a material fact. The hearing officer shall identify such disputes as follows:

(1) *Joinder in RC cases.* In a case arising under § 102.61(a) of this subpart, after the employer completes its Statement of Position and prior to the

introduction of further evidence, the petitioner shall respond to each issue raised in the Statement. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions: *Provided, however*, That if the employer fails to take a position regarding the appropriateness of the petitioned-for unit, the petitioner shall explain why the proposed unit is appropriate and may support its explanation with evidence in the form of sworn statements or declarations consistent with the requirements stated in § 102.60(a) of this subpart or through examination of witnesses and introduction of documentary or other evidence.

(2) *Joinder in RM cases.* In a case arising under § 102.61(b) of this subpart, after the individual or labor organization completes its Statement of Position and prior to the introduction of further evidence, the petitioner shall respond to each issue raised in the Statement. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions: *Provided, however*, That if the individual or labor organization fails to take a position regarding the appropriateness of the petitioned-for unit, the petitioner shall explain why the proposed unit is appropriate and may support its explanation with evidence in the form of sworn statements or declarations consistent with the requirements stated in § 102.60(a) of this subpart or through examination of witnesses and introduction of documentary or other evidence.

(3) *Joinder in RD cases.* In a case arising under § 102.61(c) of this subpart, after the employer and the certified or recognized representative of employees complete their respective Statements of Position and prior to the introduction of further evidence, the petitioner shall respond to each issue raised in the Statements. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions: *Provided, however*, That if the employer and/or the certified or recognized representative fails to take a position regarding whether the petitioned-for unit is coextensive with the unit for which a representative is certified or recognized, the petitioner shall explain why the proposed unit is appropriate and may support its explanation with evidence in the form of sworn statements or declarations consistent with the requirements stated in § 102.60(a) of this subpart or through examination of witnesses and

introduction of documentary or other evidence.

(b) *Offers of proof; discussion of election procedure.* After identifying the issues in dispute pursuant to paragraph (a) of this section, the hearing officer shall solicit offers of proof from the parties or their counsel as to all such issues. The offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing the witness' testimony. The hearing officer shall examine the offers of proof related to each issue in dispute and shall proceed to hear testimony and accept other evidence relevant to the issue only if the offers of proof raise a genuine dispute as to any material fact. Prior to the close of the hearing, the hearing officer will:

(1) Solicit the parties' positions on the type, dates, times, and locations of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Inform the parties that the regional director will issue a decision, direction of election or both as soon as practicable and that the director will immediately transmit the document(s) to the parties' designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(3) Inform the parties what their obligations will be under these rules if the director directs an election and of the time for complying with such obligations.

(c) *Preclusion.* A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement: *Provided, however,* that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition; *Provided, further,* that no party shall be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the petitioned-for unit is not appropriate in its Statement of Position but fails to state the most similar unit that it concedes is appropriate, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-

examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit.

(d) *Disputes concerning less than 20 percent of the unit.* If at any time during the hearing, the hearing officer determines that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer shall close the hearing.

(e) *Witness examination and evidence.* Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(f) *Objections.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(g) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena or by such earlier time as the hearing officer or regional director shall determine, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing

and the hearing has opened, the petition to revoke shall be filed with the hearing officer or, with the permission of the hearing officer, presented orally. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(h) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Briefs shall be filed only upon special permission of the hearing officer and within the time the hearing officer permits.

(i) *Hearing officer analysis.* The hearing officer may submit an analysis of the record to the regional director but he shall make no recommendations.

(j) *Witness fees.* Witness fees and mileage shall be paid by the party at whose instance the witness appears.

■ 13. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; review of action by the regional director; statement in opposition; final notice of election; voter list.

(a) *Proceedings before regional director.* The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine whether a question concerning representation exists in a unit appropriate for purposes of collective bargaining, and to direct an election, dismiss the petition, or make other disposition of the matter. If the hearing officer has determined during the

hearing or the regional director determines after the hearing that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the regional director shall direct that those individuals be permitted to vote subject to challenge. In the event that the regional director permits individuals whose eligibility or inclusion remains in dispute to vote subject to challenge, the Final Notice to Employees of Election shall advise employees that said individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of said individuals will be resolved, if necessary, following the election.

(b) *Directions of elections; dismissals; requests for review.* A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction: *Provided, however,* that the regional director may direct an election with findings and a statement of reasons to follow prior to the tally of ballots. In the event that the regional director directs an election, said direction shall specify the type, date, time, and place of the election and the eligibility period. The regional director shall schedule the election for the earliest date practicable consistent with these rules. The regional director shall transmit the direction of election to the parties' designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). Along with the direction of election, the regional director shall also transmit the Board's Final Notice to Employees of Election by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The regional director shall also electronically transmit the Final Notice to Employees of Election to affected employees to the extent practicable. The decision of the regional director shall be final: *Provided, however,* That within 14 days after service of a decision dismissing a petition any party may file a request for review of such a dismissal with the Board in Washington, DC: *Provided, further,* That any party may, after the election, file a request for review of a regional director's decision to direct an election within the time periods specified and as described in § 102.69 of this subpart.

(c) *Grounds for review.* The Board will grant a request for review only where

compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of, or
(ii) A departure from, officially reported Board precedent.
(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) *Contents of request.* Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (c)(2) of this section, and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) *Opposition to request.* Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition thereto, which shall be served in accordance with the requirements of paragraph (h) of this section. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) *Waiver; denial of request.* The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) *Grant of review; briefs.* The granting of a request for review shall not stay the regional director's decision

unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h)(1) *Format of request.* All documents filed with the Board under the provisions of this section shall be filed in seven copies, double spaced, on 8½- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Requests for review, including briefs in support thereof; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited.

(2) *Service of copies of request.* The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of such service shall be filed with the Board together with the document.

(3) *Extensions.* Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

(i) *Final notice to employees of election.* The employer shall post copies of the Board's Final Notice to Employees of Election in conspicuous places at least 2 full working days prior to 12:01 a.m. of the day of the election and shall also distribute the Final

Notice to Employees of Election electronically if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the regional office in the mail. In all cases, the notices shall remain posted until the end of the election. The term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. Failure properly to post and distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a) of this subpart.

(j) *Voter lists.* Absent extraordinary circumstances specified in the direction of election, the employer shall, within 2 days after such direction, provide to the regional director and the parties named in such direction a list of the full names, home addresses, available telephone numbers, available email addresses, work locations, shifts, and job classifications of all eligible voters. In order to be timely filed, the list must be received by the regional director and the parties named in the direction within 2 days of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the petition. Failure to file or serve the list within the specified time and in proper format shall be grounds for setting aside the election whenever proper objections are filed. The regional director shall make the list available upon request to all parties in the case on the same day or as soon as practicable after the director receives the list from the employer. The parties shall use the list exclusively for purposes of the representation proceeding and related Board proceedings.

■ 14. Revise § 102.68 to read as follows:

§ 102.68 Record; what constitutes; transmission to Board.

The record in a proceeding conducted pursuant to the foregoing section, or conducted pursuant to § 102.69 of this subpart, shall consist of: The petition, notice of hearing with affidavit of

service thereof, Statements of Position, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any. Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

■ 15. Revise § 102.69 to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; requests for review of directions of elections, hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; requests for review of regional director reports or decisions in stipulated or directed elections.

(a) *Election procedure; tally; objections.* Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the regional director an original and five copies of objections to the conduct of

the election or to conduct affecting the results of the election with a certificate of service on all parties, which shall contain a short statement of the reasons therefore and a written offer of proof in the form described in § 102.66(b) of this subpart insofar as applicable, but the written offer of proof shall not be served on any other party. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile or electronically pursuant to § 102.114(f) or (i) of this part shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.114(f) or (i) of this part.

(b) *Requests for review of directions of elections.* If the election has been conducted pursuant to § 102.67 of this subpart, any party may file a request for review of the decision and direction of election with the Board in Washington, DC In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election shall be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review shall be filed within 14 days after the regional director's report or supplemental decision on challenged ballots, on objections, or on both, and may be combined with a request for review of that decision as provided in paragraph (d)(3) of this section. The procedures for such request for review shall be the same as set forth in § 102.67(c) through (h) of this subpart insofar as applicable. If no request for review is filed, the decision and direction of election is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(c) *Certification in the absence of objections, determinative challenges and requests for review.* If no objections are filed within the time set forth in paragraph (a) of this section, if the

challenged ballots are insufficient in number to affect the results of the election, if no runoff election is to be held pursuant to § 102.70 of this subpart, and if no request for review is filed pursuant to paragraph (b) of this section, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(d)(1)(i) *Reports.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for overturning the election if introduced at a hearing, the regional director shall issue a report or supplemental decision disposing of objections and a certification of the results of the election, including certification of representative where appropriate, unless there are potentially determinative challenges.

(ii) *Notices of hearing.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof could be grounds for overturning the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election, the regional director shall transmit to the parties' designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a notice of hearing before a hearing officer at a place and time fixed therein no later than 14 days after the preparation of the tally of ballots or as soon as practicable thereafter: *Provided, however,* that the regional director may consolidate the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge.

(iii) *Hearings; hearing officer reports; exceptions to regional director.* Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66 of this subpart, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date of

issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(2) *Regional director reports or decisions in consent or full consent elections.* If the election has been held pursuant to § 102.62(a) or (c) of this subpart, the report or decision of the regional director shall be final and shall include a certification of the results of the election, including certification of representative where appropriate.

(3) *Requests for review of regional director reports or decisions in stipulated or directed elections.* If the election has been held pursuant to §§ 102.62(b) or 102.67 of this subpart, within 14 days from the date of issuance of the regional director's report or decision on challenged ballots or on objections, or on both, any party may file with the Board in Washington, DC, a request for review of such report or decision which may be combined with a request for review of the regional director's decision to direct an election as provided in § 102.67(b) of this subpart. The procedures for post-election requests for review shall be the same as set forth in § 102.67(c) through (h) of this subpart insofar as applicable. If no request for review is filed, the report or decision is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any

related subsequent unfair labor practice proceeding. *Provided, however,* that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing the provisions of § 102.46 of this part shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(e)(1)(i) *Record in case with hearing.* In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the regional director, any requests for review, and the record previously made as defined in § 102.68 of this subpart. Materials other than those set out above shall not be a part of the record.

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any report or decision on objections or on challenged ballots and any request for review of such a report or decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision or report, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (e)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (e)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a regional director's report or decision on objections, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the regional director and which were not included in the report or decision. Documentary evidence so appended shall thereupon become part of the

record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(f) *Revised tally of ballots.* In any case under this section in which the regional director, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(g) *Format of filings with regional director.* All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8½- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(h) *Extensions of time.* Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

■ 16. Revise § 102.71(c) to read as follows:

§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the regional director.

* * * * *

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the regional director and copies served on all the other parties within 14 days of service of the

notice of dismissal or notification that the petition is to be held in abeyance. The request shall be submitted in eight copies and shall contain a complete statement setting forth facts and reasons upon which the request is based. Such request shall be printed or otherwise legibly duplicated. Requests for an extension of time within which to file the request for review shall be filed with the Board in Washington, DC, and a statement of service shall accompany such request.

Subpart D—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

■ 17. Revise § 102.76 to read as follows:

§ 102.76 Petition; who may file; where to file; contents.

When picketing of an employer has been conducted for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of §§ 102.60 and 102.61 of this part, insofar as applicable: *Provided, however,* That if a charge under § 102.73 of this subpart has been filed against the labor organization on whose behalf picketing has been conducted, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act; or that the union represents a substantial number of employees; or that the labor organization is currently recognized but desires certification under the act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

■ 18. Revise § 102.77(b) to read as follows:

§ 102.77 Investigation of petition by regional director; directed election.

* * * * *

(b) If after the investigation of such petition or any petition filed under subpart C of this part, and after the investigation of the charge filed pursuant to § 102.73 of this subpart, it appears to the regional director that an expedited election under section 8(b)(7)(C) of the Act is warranted, and

that the policies of the Act would be effectuated thereby, he shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties, individuals, and labor organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following, shall be governed insofar as applicable by §§ 102.63 to 102.69 inclusive of this part. *Provided further, however,* That if a petition has been filed which does not meet the requirements for processing under the expedited procedures, the regional director may process it under the procedures set forth in subpart C of this part.

Subpart E—Procedure for Referendum Under Section 9(e) of the Act

■ 19. Revise § 102.83 to read as follows:

§ 102.83 Petition for referendum under section 9(e)(1) of the Act; who may file; where to file; withdrawal.

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. One original of the petition shall be filed with the regional director wherein the bargaining unit exists or, if the unit exists in two or more Regions, with the regional director for any of such Regions. A person filing a petition by facsimile or electronically pursuant to § 102.114(f) or (i) of this part shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed. Upon approval of the withdrawal of any petition the case shall be closed.

■ 20. Amend § 102.84 by revising paragraph (i), redesignating paragraph (j) as paragraph (k), and adding new paragraphs (j), (l) and (m) to read as follows:

§ 102.84 Contents of petition to rescind authority.

* * * * *

(i) The name and address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the proceeding.

(j) A statement that 30 percent or more of the bargaining unit employees covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that the authority to make such an agreement be rescinded.

* * * * *

(l) Evidence supporting the statement that 30 percent or more of the bargaining unit employees desire to rescind the authority of their employer and labor organization to enter into an agreement made pursuant to section 8(a)(3) of the Act. Such evidence shall be filed together with the petition, but shall not be served on any other party.

(m) Evidence filed pursuant to paragraph (l) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than two days after the facsimile or electronic filing.

■ 21. Revise § 102.85 to read as follows:

§ 102.85 Investigation of petition by regional director; consent referendum; directed referendum.

Where a petition has been filed pursuant to § 102.83 of this subpart and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer: *Provided, however,* That in

any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or, upon grant of a request for review, by the Board.

■ 22. Revise § 102.86 to read as follows:

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing shall be governed, insofar as applicable, by §§ 102.63 to 102.69 inclusive of this part.

Subpart I—Service and Filing of Papers

■ 23. Revise § 102.112 to read as follows:

§ 102.112 Date of service; date of filing.

The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by electronic mail, the date of service shall be the date on which the message is sent. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111 of this subpart.

■ 24. Revise § 102.113(d) to read as follows:

§ 102.113 Methods of service of process and papers by the Agency; proof of service.

* * * * *

(d) *Service of other documents.* Other documents may be served by the Agency by any of the foregoing methods as well as regular mail, electronic mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

* * * * *

■ 25. Revise § 102.114(a), (d), and (g) to read as follows:

§ 102.114 Filing and service of papers by parties; form of papers; manner and proof of filing or service; electronic filings.

(a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically or if specifically provided for in these rules), or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of § 102.113(a) or (c) of this subpart provide otherwise.

* * * * *

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8½ by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Nonconforming papers may, at the Agency's discretion, be rejected.

* * * * *

(g) Facsimile transmissions of the following documents will not be accepted for filing: Answers to Complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Default Judgment; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Intervene; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

* * * * *

PART 103—OTHER RULES

■ 26. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

Subpart B—[Removed and Reserved]

■ 27. Remove and reserve subpart B, consisting of § 103.20.

Dated: Washington, DC, January 28, 2014.

By direction of the Board.

William B. Cowen,

Solicitor.

[FR Doc. 2014-02128 Filed 2-5-14; 8:45 am]

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